ARGUMENT

I. Standard of Review for the First Issue

The issue as to whether an insurance plan violates the provisions of the ADA is a question of law. The court "review[s] the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) *de novo*, 'accepting as true the factual allegations of the complaint, construing all reasonable inferences therefrom in favor of the plaintiffs, and determining whether the complaint, so read, limns facts sufficient to justify recovery on any cognizable theory of the case.'" Disabled Americans for Equal Access, Inc. v. Ferries del Caribe, Inc., 405 F.3d 60, 64 (1st Cir. 2005) (quoting Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998).

II. An Optional Disability Plan that provides the same package of benefits to all employees, containing a disparity in benefits, does not violate the ADA.

a. Statute in Question

Mudge/Rose Inc. did not discriminate against Mr. Egan by having a package of benefits that contained a disparity in benefits. Tile I of the ADA states, "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2006).

b. Legislative history supports that a disparity in benefits does not violate the ADA

The legislative history of the ADA and subsequent congressional action support that Mudge/Rose did not violate the ADA by having a disparity in benefits in their disability insurance plan. First, the Senate Labor and Human Resources Committee report on the subject of the ADA states,

> **"**…employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified number of blood transfusions per year… A limitation may be placed on reimbursements for a procedure or the types of drugs or procedures

covered… but, that limitation must apply to persons with or without disabilities. All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees." H.R. Rep. No. 101-485, pt. 2, at 102 (1990).

A health plan that limits the amount of blood transfusions in a given year will be limiting the amount to hemophiliacs. However, the denial for subsequent coverage is not due them having hemophilia. The denial is based solely on the limited coverage built into the plan and the limitation is imposed on every individual in the plan regardless of their status. Similarly David Egan was not denied subsequent coverage under the Disability Insurance because of his mental disability, but he was denied due to the limited coverage that each individual receives when they purchase the plan. Mudge/Rose Inc. does not discriminate by saying that people with physical disabilities can purchase in, but those with mental disabilities can't. Every individual is given the opportunity to purchase into the plan regardless of their status. The legislative history of the ADA and the 1996 amendment voted on in congress support the fact that disparity in benefits does not violate the ADA as long as every individual is offered the same plan. Mudge/Rose offered each individual, regardless of their present status, the opportunity to purchase into the same plan. (JA 2) Mr. Egan chose to purchase into this optional plan that was exactly the same in form as was offered to every other individual in the company. (JA 5)

Second, in 1996, an amendment was voted on and defeated to the Health Insurance Portability and Accountability Act of 1996. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996). This amendment would have required that there was parity in insurance coverage between mental and physical disabilities. If the ADA already covered such parity then this legislation would have been unnecessary. The legislative history of the ADA illustrates the fact that the ADA was not intended to provide parity in insurance coverage. The ADA was intended to make sure that each individual, regardless of if they had a disability, would be entitled to the engage in the same benefits that was available to all others. Finding that disparity in benefits constitutes discrimination under the ADA would be to impose a new duty on every employer that is outside the scope of the ADA and outside the scope of the intent of the legislature.

c. Case Law vastly supports the contention that a disparity in benefits does not violate the ADA

Nearly all circuit courts dealing with the issue of disparity in benefits have determined that a disparity does not violate the ADA. These Circuits hold that the ADA does not ban offering different benefits between physical and mental disabilities as long as all employees are offered the same plan. See EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 146-48 (2d Cir. 2000); See also Rogers v. Dep't of Health & Environ. Control, 174 F.3d 431, 432 (4th Cir. 1999); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1043-45 (7th Cir. 1996); Kimber v. Thiokol Corp., 196 F.3d 1092, 1101-02 (10th Cir. 1999); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1116-18 (9th Cir. 2000).

In Ford v. Schering-Plough Corp., 145 F.3d 601, 601 (3d Circ. 1998) the court dealt with a case that had striking similarities to the one at hand. While Ford was employed for Schering she elected to purchase into the disability insurance that the company offered. Ford subsequently became disabled due to a mental disability. The plan limited her benefits for her mental disability to two years while allowing a person with a physical disability to retain benefits until the age of sixty-five. Ford filed her case in court on three counts "alleging discrimination in violation of the ADA." Id. at 604. In analyzing the statutory construction of the ADA the Third Circuit believed so strongly that Differentiation in plans does not violate the ADA that they described it as "a **far cry** from discrimination under the ADA." Id. at 608 (emphasis added).

In Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1015-19 (6th Cir. 1997) the Sixth Circuit looked at case where an employee was similarly limited the disability insurance coverage to two years for a mental condition as opposed to retaining benefits until the age of 65 for physical disabilities. Parker, like David Egan, was diagnosed with severe depression and covered for the full two years. The Sixth Circuit ultimately held in this case that it was not discrimination because the "ADA does not mandate equality between individuals with different disabilities. Rather, the ADA prohibits discrimination between the disabled and the non-disabled." Id. at 1015.

The 8th Circuit has not dealt with a case exactly on point. However, in Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 678 (Sth Cir. 1996) they looked at a health insurance plan that excluded fertility treatment coverage. In this case the court concluded that "Insurance distinctions that apply equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability." Id.

The only court to come to a conclusion contrary to the vast majority of circuits was the is the United States Court of Appeals for the 11th Circuit in Johnson v. K Mart Corp., 273 F.3d 1035, 1035 (11th Cir. 2001) (Rehearing, en banc, granted by, Vacated by Johnson v. K Mart Corp., 273 F.3d 1035 (11th Cir. 2001)). The 11th Circuit

concluded that "Denial of that benefit on the express ground that the claimant is mentally disabled is discrimination of a sort prohibited by 12112(a)…" Id. at 1056. In order to come this conclusion the 11th Circuit was making many inferences from cases that were not there , overlooking legislative history, and ignoring the vast amount of circuits who have found otherwise.

First, the primary case that the 11th Circuit relied on for this conclusion was Olmstead v. L.C. by Zimring, 527 U.S. 581, 581 (1999). The main inference that they drew from this did not come from a decisive statement by the court as to the ADA's application, but instead came from a footnote. See Johnson, 273 F.3d at 1053 n.14.

Second, in coming to their conclusion the 11th Circuit recognized that the Second Circuit had come to a different conclusion stating, "in reading *Olmstead* much as we do, the Second Circuit has rejected the 'view that [the] ADA requires no more than evenhanded treatment between the disabled and non-disabled."' Id. at 1054.

In order to determine if Olmstead was applicable both courts looked at the same Committee reports. In analyzing the committee reports the 11th Circuit stated, "we are here dealing not with a limitation on procedures and treatments equally available to all but a limitation on compensation in lieu of salary which is expressly contingent on what kind of disability has caused a former employee to lose his job." Id. at 1056. However, in making this statement the 11th circuit seems to have missed what the other circuits have picked up on. As stated above, (see section IIa pp. 6-7) just as the hemophiliac can be denied coverage for further transfusions because it is a limit on each individual so can a person with a mental disability be denied subsequent coverage under a disability insurance plan. What the Eleventh Circuit seems to miss is that this is not discrimination because "[a]ll people with disabilities [] have equal access to the health insurance coverage that is provided by the employer to all employees." H.R. Rep. No. 101-485, pt. 2, at 102 (1990); See EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 150 (2d Cir. 2000).

The Second Circuit in their analysis also pointed "[t]he Senate Report provides the example that insurance plans may offer 'only a specified amount per year for mental health coverage.'" Id. at 150 (citing S. Rep. No. 101-116, at 29 (1990)). The Second Circuit recognized that just as an employer can limit the amount that they will pay per year under a health insurance plan, so can they limit the amount of years that they will pay under a disability insurance plan.

The 11th circuit essentially relied on a footnote in Olmstead in order to make the case that eight circuit decisions, interpretation of the Rehabilitation act, ADA legislative history, and recent Congressional legislation have

no bearing on the analysis. A vast majority of circuits have dispelled this notion stating, "so long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities." Id. at 150 **(**citing Ford v. Schering-Plough Corp., 145 F.3d 601, 608**)**; Accord Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1116 (9th Cir. 2000); Kimber v. Thiokol Corp., 196 F.3d 1092, 1101-02 (10th Cir. 1999); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1015-16 (6th Cir. 1997); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1044-45 (7th Cir. 1996)).

Mudge/Rose offered every individual the opportunity to purchase into the option benefit plan. (JA 2) This plan contained a disparity in benefits. A vast majority of circuits have rightfully held that disparity in benefits in a plan does not constitute discrimination under the ADA.

d. Not allowing employers to construct their plans accordingly to the needs of their company will result in employers dropping insurance coverage altogether.

Finding that a disparity in benefits constitutes discrimination of the ADA would have major negative implications on what plans, if any, employers like Mudge/Rose would be able to offer. Insurance plans are structured in a way that employees can retain the greatest benefits under them while also controlling the costs to employers and the premiums of employees. The reason for the almost universal standard of limiting mental coverage is that the plans would otherwise become cost prohibitive. Essentially requiring employers to have parity in their plans would result in many employers not offering the plans at all or offering them with vastly unaffordable premiums. A better way is to allow the free market to work. If employers are able to afford to offer parity in benefits and they are demanded by the employees then a company will have parity in plans. While in most cases companies today have not been able to provide parity that does not mean that in the future it will no longer be cost prohibitive. The determination of the American free market is strong and it is vital that in this case it is allowed to work. Finding otherwise would undermine the free market, revolutionize the insurance industry, created cost prohibitive plans, and skyrocket premiums. It would work in a way to rewrite the law requiring new duties on employers in a way that only congress should be the only one with the power to do.

III. Standard of Review for the Second Issue

The issue as to whether an individual is considered a "qualified individual" under the provisions of the ADA is a question of law. The court "affords de novo review to a district court's resolution of a motion to dismiss…[T]he the court [] must accept as true the factual allegations of the complaint, construe all reasonable inferences therefrom in favor of the plaintiffs, and determine whether the complaint, so read, limns facts sufficient to justify recovery on any cognizable theory of the case." Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998).

IV. Mr. Egan does not meet the requirement of being a "qualified individual with a disability" in order to bring an ADA complaint.

a. The Plain Language of the Statute

"The starting point in statutory interpretation is 'the language [of the statute] itself.'" U.S. v. Ramirez-Ferrer, 82 F.3d 1131, 1136 (1st Cir. 1996) (quoting U.S. v. James, 478 U.S. 597, 604 (1986)). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Id. (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)); See Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

Title I of the ADA states, "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2006). A "qualified individual" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that [the] individual holds or desires." Id. § 12111(8); See Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996).

b. David Egan is not a "qualified individual" because he is a former employee.

Based on the plain language of the ADA David Egan is not a "qualified individual" in order to bring a complaint under the Title I of the ADA. The Seventh Circuit decided a case that dealt with a former employee with a mental disability limited to 24 months of coverage stating, "[w]e need not tarry long on the argument that the status of 'benefit recipient' fits within the definition of someone filling an 'employment position,' as required by 42 U.S.C. § 12111(8). An 'employment position' is a job." CNA Ins. Cos., 96 F.3d at 1044. The Seventh Circuit

determined that because the individual was no longer an employee and because she was not let go for retaliatory reasons, she did not meet the definition of a "qualified individual." See id. at 1044-45. On November 6, 2009 after multiple accommodations were made to David Egan Mudge/Rose Inc. unfortunately had to let Mr. Egan go from his job due to David Egan's inability to perform his job with reasonable accommodation. (JA 6) On January 22, 2010 when David Egan filed his complaint with the EEOC he was no longer employed with Mudge/Rose Inc. Thus Mr. Egan can't be considered a "qualified individual" based on the plain text of the statute and "judicial inquiry is complete." Conn. Nat'l Bank, 503 U.S. 249 (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)); See Robinson, 519 U.S. at 340.

c. **Robinson v. Shell Co. is a misplaced argument**

Robinson is a misplaced argument because it ignores the plain language of the ADA. The Supreme Court stated "Title VII's definition of 'employee'…lacks and temporal qualifier and is consistent with either current or past employment." Robinson, 519 U.S. at 342, 117 S. Ct. 843. If congress intended the same effect of Title VII on the ADA then the wording of the statute would have possibly been "no covered entity shall discriminate against [an employee] on the basis of disability." See 42 U.S.C. § 12112(a). If this was the case with the ADA then the analysis might mirror Robinson. However, instead of the statute stating "employee," Congress purposely drafted it to say "qualified individual." Id. Further Congress intentionally defined a qualified individual as an individual who "can perform." 42 U.S.C. § 12111(8). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank, 503 U.S. at 253-54. A determination that an individual who can no longer perform their duties is still a qualified individual ignores the temporal qualifier purposely written into the legislation and ignores the plain language of the statute. See Robinson, 519 U.S. at 341. Thus, Robinson is a misplaced argument because it ignores the plain language of the statute.

d. David Egan is not a "qualified individual" because of his inability to work.

David Egan is not a "qualified individual" under the plain language of the ADA because at his own attorney's admission he "has been totally disabled and unable to work since June 2007." (JA 13). A majority of circuit courts in considering whether or not a completely disabled person can constitute a "qualified individual"

within the language of the ADA have found that they cannot. See Hatch v. Pitney Bowes, Inc., 485 F. Supp. 2d 22, 27 (D.R.I. 2007) (citing Weyer, 198 F.3d at 1112). A major part of the substance of this argument comes from the plain language of the statute in having the temporal qualifier "can perform." 42 U.S.C. 12111(8) (2006). If an individual "cannot" perform the functions of their job then they fall outside the scope of ADA because they are not a qualified individual. Because David Egan was "totally disabled" from his own attorney's admission he cannot perform the functions of his job and thus does not fall within the definition of a "qualified individual."

Two circuits have found in conflict to the plain language of the statute "that totally disabled individuals are covered under the qualified individual definition and may bring ADA discrimination claims." Hatch, 485 F. Supp. 2d at 27 (citing Ford, 145 F.3d at 607 (3d Cir.); Castellano v. City of N.Y., 142 F.3d 58, 66-70 (2d Cir. 1998)). In Hatch the court analyzed the congressional intent of the statute and recognized that Robinson has no effect on the analysis. After this they concluded that "these contrary holdings rest on weak footings, and the conclusion reached by those courts distends the words of the ADA to effectively expand its coverage beyond what Congress prescribed." Hatch, 485 F. Supp. 2d at 28. When courts have looked to the plain meaning of the statute first then they have reached the majority position that the statute is unambiguous and that judicial inquiry is complete. When the courts have gone beyond the plain meaning of the ADA they have at times reached a conclusion that goes way farther than what Congress ever intended. Based on the plain language which is the primary place to find the congressional intent Mr. Egan is not a "qualified individual" individual to bring a claim under the ADA due to his inability to work.

CONCLUSION

For all the foregoing reasons, the District Court erred in denying Defendant's Motion to Dismiss for failure to state a claim. The court's decision should be reversed in its totality.

Respectfully submitted,