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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTORIANO TAVAREZ, Individually, and on behalf of d all others similarly situated,

Plaintiff,

vs.

EXTRACT LABS INC.,

Defendant.

No. 1:21-cv-09916-JPO

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990 AND NEW YORK CITY HUMAN RIGHTS LAW

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Defendant, Extract Labs, Inc. ("Defendant" or "Extract Labs") respectfully submits this Memorandum of Law in support of its Motion to Dismiss the Plaintiffs' Class Action Complaint for Violations of the Americans with Disabilities Act of 1990 and New York City Human Rights Law (the "Complaint") (ECF No. 1), pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) (this "Motion").

INTRODUCTION

This lawsuit is one of 113 of virtually identical lawsuits Plaintiff's counsel has filed in this Court in the past few months alleging that various companies' websites violate the American with Disabilities Act (the "ADA") because they purportedly are not accessible to the visually impaired. In fact, on November 24, 2021 and November 23, 2021 alone, Plaintiff filed over one hundred separate ADA class action lawsuits. *See,* Exhibit 1. From his filings, it is clear that Plaintiff decided to engage in a deliberate and systematic campaign to visit as many random websites as possible in an effort to identify as many sites as he could come across that somehow, someway contained purported access barriers for the visually impaired. A sampling of the complaints filed in Plaintiff's lawsuits include claims against a pre-teen pop musician, bikini store, lingerie store, Latinx beauty products, women's cosmetics, beer manufacturers, and many others. All of Plaintiff's complaints contain virtually the exact same general factual allegations and claims, without specific details as to how the websites he alleges are non-compliant with the ADA and whether and in what ways he was specifically injured.

According to Plaintiff's Complaint in this case, Plaintiff alleges that his is visually impaired, and in August of 2021, was somehow prevented from accessing certain portions of Extract Labs' website (the "Website") due to alleged barriers in the sites' accessibility and functionality for the visually impaired. *See*, Complaint at ¶ 2; 22-23. While Plaintiff alleges that

the Website fails to comply with Web Content Accessibility Guidelines (the "WCAG") he specifically alleges the screen reader software program he was using failed without plausibly alleging that Defendant's Website was to blame for the failure of the screen reader program. Based on these vague allegations, Plaintiff asserts claims for (i) violation of the ADA, (ii) violation of the New York City Human Rights Law ("NYCHRL"), and (iii) declaratory relief that the website violates 42 U.S.C. §§ 12182, et seq., and N.Y.C. Admin. Code § 8-107, et seq. All three of Plaintiff's claims fail for the reasons set forth below.

First, after Extract Labs was served with Plaintiff's Complaint, Extract Labs undertook and completed efforts to remedy potential issues identified in the Complaint as non-compliant with WCAG guidelines. Extract Labs has now confirmed that the alleged issues with its website are resolved. As such, Plaintiff's claims are moot and the Court lacks subject matter jurisdiction over Plaintiff's claims, and they must therefore be dismissed.

Second, even if the claims are not moot, Plaintiff's Complaint fails to establish standing as Plaintiff only sets forth only general, conclusory allegations without establishing a clear injury in fact. Plaintiff alleges specifically that his "screen reader fail[ed]" to read and close pop up advertisement links on Extract Labs' website and that his screen reader failed to read the links on the Website. *See*, Complaint at ¶ 2; 22-23. Plaintiff does not allege that the Website was the reason his screen reader failed, and a plain reading of the Complaint makes clear that it was the screen reader that did not function properly, *not* Defendant's Website. Plaintiff's complaint fails to specify how the alleged violations or failures rest with Defendant's website and not with the screen reader program he used that day. A plain reading of Plaintiff's allegations place the blame on his screen reading software.

Plaintiff's conclusory allegations fail to identify specific problems with the Website and how those problems caused his injury in fact. *Id.* For example, Plaintiff alleges that he visited

Extract Labs' Website in August of 2021, but fails to allege (i) what product Plaintiff intended to buy or what information he intended to access on the Website that he was prevented from accessing, (ii) what actual barriers existed on what portions of the Website, (iii) how those barriers prevented Plaintiff from accessing information on the Website, (iv) how Plaintiff determined that accessibility was caused by Website deficiencies rather than a deficiency with the screen reader program he used, or (v) what actual injury Plaintiff suffered as a result thereof. These facts must be alleged to set forth an injury in fact, and Plaintiff does not allege, let alone plausibly allege any of them. As such, Plaintiff has failed to allege an injury in fact, and therefore lacks standing to bring forth his claims.

Therefore, Extract Labs respectfully asks the Court to dismiss all of Plaintiff's claims (i) because they are moot (ii) for lack of standing because of his failure to plead a particularized injury, and for failure to state a claim on which relief can be granted because of his failure to plausibly plead his claims. Furthermore, Extract Labs respectfully requests that the Court dismiss Plaintiff's claim for civil penalties and punitive damages under NYCHRL.

STATEMENT OF FACTS

Extract Labs sells CBD and cannabinoid products and operates the website www.extractlabs.com through which an individual may shop for and purchase such products. *See,* Complaint ¶¶ 2, 20. Plaintiff is a visually impaired individual who uses screen reading software to access information located on websites. *Id.,* ¶¶ 12, 22. For screen-reading software to function, the information on the website must be coded in such a way as to allow the screen reader to render the visual information on the website to be rendered into text. *Id*. ¶ 18. W3C is an international website standards organization that publishes website accessibility guidelines for blind and visually impaired users known as the Web Content Accessibility Guidelines. *Id.* ¶ 19. The most recent version of these guidelines is known as "WCAG 2.1." *Id.*

Plaintiff alleges that in August of 2021 he "encountered multiple access barriers that denied Plaintiff full and equal access to the goods and/or services offered to (and made available for) the public. *Id.* ¶ 22. However, Plaintiff fails to allege the specific pages he browsed on the Website or what he intended to purchase. *Id.*

Plaintiff further alleges that when he accessed the Website, he was denied access as a visually impaired individual because the Website included multiple barriers making it impossible for him to enjoy access to the Website's content equally to that of a sighted user. *Id.* ¶¶ 23-24, 27. What those barriers are and how they prevented Plaintiff from accessing the Website and obtaining information he was seeking is left to Plaintiff's and this Court's imagination. Indeed, Plaintiff alleges generally that "(a) the screen reader fails to read advertisement pop up links. The website then requires the use of the cursor to close the advertisement; (b) the screen reader fails to read the links on the website." *Id.* ¶23. First, Plaintiff's allegations state clearly that it was Plaintiff's screen reader that failed and does not allege that Defendant's website caused the failure. *Id.* Second, Plaintiff fails to plausibly allege what actual information he wanted to access but was unable to access, and how it harmed him. *Id.* Finally, and critically, Plaintiff fails to allege how, even if the barriers existed and caused him harm, the existence of those barriers does not conform to the WCAG 2.1 Guidelines (and thus is violative of the ADA). *Id.* Plaintiff does not allege what he was actually prevented from accessing or doing on the Website, or how or why he was prevented from doing so (*e.g.* that he was prevented from purchasing CBD products). *Id.* ¶¶ 20-23. Based upon these general and conclusory allegations, Plaintiff alleges that the Website violates Title III of the ADA and the NYCHRL because it does not meet WCAG 2.1 guidelines. *Id.* ¶¶ 38-52. In addition, Plaintiff seeks to certify a nationwide class, as well as a New York City subclass of "all visually-impaired or legally blind individuals in the United States who have attempted to

access Defendant's website and have been denied access to the equal enjoyment of goods and services offered, during the Class Period." *Id.* ¶¶ 29, 37-52.

Finally, as set forth in the accompanying Declaration of Grant Rogers[1] ("Rogers Decl."), Extract Labs has undertaken to remedy all the alleged infirmities with the Website and has completed all necessary improvements to make the Website accessible under WCAG. *See* Rogers Decl. attached hereto as Exhibit 2, ¶18. Specifically, Extract Labs engaged accesiBe, a digital accessibility software solution provider. *Id.* ¶¶ 9-11. As set forth on its website, accessiBe continually monitors the relevant World Wide Web Consortium's WCAG to improve conformance with WCAG guidelines and to eradicate issues of accessibility that may impede access for persons with disabilities. *Id.* at ¶ 11. Extract Labs submitted www.extractlabs.com to accesiBe for an audit and engaged its IT Department to remedy all WCAG 2.1 deficiencies including those described in the Complaint. *Id.* at ¶ 12. accessiBe has confirmed that the issues identified in the Complaint have been remedied. *Id.* at ¶ 13. Additionally, Grant Rogers, Extract Labs' Director of Marketing, personally tested all alleged deficiencies identified in the Complaint while using the screen reader program identified by Plaintiff in the Complaint, and personally confirmed that www.extractlabs.com is capable of being read by a screen reader program. *Id.* at ¶¶ 14-20.

Extract Labs intends to continue to maintain a monthly subscription to accesiBe, which will allow Extract Labs to ensure that its Website remains complaint with current WCAG Guidelines, and that the Website will be further remediated to ensure compliance with any new guidelines that may be established in the future. *Id.* ¶¶ 19-20. Extract Labs is committed to

[1] The Court may consider evidence outside of the Complaint, including the Declaration of Grant Rogers, in deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(1). *See Cortlandt St. Recovery Corp. v. Hellas Telecomm., S.A.R.L.,* 790 F.3d 411, 417 (2d Cir. 2015).

ensuring that its Website is up to date and compliant with all relevant standards and guidelines, including WCAG Guidelines, in order to allow the Website to be accessible to all, including the blind and visually-impaired. *Id.*

LEGAL ARGUMENT

Courts in the Second Circuit review a facial challenge to a court's jurisdiction under Rule 12(b)(1) using the same standard applied in a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011) (stating in a case involving "a facial attack to the court's jurisdiction" that to survive a "Rule 12(b)(1) motion to dismiss, [the plaintiff] must allege facts that affirmatively and plausibly suggest that it has standing to sue"). Mere "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" will not suffice to survive a motion to dismiss under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678; quoting *Twombly*, 550 U.S. at 570. To survive a motion to dismiss, a complaint must do more than proffer "an unadorned, the defendant unlawfully harmed me accusation." *Id.* at 679. Rather, all conclusory allegations must first be pared from the complaint, and then, the court must review the complaint's remaining allegations to determine whether the well pleaded factual allegations plausibly entitle the plaintiff to relief. *Id.* at 678-79; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010).

In the Second Circuit, the *Iqbal/Twombly* standard requires that a claim be dismissed unless a court can "draw the reasonable inference that the defendant is liable for the misconduct alleged." *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 253 (2d Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678). "Contrary to [the abandoned] 'no set of facts' standard [from *Conley v. Gibson*, 355 U.S. 41

(1957)], which requires only that a complaint not *preclude* the viability of claims, *Twombly* and *Iqbal* require that a complaint *support* the viability of its claims by pleading sufficient nonconclusory factual matter to set forth a claim that is plausible on its face." *Id.* (citing *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678) (emphases in original). Reviewing a complaint for plausibility is "a context specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 258 (quoting *Iqbal*, 556 U.S. at 679). If a complaint lacks sufficient factual allegations to raise a plaintiff's claims "above the speculative level," the claims must be dismissed as a matter of law. *Id.* at 257 (quoting *Twombly*, 550 U.S. at 555).

I. PLAINTIFF'S CLAIMS ARE MOOT BECAUSE EXTRACT LABS HAS REMEDIED ALL ALLEGED ADA VIOLATIONS.

Immediately upon being served with Plaintiff's Complaint, Extract Labs undertook all necessary steps to ensure that it remedied the issues identified in the Complaint. *See,* Rogers Decl. ¶¶ 6 – 7. Since Extract Labs has remedied all of the alleged violations of the ADA as described in the Complaint, no actual case or controversy exists and the case is moot. *Id.* at ¶ 18. Because this case is moot, the Court lacks subject matter jurisdiction and must dismiss Plaintiff's Complaint.

A claim shall be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d at 416-17 ("A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it."). It is the burden of the plaintiff to demonstrate "that subject matter jurisdiction lies over the dispute." *Diaz v. Kroger Co.*, 18-cv-7953, 2019 WL 2357531, at *2 (S.D.N.Y. Jun. 4, 2019); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements") (citation omitted). Moreover, "an actual controversy must be extant at all stages of

review." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 72. "[F]actual changes made by a defendant after litigation has commenced cannot render a case moot unless it is absolutely clear the defendant cannot resume the allegedly offending conduct." *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 110 (2d Cir. 2010) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)). However, "[t]he voluntary cessation of allegedly illegal activity may render a case moot 'if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Id.* (quoting *Campbell v. Greisberger*, 80 F.3d 703, 706 (2d Cir. 1996)).

Two cases, *Diaz v. Kroger Co*., 2019 WL 2357531 (S.D.N.Y. Jun. 4, 2019) and *Guglielmo v. Nebraska Furniture Mart, Inc.*, 2020 WL 7480619 (S.D.N.Y. Dec. 18, 2020) are particularly instructive here, as the facts alleged these cases, and subsequent remedial actions taken by those defendants are extremely similar to those asserted here.

In *Diaz*, the plaintiff, a visually impaired individual, alleged that the defendant's website was not compliant with WCAG standards and thus violated the ADA. *See Diaz,* 2019 WL 2357531, at *2. In response to the complaint, the defendant submitted an affidavit by which it explained that (i) it had undertaken to comply with the WCAG guidelines, (ii) the affiant personally made sure that all deficiencies in the website (that made it non-compliant) were remedied, (iii) the website was, in fact, now compliant, (iv) it would continue to keep the website compliant and (v) it would to keep the website up to date with any new standards that may be established. *Id.* at *3. The court found these averments to be sufficiently specific and detailed to meet the showing required to establish mootness and, thus, dismissed the complaint. *Id.* at *5.

In *Guglielmo,* the plaintiff, also a visually impaired individual, alleged that he visited the website of the defendant, a furniture and appliance retailer, and was unable to make a purchase, also due to the existence of access barriers, in violation of the ADA. *See Guglielmo,* 2020 WL 7480619, at *1-2. In response, the defendant also argued that the claim was moot and submitted a declaration stating (i) prior to lawsuit, defendant had invested time and resources in improving the website's accessibility; (ii) the defendant had since remedied each of the ADA violations alleged by the plaintiff; and (iii) the defendant intended to commence a significant redesign of its website, to enhance accessibility. *Id.* at *6. The Court, citing to *Diaz*, held that the defendant's declaration was sufficient to demonstrate that the claims were moot and dismissed the complaint. *Id.* Here, like in *Diaz and Guglielmo*, Extract Labs has submitted evidence via the Rogers Decl. which demonstrates that (i) it has modified its Website to make it compliant with WCAG 2.1 standards as alleged in the Complaint, (ii) it has specifically addressed and remedied the alleged access barriers Plaintiff encountered, (iii) it will actively update its Website to ensure that it continues to be compliant with WCAG 2.1 standards, and (iv) it will make sure to comply with any new standards set forth by the WCAG in the future (or any other similar organization).[2] *See* Exhibit 2, Rogers Decl. ¶¶ 10-20. In short, Extract Labs has demonstrated that it is committed to ensuring that it is compliant with WCAG 2.1 guidelines and has remedied all issues mentioned in the Complaint; thus, there is no reasonable expectation that any of the violations Plaintiff alleges Extract Labs committed will recur in the future. *See Clear Channel Outdoor*, 594 F.3d at 110. As

[2] While Extract Labs acknowledges that it undertook its efforts to remedy the alleged violations after the lawsuit was filed (and not before, like in *Diaz*), the primary focus of the court in *Diaz* was not on when the efforts to remedy *began*, but rather when the efforts and remediation were *completed* (i.e. that the remedies were already complete and not in the process of being completed). *See Diaz*, 2019 WL 2357531, at *5. Here, as set forth in the Rogers Decl., Extract Labs has completed its remedies, and its Website is presently compliant. *See* Rogers Decl. ¶¶ 10, 21.

such, Plaintiff's claims are moot, and the Complaint should be dismissed with prejudice because the Court lacks subject matter jurisdiction over the matter. *See F.O. v. New York City Dept. of Educ*., 899 F. Supp. 2d 251, 255 (S.D.N.Y. 2012).[3]

II. PLAINTIFF LACKS STANDING TO BRING HIS ADA CLAIM

Even if the Court were to find that Plaintiff's claims are not moot, the Court should dismiss Plaintiff's claims because Plaintiff fails to allege that he has suffered an injury in fact. *Spokeo, Inc.*, 136 S. Ct. at 1547. To satisfy Article III's standing requirement, a plaintiff must sufficiently plead that he has "suffered (1) a concrete, particularized, and actual or imminent injury-in-fact (2) that is traceable to defendant's conduct and (3) likely to be redressed by a favorable decision." *Mendez v. Apple, Inc.*, 2019 WL 2611168, at *1 (S.D.N.Y. Mar. 28, 2019) (internal quotation and citation omitted). As such, in order to have standing, Plaintiff must plead "a concrete, particularized, and actual or imminent injury-in-fact." *Id*. at *2. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

In *Jaques v. Aqua Carpatica USA,* 2021 WL 3727094 (S.D.N.Y. August 20, 2021), a case very similar to this matter, the court held that the plaintiff lacked standing and dismissed the amended complaint. In *Jaques,* a plaintiff with visual impairment alleged the defendant violated the ADA and the NYCHRL because the defendant's website was not compatible with the software he used to make the website accessible for the visually impaired in violation of the ADA. *Id.* at **1-2. The *Jaques* court held that Plaintiff lacked standing because he failed to sufficiently

[3] Should the Court grant this Motion, Extract Labs will seek its attorneys' fees pursuant to 42 U.S.C. § 12205, since, if Plaintiff proceeds with claims that are shown to be moot, such conduct will amount to litigating frivolous, unreasonable, and groundless claims.

identify the product he intended to purchase on the defendant's website, or the product he intended to purchase in the future. *Id.* at *4, *6. The *Jacques* court held that "a plaintiff must allege sufficient facts to show 'more than a sheer possibility that a defendant had acted unlawfully' in order to survive a motion to dismiss." *Id*. at *4.

Here, Plaintiff cannot establish the elements necessary to confer standing because he has not alleged that he suffered an injury-in-fact that is both "concrete" and "particularized." Indeed, the Complaint lists in one single paragraph two examples of generic alleged access barriers on Extract Labs' Website, which Plaintiff alleges prevented him from accessing the Website, to wit:

> 23. While attempting to navigate the website, Plaintiff encountered multiple accessibility barriers, including, but not limited to, the following:
>
> a. The **screen reader fails** to read advertisement pop up links. The website then requires the use of a cursor to close the advertisement.
>
> b. The **screen reader fails** to read the links on the website.

See Compl. ¶ 23 (emphasis added.) Plaintiff's allegations are not plausible because they expressly state only that Plaintiff's own software failed, *i.e.* the screen reader, and not that the screen reader worked properly but was unable to read the links due to failures with Defendant's Website. In *Angeles v. Grace Products, Inc.,* for example, this Court held that the plaintiff had plausibly alleged standing because, in part, her complaint explains that her screen-reading software was "(1) unable to discern which products were on the screen and distinguish between different screens on the website due to the failure of the website to adequately describe its content and (2) she encountered problems with broken links that prevented her from using the screen reader to return to her search." *Angeles v. Grace Products, Inc.,* 2021 WL 4340427, *2 (S.D.N.Y. September 23, 2021). The plaintiff in *Angeles* alleged specific problems with the defendant's website that caused her screen reader to fail. Similarly, in *Quezada v. US Wings, Inc.,* this Court noted that the plaintiff listed "thirteen issues and barriers that he experienced or knows the website contains in the Amended

Complaint." *Quezada v. US Wings,* 2021 WL 5827437, *1 n.1 (S.D.N.Y. December 7, 2021). The plaintiff specifically alleged that he was "unable to determine information about defendant's products such as which sizes were available." *Id.* at *4.

Here, Plaintiff does not allege how the functionality of the screen reader was negatively impacted by the Website. In fact, Plaintiff specifically alleges that the "screen reader fails to read advertisement pop up links" and "the screen reader fails to read links on the website." *Complaint,* ¶¶ 2, 23. Plaintiff does not allege that at the time he was allegedly on the Defendant's website, the screen reader functioned properly or that the screen reader's failure to read advertisements and links was caused by specific problems with Defendant's Website.

Further, Plaintiff fails to identify (and thus fails to plausibly allege) (i) *which* links the screen reader failed to read, (ii) *how* these links prevented him from accessing or purchasing a product, (iii) *whether* Plaintiff even attempted (but could not) make a purchase of some unidentified product, (iv) *what* product Plaintiff intended to purchase. *Id.* ¶ 23. While Plaintiff alleges he was "highly interested in purchasing the products offered by Defendant," he does not provide specific details regarding a single product of interest or line of products he intended to purchase. *Id.* ¶ 24. Plaintiff also fails to explain how the non-conforming features of the Website resulted in an injury. *Id.* Instead, Plaintiff simply alleges generally that he was injured because he was denied full enjoyment of the goods and/or services offered on the Website. *Id,* ¶ 22.

In short, Plaintiff fails to plausibly allege a single concrete example of an access barrier on Extract Labs' Website that prevented him from accessing information or prevented him from making a purchase of a specific CBD or other Extract Labs product. Plaintiff also fails to link any of these alleged barriers to any specific injury that Plaintiff purportedly suffered. Instead, Plaintiff relies on threadbare conclusory allegations that are insufficient to withstand a Fed. R. Civ. P. 12(b)(1) motion. *Amidax*, 671 F.3d at 145-46 (holding that a court "need not 'credit a complaint's

conclusory statements'" when considering whether a plaintiff has alleged facts sufficient to support standing).

This Court has dismissed similarly deficient complaints for lack of standing in *Mendez v. Apple, Inc*., 2019 WL 2611168 (S.D.N.Y. Mar. 28, 2019) and in *Guglielmo,* 2020 WL 7480619 (S.D.N.Y December 18, 2020). In *Mendez*, the plaintiff alleged that she visited the defendant's website on separate occasions where she encountered four different access barriers, which she alleges prevented her from browsing and purchasing electronics on the website, from accessing information regarding defendant's stores, and from making a service appointment online. *Id.* at *1. The *Mendez* court read plaintiff's complaint as merely alleging that "general and systematic barriers on [the defendant's] website prevented her both from accessing goods and services on the website, as well as accessing goods and services in [the defendant's] physical stores," and found the complaint's threadbare allegations to be lacking in the requisite specificity to allege an injury-in-fact. *Id.* at *2. Specifically, the *Mendez* court explained that the plaintiff failed to (i) provide the date she tried to access the store, (ii) identify what product she was prevented from purchasing, (iii) identify which sections of the website she tried to access but could not, and (iv) which actual barriers prevented her from accessing the defendant's store. *Id.* The court, thus, dismissed the plaintiff's claims. *Id.*

As set forth above, in *Guglielmo,* the plaintiff, also a visually impaired individual, visited the website of the defendant, a furniture and appliance retailer, to make a purchase of some unidentified product. *See Guglielmo,* 2020 WL 7480619, at *1-2. The plaintiff alleged that he was unable to make a purchase due to barriers he encountered on the website, which he described to a degree as the following: (i) the website lacked certain features and accommodations to aid visually-impaired individuals, (ii) many features lacked "alt. text" code embedded beneath a graphical image to allow the plaintiff to differentiate among products, (iii) features failed to include

elements or attributes that enable an individual to identify the purpose of a webpage or determine when content requires input, (iv) many features contained similar title elements that made it difficult to distinguish among webpages, and (v) there existed a number of broken links that hyperlinked to non-existent webpages. *Id.* at *2. However, despite having made some effort to allege some examples of access barriers (unlike in *Diaz*), the *Guglielmo* court still found that plaintiff had failed to allege enough specifics to set forth an ADA claim, specifically stating:

> But while Plaintiff identifies certain barriers, he does not allege where exactly on the Website he encountered these barriers, aside from noting that the lack of embedded "alt. text" code was particularly an issue on an unspecified section of the Website where he unsuccessfully attempted to make a purchase. Further, Plaintiff does not identify the goods that he intended to purchase on any of his visits to the Website, nor does he specify the dates of any visits. Courts in this Circuit have required far more from plaintiffs bringing ADA claims.

Id. (internal citation omitted).

This is exactly the case here. Like in *Mendez* and *Guglielmo*, Plaintiff fails to allege (i) on what specifc date he tried to access the store, (ii) *what* product he intended to purchase but could not purchase due to barriers, (ii) *which* sections of the Website he was prevented from accessing, or (iii) *how* the alleged barriers prevented him from accessing information he needed in order to make a purchase on the Website; (iv) *how* the screen reader's failure was caused by Defendant's Website. *Id.* at **2-3. Thus, like in *Mendez* and *Guglielmo*, in failing to allege these specific facts and instead relying only on conclusory allegations that his screen reader failed, and that he observed and encountered general barriers, Plaintiff has failed to establish Article III standing necessary for all his claims. *Id.; Harty v. Nyack Motor Hotel, Inc.*, 2020 WL 1140783, at *4 (S.D.N.Y. Mar. 9, 2020) (dismissing ADA complaint where plaintiff "fail[ed] to describe any purportedly deficient features, how they impeded his navigation of the Website, or what, if anything, he was able to observe when he did attempt to access the Website."); *Feltzin v. Stone Equities, LLC*, 2018 WL 1115135, at *10 (E.D.N.Y. Feb. 8, 2018) (recommending the district

court grant a judgment on the pleadings in a Title III ADA case, noting that "although Plaintiff lists thirteen alleged ADA Violations . . . conspicuously absent [from the complaint] are facts explaining *how* Plaintiff interacted with and experienced violations" and concluding that "[the plaintiff's] conclusory allegation that '[the plaintiff] has personally observed or encountered' these violations . . . is insufficient to connect the violations to Plaintiff's experience of them for purposes of establishing a concrete and particularized injury in fact.") (emphasis in original); *Feltzin v. Triangle Props. #1, LLC*, 2016 WL 11599264, at *5 (E.D.N.Y. Dec. 15, 2016) ("Plaintiff provides no additional information concerning either the[] alleged encounters or any resulting injuries. In fact, Plaintiff provides no details at all concerning any instance in which he allegedly encountered a violation.").

Because Plaintiff has failed to allege an actual injury, and specifically because Plaintiff failed to allege how the failure of a screen reader program is connected to alleged deficiencies with Defendant's Website, the Court does not have subject matter jurisdiction over Plaintiff's claims and the Court must dismiss the Complaint.

III. PLAINTIFF FAILS TO PLAUSIBLY STATE A CLAIM UNDER FED. R. CIV. PRO. 12(b)(6)

For the reasons outlined above, Plaintiff has failed to plausibly allege his claims and pursuant to Fed. R. Civ. Pro. 12(b)(6) this Court should dismiss Plaintiff's Complaint. Pursuant to Fed. R. Civ. Pro. 12(b)(6), "[a] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqubal,* 556 U.S. at 678; quoting *Twombly,* 550 U.S. at 570. Here, Plaintiff failed to assert a claim for relief. Plaintiff specifically alleges that his screen reader failed when he was on Defendant's Website. *Complaint,* ¶ 2, 23. Plaintiff does not allege that Defendant's Website caused the screen reader to fail to function. Plaintiff does not allege that barriers or functional problems with the Website prevented him from

purchasing a specific product or line of products on Defendant's Website, let alone *how*. Therefore, for all the reasons detailed above, this matter should be dismissed for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6).

IV. PLAINTIFF LACKS STANDING TO BRING HIS STATE AND CITY LAW CLAIMS BECAUSE HE FAILS TO PROPERLY PLEAD AN INJURY IN FACT

For the reasons stated above, because the same legal standards governing standing under the ADA apply to the NYCHRL, Plaintiff's remaining claims also fail and the Court should dismiss the Complaint in its entirety, with prejudice. *Kreisler v. Humane Soc'y of New York*, 2018 WL 4778914, at *6, *8 & n.5 (S.D.N.Y. Oct. 3, 2018) (granting dismissal with respect to alleged ADA violations on the basis that the issue was moot, and concluding, "[f]or the same reasons," that the plaintiff "also lack[ed] standing to challenge the restroom and water fountain under the NYCHRL") (citation omitted).

V. PLAINTIFF FAILS TO STATE A CLAIM FOR VARIOUS FORMS OF RELIEF UNDER THE NYCHRL.

Should the Court find that Plaintiff has standing (as set forth above, he does not), the Court should dismiss this Motion in its entirety, in part, because Plaintiff has failed to state a claim for several forms of relief under the NYCHRL.

Civil penalties are not recoverable by individual plaintiffs under the NYCHRL. *See* N.Y.C. Admin. Code, Tit. 8, Ch. 1, § 8-127(a) ("Any civil penalties recovered pursuant to this chapter shall be paid into the general fund of the city."). Moreover, to be awarded punitive damages under the NYCHRL, the defendant must have "engaged in discrimination with willful or wanton negligence, or recklessness, or a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.'" *Chauca v. Abraham*, 89 N.E.3d 475, 481 (N.Y. 20017). Here, Plaintiff has failed to allege any facts whatsoever to support its wholly conclusory allegation that

Defendant's actions were somehow "willful intentional discrimination." *Complaint,* ¶ 51. As such, Plaintiff has utterly failed to allege any conduct that could arise to an award of punitive damages under the NYCHRL.

CONCLUSION

For the foregoing reasons, Extract Labs respectfully requests that the Court dismiss the Complaint with prejudice.

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