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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 FIRST AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990 AND NEW YORK CITY HUMAN RIGHTS LAW

TABLES OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS 4

LEGAL ARGUMENT 6

I. PLAINTIFF'S CLAIMS ARE MOOT BECAUSE EXTRACT LABS HAS REMEDIED ALLEGED ADA VIOLATIONS 7

II. PLAINTIFF LACKS STANDING TO BRING HIS ADA CLAIM 11

III. PLAINTIFF FAILS TO PLAUSIBLY STATE A CLAIM UNDER FED. R. CIV. PRO. 12(b)(6).....15

IV. PLAINTIFF LACKS STANDING TO BRING HIS CITY LAW CLAIMS BECAUSE HE FAILS TO PROPERLY PLEAD AN INJURY IN FACT**Error! Bookmark not defined.**

IV. PLAINTIFF FAILS TO STATE A CLAIM FOR VARIOUS FORMS OF RELIEF UNDER THE NYCHRL 16

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Amidax Trading Grp. V. S.W.I.F.T. SCRL,
671 F.3d 140 (2d Cir. 2011)….....6

Angeles v. Grace Products, Inc.,
2021 WL 4340427 (S.D.N.Y. September 23, 2021) ….....12

Ashcroft v. Iqbal,
556 U.S. 662 (2009) ….....6

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) ….....6

Campbell v. Greisberger,
80 F.3d 703 (2d Cir. 1996).....….....9

Chauca v. Abraham,
89 N.E.3d 475 (N.Y. 20017) 16

Clear Channel Outdoor, Inc. v. City of New York,
594 F.3d 94 (2d Cir. 2010)….....8, 10

Conley v. Gibson,
355 U.S. 41 (1957) ….....7

Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.,
790 F.3d 411 (2d Cir. 2015)…..... 8

Diaz v. Kroger Co.,
2019 WL 2357531 (S.D.N.Y. Jun. 4, 2019) ….....8, 9, 10, 11, 13

EEOC v. Port Auth. Of N.Y. & N.J.,
768 F.3d 247 (2d Cir. 2014)….....7

Feltzin v. Stone Equities, LLC,
2018 WL 1115135 (E.D.N.Y. Feb. 8, 2018)….....14

Feltzin v. Triangle Props. #1, LLC,
2016 WL 11599264 (E.D.N.Y. Dec. 15, 2016) ….....14

F.O. v. New York City Dept. of Educ.,
899 F. Supp. 2d 251 (S.D.N.Y. 2012) 10

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,
528 U.S. 167 (2000) 8

FW/PBS, Inc. v. Dallas,
493 U.S. 215 (1990) 12

Genesis Healthcare Corp. v. Symczyk,
569 U.S. 66 (2013) 8

Guglielmo v. Nebraska Furniture Mart, Inc.,
2020 WL 7480619 (Dec. 18, 2020 S.D.N.Y.) 10,11, 13, 14

Harty v. Nyack Motor Hotel, Inc.,
2020 WL 1140783 (S.D.N.Y. Mar. 9, 2020) 14

Hayden v. Paterson,
594 F.3d 150 (2d Cir. 2010).....7

Hecht v. Magnanni, Inc.,
2022 WL 974449, 4 (S.D.N.Y. March 31, 2002.....11

Kreisler v. Humane Soc'y of New York,
2018 WL 4778914 (S.D.N.Y. Oct. 3, 2018) 16

Mendez v. Apple, Inc.,
2019 WL 2611168 (S.D.N.Y. Mar. 28, 2019) 11, 13, 14

Quezada v. U.S. Wings, Inc.,
2021 WL 5827437 (S.D.N.Y. December 7, 2021)..... 12

Sanchez v. NutCo, Inc.,
2022 WL 846896 *3 (S.D.N.Y. March 22, 2022)…..... 9

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016) 8, 11

Statutes

42 U.S.C. § 12205 10

Other Authorities

N.Y.C. Admin. Code, Tit. 8, Ch. 1, § 8-127(a) 16

Rule 12(b)(1) 1, 6, 8

Rule 12(b)(6) 1, 6, 15

Defendant, Extract Labs, Inc. ("Defendant" or "Extract Labs") respectfully submits this Memorandum of Law in support of its Motion to Dismiss the Plaintiff's First Amended Class Action Complaint for Violations of the Americans with Disabilities Act of 1990 and New York City Human Rights Law (the "Amended Complaint") [Dkt. No. 18], pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) (this "Motion").

INTRODUCTION

This lawsuit is one of 113 virtually identical lawsuits Plaintiff's counsel has filed in this Court over the last year alleging that various companies' websites violate the American with Disabilities Act (the "ADA") because they purportedly are not accessible to the visually impaired. *See,* Exhibit 1. In fact, on November 24, 2021 and November 23, 2021 alone, Plaintiff filed over one hundred separate ADA class action lawsuits. *Id.* From his filings, it is clear that Plaintiff is engaging in a deliberate and systematic campaign to visit as many random websites as possible in an effort to identify as many websites that somehow, someway contained alleged 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 store, women's cosmetics, out of state beer manufacturers, and many others. *Id.* 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/or how the defendant caused his alleged injuries.

Here, on November 24, 2021, Plaintiff filed his original Class Action Complaint for Violations of the Americans with Disabilities Act of 1990 and New York City Human Rights Law [Dkt#1]. On February 7, 2022, Defendant filed Defendant's Motion to Dismiss Class Action Complaint for Violations of the Americans with Disabilities Act and New York City Human Rights

Law [Dkt. #13] and Memorandum of Law in Support of Defendant's Motion to Dismiss Class Action Complaint [Dkt. #14]. On February 18, 2022, Plaintiff filed a letter with this Court indicating that Plaintiff intended to file an amended pleading by or on February 28, 2022. [Dkt. #16]. Two months later, this Court entered a minute order giving Plaintiff until May 4, 2022, to file an Amended Complaint or, the court indicated it would treat Defendant's Motion to Dismiss as unopposed. [Dkt. #17]. At nearly the last possible minute, on the night of May 4, 2022, Plaintiff filed his First Amended Class Action Complaint for Violations of the Americans with Disabilities Act of 1990 and New York City Human Rights Law. [Dkt.18]. Plaintiff's First Amended Complaint alleges that Plaintiff is visually impaired and that in August of 2021 and on May 4, 2022 (the day he filed his Amended Complaint), Plaintiff 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*, Amended Complaint, ¶ 2; 22-23. Critically, Plaintiff's Amended Complaint is based on allegations that it was the screen reader software program he was using that failed to read the text, *and not* that Defendant's Website *caused* the screen reader program to fail. *See,* Amended Complaint, ¶¶ 2, 23. Plaintiff fails to causally connect the failure of his screen reader program to Defendant's Website or Defendant's conduct. Put directly, Plaintiff fails to allege that Defendant's Website prevented the screen reader from functioning. *Id.* Based upon these 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, once Extract Labs was served with a copy of Plaintiff's Complaint, Extract Labs made ADA compliance its top priority. *See,* Exhibit 2, Rogers Decl. ¶ 6. Upon receipt of the original Complaint, Extract Labs, through the personal supervision of its CEO, engaged its Website

Development Team, Director of Marketing, Director of Operations and Graphic Design Team to make its website compliant and accessible to the visually impaired. *Id.,* ¶¶ 2, 7-14. Extract Labs began the process of becoming compliant by subscribing to accessiBe, which is a website auditing and monitoring company with expertise in the area of WCAG compliance. *Id.,* ¶¶ 9-12.

On May 6, 2022, Extract Labs' Director of Marketing, Grant Rogers, personally reviewed the new allegations in Plaintiff's Amended Complaint. *Id.,* ¶ 14. Extract Labs sought the assistance of an expert in the area of WCAG 2.1 guidelines and ADA website compliance for guidance and assistance in making the new website fully compliant. *Id.,* ¶¶ 17 - 18. On May 27, 2022, Extract Labs launched a completely new website using the same web address, www.extractlabs.com. *Id.,* ¶ 15. While the new website's domain is the same, most, if not all of the code has been rebuilt and redesigned specifically to meet Extract Labs' desire to comply with WCAG 2.1 guidelines. *Id.* Extract Labs has now confirmed that all alleged issues with the Website are resolved and will not recur. *Id.,* ¶¶ 19 – 28. 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 fails to allege an injury in fact that is traceable to Defendant's conduct. Plaintiff alleges that it was the screen reader software program that failed and not that Defendant's Website *caused* the screen reader program to fail. *Amended Complaint,* ¶¶ 2, 23. Plaintiff fails to allege (i) what actual barriers existed on what portions of the Website, (ii) how those barriers prevented Plaintiff from accessing information on the Website, or (iii) how Plaintiff determined that inaccessibility was caused by Website deficiencies rather than a deficiency with the screen reader program he used. These facts must be alleged to establish standing, and Plaintiff does not allege any of them plausibly. As such, Plaintiff has failed to allege an injury in fact traceable to Defendant's conduct, 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 caused by Defendant's conduct, 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 and his request for declaratory relief.

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,* Amended 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 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 and on May 4, 2022, he "encountered multiple access barriers that denied Plaintiff full and equal access to the CBD infused products offered to (and made available for) the public." *Id.* ¶ 2, 22. However, Plaintiff fails to allege the specific pages he browsed on the Website or which CBD infused gummies 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. Plaintiff alleges generally that his screen reader failed to read descriptions to linked images, failed

to read product descriptions, could not read all of the products for selection, and failed to read when all of the items are added to the cart. *Id.* ¶23.

First, Plaintiff's allegations state clearly that it was Plaintiff's screen reader that failed. *Id.* Plaintiff *does not* allege that Defendant's Website *caused* the failure. *Id.* Words have meaning and Plaintiff amended his Complaint but did not amend his allegations regarding the screen reader failing. Second, Plaintiff fails to plausibly allege what specific 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 do not conform to the WCAG 2.1 guidelines (and thus is violative of the ADA). *Id.* 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.* ¶¶ 37-52. 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, Extract Labs has recently put forth a tremendous effort to make its Website accessible to the visually impaired. *See,* Exhibit 2, Rogers Decl. ¶ 6. Extract Labs has built an entirely new Website, which it launched on May 27, 2022, that conforms to WCAG 2.1 guidelines. *Id.,* ¶ 15. The new Website has remedied all the alleged infirmities with the original Website. *Id.*, ¶¶ 20-28. Extract Labs has also engaged accesiBe, which is a digital accessibility software solution provider to address and resolve any potential issues in the future in regards to website compliance. *Id*., ¶ ¶12-13. 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.,* ¶ 13.

On June 7, 2022 Extract Labs submitted the newly designed and newly rebuilt Website, which uses the same URL: www.extractlabs.com, for audits with two website auditing companies that specialize in WCAG 2.1 compliance – Wave and Accessibility Checker. *Id.*, ¶ 19. Both Wave and Accessibility Checker show that the Website is compliant with WCAG 2.1 guidelines. *Id.,* ¶ 20. Additionally, Grant Rogers, Extract Labs' Director of Marketing, personally tested all alleged deficiencies identified in the Amended Complaint while using the screen reader program identified by Plaintiff in the Amended Complaint, and personally confirmed that www.extractlabs.com is capable of being read by a screen reader program. *Id.*, ¶¶ 21-24.

Extract Labs intends to continue to maintain a monthly subscription to accesiBe, which will allow Extract Labs to ensure that its Website remains compliant 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.* ¶¶ 26-28. Extract Labs is committed to 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, and Amended Complaint, Extract Labs focused its resources and time to prioritize the need to make its Website accessible to

all people with disabilities in accordance with WCAG guidelines. *See,* Exhibit 2, Rogers Decl. ¶¶ 6-7. Since Extract Labs has rebuilt and re-designed its Website with the guidance of accessiBe, and other experts in the field, it has eliminated the risk of a violation of WCAG guidelines in the future. *Id.* at ¶¶ 11 -20; ¶¶ 25-28. Therefore, no actual case or controversy exists and the case is moot. 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)).

There is a two-part test to determine when voluntary cessation 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." *Sanchez v. NutCo, Inc.,* 2022 WL 846896 *3 (S.D.N.Y. March 22, 2022). The district court calls this a "formidable burden" and where there is competing evidence, motions to dismiss for mootness are denied. *Id.*

Here, there is no reasonable expectation that the alleged violations will recur because interim events have irrevocably eradicated the effects of the alleged violation as Extract Labs entirely rebuilt its Website to make the newly released Website compliant. *See* Exhibit 2, Rogers Decl, ¶¶ 15-25. The Declaration of Grant Rogers establishes that Extract Labs (i) has redesigned and rebuilt its Website and made the new Website compliant with WCAG 2.1 standards, (ii) has specifically addressed and remedied the alleged access barriers Plaintiff encountered, (iii) 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).[1] *Id*. 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 and that it will remain compliant in the future; thus, there is no reasonable

[1] 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. ¶¶ 24, 28.

expectation that any of the alleged violations will recur in the future. *See Clear Channel Outdoor*, 594 F.3d at 110; *Sanchez.,* 2022 WL 846896*3. As 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).[2]

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 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,

[2] 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.

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 shown that it has invested time and resources into re-building its website to remedy all of the alleged ADA violations. *See* Exhibit 2, Rogers Decl, ¶¶ 15-25.

In *Hecht v. Magnanni*, Inc., the district court denied the defendant's motion to dismiss as the supporting affidavits and declarations presented by each side showed evidence that the violations of the ADA could reasonably be expected to recur. *Hecht v. Magnanni, Inc.,* 2022 WL 974449, *4 (S.D.N.Y. March 31, 2022). Here, however, there is no reasonable expectation that these alleged violations will recur because the interim events have eradicated the risk insofar as Extract Labs has now re-built a new Website with new code that specifically complies with WCAG guidelines. *See,* Exhibit 2, Grant Rogers Decl. ¶¶ 15-28. Therefore, Plaintiff's Amended Complaint is moot and the matter should be dismissed with prejudice.

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 establish standing. *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). 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).

Here, Plaintiff cannot establish the elements necessary to confer standing because he has not alleged that he suffered an injury-in-fact that is traceable to Defendant's conduct. Plaintiff repeatedly alleges that "the screen reader fails" or "the screen reader cannot read" rather than alleging that Defendant's Website *caused* the screen reader to fail. *See,* Amended Complaint, ¶¶ 2, 23. Additionally, Plaintiff never alleges that the screen reader that he used worked properly and that even though it worked properly, it was unable to read the information on Defendant's Website due to specific failures with the 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. These allegations specifically addressed how the website caused the plaintiff to be unable to use the screen reader program to understand the content of the website.

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. *Id.* (internal citation omitted).

Like in *Mendez* and *Guglielmo*, Plaintiff fails to allege (i) *what* specific product he intended to purchase but could not purchase due to barriers, and (ii) *how* the screen reader's failure was caused by or traceable to 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 traceable to Defendant's conduct, 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 Amended 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 plausibly assert a claim for relief. Plaintiff specifically alleges that it was his screen reader that failed when he was on Defendant's Website. *Amended Complaint,* ¶¶ 2(a), 2(b), 2(c), 2(d), 23(a), 23(b), 23(c), 23(d). Plaintiff does not allege that Defendant's Website caused the screen reader to fail to function. *Id*. 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. Therefore, taking Plaintiff's allegations as true, he has failed to state a cause of action. 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 Amended Complaint with prejudice.

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LASZLOLAW

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