UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOEL PRICE,

Plaintiff,

v.

BREVARD COUNTY,

Defendant.
_____/

Case No. 6:18-cv-428-Orl-22DCI

DISPOSITIVE MOTION

MOTION TO DISMISS, MOTION TO STRIKE, AND INCORPORATED MEMORANDUM OF LAW

COMES NOW Defendant Brevard County (the "County"), by and through its undersigned attorney, hereby files and serves its Motion to Dismiss, Motion to Strike, and Incorporated Memorandum of Law. The County responds to Plaintiff Joel Price's Complaint for Injunctive and Declaratory Relief (Doc. 1) with this motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and alternative motion to strike pursuant to Rule 12(f).

I. BACKGROUND

Price brought this case under Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 concerning the accessibility of certain portions of the County's website (www.brevardfl.gov) to Price, an individual who is visually impaired. (*See* Doc. 1 at 1, ¶ 5). Price alleges that much of the content provided on the County's website is provided in PDF format that is not accessible to individuals who are visually impaired and use screen readers. (Doc. 1 ¶¶ 3-4). Price alleges that due to his disability, he requires that electronic documents be saved in an accessible format so that he can comprehend those electronic documents with screen reader software. (Doc. 1 ¶ 16). However, certain documents on the County's website

(Price specifically lists only two) are allegedly provided "solely in a PDF flat surface format." (Doc. 1 ¶¶ 26, 28). As a result, such documents are supposedly inaccessible to visually-impaired individuals who use screen readers. (*See* Doc. 1 ¶¶ 27-28). Price maintains that such alleged inaccessibility amounts to unlawful discrimination against visually-impaired individuals. (*See* Doc. 1 ¶ 39).

Price is not a resident of the County—Price resides in an unspecified Florida county to the south of Brevard County. (*See* Doc. 1 ¶ 29). Price states that he "is interested in the quality of life, level of environmental concern, and progressive nature of Brevard County[] . . . to visit and to consider as a living option." (Doc. 1 ¶ 29). Price alleges that in February 2018, he visited the County's website "with the intent of educating himself about the quality of life in Brevard County, which can be reflected in the governmental functions and (historical) legislative intent of the Board of Commissioners, as well as to find out about programs, services[,] and activities available to visitors and residents of Brevard County as available through [the County's] Portal." (Doc. 1 ¶ 30). Price alleges that because he could not comprehend the County's electronic documents, he was excluded from learning about the County's stance in environmental and social issues and was left unable to participate in the business affairs of the County. (*See* Doc. 1 ¶ 31). Price alleges that he continues to desire to become an involved citizen in the County's governmental process by learning about the agenda items debated, discussed, and voted upon by the Board of County Commissioners that affect Price as a visitor as well as the County's community. (Doc. 1 ¶ 34).

On March 21, 2018 Price initiated this case by filing his complaint. (*See* Doc. 1 at 1). In Count I of the complaint, Price asserts a claim against the County for alleged violation of Title II of the ADA. (*See* Doc. 1 at 10). In Count II, Price asserts a claim against the County for alleged violation of Section 504 of the Rehabilitation Act. (*See* Doc. 1 at 13). As relief, Price seeks a

declaratory judgment, permanent injunction, damages, attorneys' fees, and litigation expenses. The County now moves to dismiss Price's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Additionally and alternatively, the County moves to strike Price's demand for compensatory damages pursuant to Rule 12(f).

II. ARGUMENT

A. Motion to Dismiss

1. Legal Standard for Motions to Dismiss

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Evaluation of a complaint requires a two-step inquiry: "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. The court, however, is not bound to accept as true a legal conclusion presented as a factual allegation in the complaint. *Id.*

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. "'[D]etailed factual allegations'" are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (quoting *Twombly*, 550 U.S. at 555). A plaintiff must allege facts sufficient to "nudge[]" his or her claims "across the line from conceivable to plausible[] . . . ." *Twombly*, 550 U.S. at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 768 (quoting *Twombly*, 550 U.S. at 556).

"Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly* 556 U.S. at 557). In such circumstances, the court should dismiss the plaintiff's claim for failure to state a claim upon which relief can be granted. *See Twombly*, 556 U.S. at 570.

2. Price Does Not Allege Impeded Access to Actual, Physical, Concrete Space, Buildings or Facilities of the County

The Court should dismiss Price's complaint because he does not allege that his access to any actual, physical, concrete space, building, or facility of the County was impeded as a result of the supposed inaccessibility to visually-impaired individuals of certain content on the County's website. Title II of the ADA requires that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[1] There is a dearth of authority concerning whether, and if so to what extent, Title II of the ADA applies to website accessibility. In fact, in 2017, the Department of Justice Announced that it was formally withdrawing, effective December 26, 2017, its previously issued Notice of Proposed Rulemaking pertaining to Accessibility of Web Information and Services of State and Local Government. *See* Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions; Federal Register Vol 82, No. 246 (December 26, 2017), *available at* https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced (last visited April 18,

[1] "Cases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa. *See Cash v. Smith*, 231 F.3d 1301, 1305 n.2 (11th Cir. 2000). Therefore, the County's argument concerning Price's ADA claim also applies with respect to his Section 504 claim.

2018). Therefore, the County relies on available precedent concerning website accessibility under Title III of the ADA.

Regulations concerning website accessibility for individuals with disabilities have yet to be promulgated, and currently, neither the Supreme Court of the United States nor any of the Circuit Courts of Appeal have directly addressed the issue of whether Title III of the ADA applies to websites. *See* Order Granting Defendant's Motion to Dismiss Complaint, Case No. 17-61195-CIV-DIMITROULEAS, *Gomez v. La Carreta Enters.,* Doc. 30 at 4 (S.D. Fla. Dec. 7, 2017).[2] Decisions of the Third, Fifth, Sixth, and Ninth Circuits suggest that Title III's coverage is limited to physical spaces. *See Ford v. Schering-Plough Corp.,* 145 F. 3d 601, 613-14 (3d Cir. 1998); *Magee v. Coca-Cola Refreshments USA, Inc.,* 833 F.3d 530, 534-36 (5th Cir. 2016), *cert. denied,* 1991. Ed. 2d 18, 2017 WL 4339924 (U.S. 2017); *Parker v. Metro Life Ins. Co.,* 121 F.3d 1006, 1014 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104, 114-15 (9th Cir. 2000).

While not directly addressing the issue in the context of websites, the Eleventh Circuit in *Rendon v. Valleycrest Prods, Ltd.*, 294 F.3d 1279, 1282-83 (11th Cir. 2002), analyzed whether Title III of the ADA also covered non-physical spaces. In *Rendon,* the court concluded that Title III applied to non-physical spaces because "the definition of discrimination provided in Title III covers both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges, and intangible barriers, such as eligibility requirements and screening rules or

[2] A copy of the United States District Court for the Southern District of Florida's Order Granting Defendant's Motion to Dismiss Complaint from *Gomez v. La Carreta Enters.* does not appear to be available through WestLaw. For convenience, the County has attached, as Exhibit 1 to this motion, a copy of that order obtained through PACER.

discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges." *Id.* at 1283 (internal citations omitted). Notably, while the court in *Rendon* found that Title III could apply to non-physical spaces, such as websites, its holding relied on cases that "require[d] a nexus between the challenged service and the premises of the public accommodation." *Id.* at 1284 n.4; *see also Gomez v. La Carreta Enters.,* at 5-6. Accordingly, the majority of district courts within the Eleventh Circuit that have considered the question of whether websites are public accommodations have uniformly held that the ADA does not apply to a website that is wholly unconnected to a physical location. *See Haynes v. Pollo Operations, Inc.*, Case No. 17-cv-61003-GAYLES, 2018 WL 1523421, at *2 (S.D. Fla. Mar. 28, 2018); *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1320 (S.D. Fla. 2017);[3] Order Granting Defendants' Motion to Dismiss Third Amended Complaint, *Haynes v. Dunkin' Donuts LLC*, Case No. 17-CIV-61072-DIMITROULEAS/SNOW, Doc. 36 at 6 (S.D. Fla. Jan. 19, 2018);[4] Order Granting Motion to Dismiss, *Haynes v. Genesco, Inc.*, Case No. 0:17-cv-61641-KMM, Doc. 22 at 4, (S.D. Fla. Jan. 11, 2018) (granting motion to dismiss where plaintiff did not allege that the partially-accessible website "impedes his access to [d]efendant's physical stores.").[5]

In *Gomez v. La Carreta Enters.,* the plaintiff alleged that his inability to use www.laccerreta.com prevented him from being able to gain information about the restaurant, such

[3] Although, through a separate order, the *Gil* court held for the plaintiff after finding that the defendant's website was "heavily integrated with [the defendant's] physical store locations and operates as a gateway to the physical store locations." *Gil v. Winn Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017). However, the *Gil* case is presently on appeal to the United States Court of Appeals for the Eleventh Circuit as case number 17-13467.

[4] A copy of the court's order in *Haynes v. Dunkin' Donuts LLC* does not appear to be available through WestLaw. For convenience, a copy obtained through PACER is attached as Exhibit 2 to this motion.

[5] A copy of the court's order in *Haynes v. Genesco, Inc.* does not appear to be available through WestLaw. For convenience, a copy obtained through PACER is attached as Exhibit 3 to this motion.

as location, hours of operation, menu, daily specials, and information concerning political events occurring at the restaurant. *Id* at 6. The court found that those alleged facts, without more, were insufficient to state a claim. *Id.* The court reasoned that the United States District Court for the Southern District of Florida requires the website to provide more information about a defendant's business in order to state a claim under the ADA for website inaccessibility. *Id; see also Gomez v. Bang & Olufsen Am., Inc.*, Case No. 1:16-cv-23801-LENARD, 2017 WL 1957182, at *4 (S.D. Fla. Feb. 2, 2017) (plaintiff's "grievances are wholly unconnected to any harm he actually suffered at the place of public accommodation (i.e. the concrete, physical store) and are therefore insufficient to survive a motion to dismiss."); *Kidwell v. Fla. Comm'n on Human Relations,* No. 2:16-cv-403-FtM-99CM, 2017 WL 176897, at *5 (M.D. Fla. Jan. 17, 2017) ("Plaintiff is unable to demonstrate that either Busch Gardens' or Sea World's online website prevents his access to 'a specific, physical, concrete space such as a particular airline ticket counter or travel agency.'") (citation omitted). The *Gomez v. La Carreta Enters.* court noted:

> Businesses are not required to have websites. If a business has a website, it cannot impede a disabled person's full use and enjoyment of the physical space the business occupies. Nearly all websites associated with a physical business location provide information about location, hours, and goods and services provided by the business. Some of these websites do not interface with screen readers. If the Court allows ADA accessibility claims to proceed for these websites under a theory that a visually impaired plaintiff was denied access to *information* about the physical business location, then this Court would be saying, in effect, that *all* websites must interface with screen readers. The Court is not willing to take that leap because it would eviscerate the framework established by district courts within the Eleventh Circuit construing *Rendon.*

Gomez v. La Carreta Enters., at 7.

Much like private businesses, counties are also not required to have websites. In the instant case, there is no allegation that Price's access to the actual, physical, concrete spaces, buildings and facilities of the County was impeded. Additionally, Price did not allege that the County's

website was the only method to obtain the information he sought. "[T]he ADA does not require places of public accommodations to create full-service websites for disabled persons. In fact, the ADA does not require a place of public accommodation to have a website at all." *Gomez v. Bang & Olufsen Am.*, 2017 WL 1957182, at *4. Moreover, Price alleges that the County's website—apparently so far as Price is concerned—is nothing more than "an information portal to the County of Brevard government for the general public (anyone who accesses the Portal)." (*See* Doc. 1 ¶ 3). However, an ADA accessibility claim cannot proceed "under a theory that a visually impaired plaintiff was denied access to information about the physical location." *Gomez v. La Carreta Enters.,* at 7. Again, a plaintiff must allege that the website's inaccessibility impedes the plaintiff's "access to the specific, physical, concrete space." *Gomez v. Bang & Olufsen*, 2017 WL 1957182, at *4; *see also* Order Granting Motion to Dismiss in matter of *Haynes v. Genesco Inc.,* Case No.: 0:17-cv-61641-KMM (Jan. 11**,** 2018, Moore, Michael, J.) (granting motion to dismiss where plaintiff did not allege that the partially-inaccessible website "impedes his access to [d]efendant's physical stores.").

Price's complaint is devoid of any allegation that the County's website has prevented access to the County's specific, actual, physical, concrete spaces, buildings, or facilities. Price has no apparent interest in visiting any such physical space, building, or facility of the County. Therefore, Price fails to adequately state a claim upon which relief can be granted. Accordingly, the Court should dismiss Price's complaint.

3. Price Does Not Allege He Made A Request for Accommodation

Under Title II, "[w]hen an auxiliary aid or service is required, the public entity must provide an opportunity for individuals to request the auxiliary aides and services of their choice [. . . .]" The Americans with Disabilities Act, Title II Technical Assistance Manual,

https://www.ada.gov/taman2.html#II-3.6000 (last visited April 18, 2018). However, a defendant's "duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." *Gatson* v. *Bellingrath Gardens & Home, Inc.,* 167 F.3d 1361, 1363 (11th Cir. 1999); *see also Wood v. President & Trs. of Spring Hill Coll.*, 978 F.2d 1214, 1222 (11th Cir. 1992). This concept applies with equal force in Title II cases. *See Rylee v. Chapman*, 316 F. App'x 901, 906 (11th Cir. 2009). Dismissal is thus appropriate where the plaintiff's allegations do not demonstrate that he made, and the defendant received, a "specific demand" for an accommodation. *Gatson*, 167 F.3d at 1363.

The County's website provides:

> Brevard County's ADA coordinator will ensure the coordination of ADA compliance, including the investigation of any complaint alleging disability-based discrimination or lack of equal accessibility to county services, programs, or facilities. Brevard County has adopted grievance procedures providing for prompt and equitable resolution of complaints regarding discrimination or lack of accessibility to qualified individuals with disabilities.
>
> [. . .]
>
> Contact the office of the ADA coordinator for more information on: [. . .]
>
> - Accessibility concerns, questions, or comments related to Brevard County sponsored services, programs, facilities, and communications.

Americans with Disabilities Act (ADA), http://www.brevardfl.gov/ADANotice (last visited April 18, 2018).

Notwithstanding, Price's complaint is devoid of any allegation that he contacted the County to request a reasonable accommodation or assistance in accessing any content on or available through the County's website. When a plaintiff alleges discrimination based on a public entity's refusal to provide a reasonable accommodation, the plaintiff must also establish that the plaintiff requested an accommodation (or the need for one was obvious) and that the public entity failed to

provide a reasonable accommodation. *Smith v. Rainey,* 747 F. Supp. 2d 1327, 1338 (M.D. Fla. 2010) ("In cases alleging a failure to make reasonable accommodations, the defendant's duty to provide a reasonable accommodation is not triggered until the plaintiff makes a 'specific demand' for an accommodation."). When a plaintiff fails to make a request for a reasonable accommodation, such as here, a defendant may still be liable if the plaintiffs need for an accommodation was sufficiently obvious to put the defendant on notice that additional auxiliary aids were needed to ensure effective communication. *McCullum v. Orlando Reg'l Healthcare Sys.,* Case No. 6:11-cv-1387-Orl-31GJK, 2013 WL 1212860, at *4 (M.D. Fla. Mar. 25, 2013). However, in this case, Price fails to allege that, in the absence of a request, the County knew that harm to a federally protected right was substantially likely. *Id.* ("Plaintiffs must provide some evidence to suggest that, in the absence of a request, defendants 'knew that harm to a federally protected right was substantially likely.'"). Price's complaint contains no facts that reasonably give rise to the inference that Price's need for accommodation with respect to certain content on the County's website was sufficiently obvious to the County. Because Price does not allege that he either (1) made a request for accommodation or (2) that his need for accommodation was sufficiently obvious to the County, he cannot prevail on his claims. As such, Price has failed to adequately state a claim upon which relief can be granted. Therefore, the Court should dismiss Price's complaint.

B. Motion to Strike

Additionally and alternatively, the County moves to strike Price's demand for compensatory damages because he fails to allege that the County engaged in intentional discrimination or was deliberately indifferent to Price's visual impairment. Rule 12(f) of the Federal Rules of Civil Procedure provides that the Court may strike from a pleading any redundant,

immaterial, impertinent, or scandalous matter. *See* Fed. R. Civ. P. 12(f). The purpose of a motion to strike is "to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters. *Liberty Media Holdings, LLC v. Wintice Grp., Inc.*, No. 6:10-cv-44-Orl-19GJK, 2010 WL 2367227, at *1 (M.D. Fla. June 14, 2010).

In order for Price to obtain compensatory damages against the County under the Section 504 Title II of the ADA, or both, Price must show that the County intentionally discriminated, was deliberately indifferent to Price, or both. *See Liese v. Indian River Cnty. Hosp. Dist.,* 701 F.3d 334, 342 (11th Cir. 2012); *Delano-Pyle v. Victoria Cnty.,* 302 F.3d 567, 574 (5th Cir. 2002). This standard is an exacting one, and the inquiry as to whether intentional discrimination or deliberate indifference occurred is individual and particularized to a plaintiff and the named defendant(s). *See McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1146-47 (11th Cir. 2014); *Doe v. Sch. Bd. of Broward Cnty.,* 604 F.3d 1248, 1259 (11th Cir. 2010); *Liese,* 701 F.3d at 344. To establish deliberate indifference, a plaintiff must show that the defendant knew that harm to a federally protected right was substantially likely and failed to act on that likelihood. *McCullum*, 768 F.3d at 1147. With respect to the County, Price must show deliberate indifference on the part of "an *official* who at a minimum has *authority* to address the alleged discrimination and to institute corrective measures on the organization's behalf and who has *actual knowledge* of discrimination in the organization's programs and fails to adequately respond." *Id.* at 1148 n.9. Price's complaint is simply devoid of facts that could reasonably give rise to such an inference. Without such facts, Price cannot seek compensatory damages against the County under either Title II of the ADA or Section 504. Therefore, the Court should strike Price's demand for compensatory damages.

III. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE Defendant Brevard County requests that the Court enter an Order dismissing Plaintiff Joel Price's Complaint for Injunctive and Declaratory Relief, or in the alternative, strike Price's demand for compensatory damages, and for any other relief the Court deems just and proper.

Respectfully submitted,

/s/ Frank Mari
Michael J. Roper, Esquire
Florida Bar No. 0473227
Frank M. Mari, Esquire
Florida Bar No. 93243
Primary: mroper@bellroperlaw.com;
fmari@bellroperlaw.com
Secondary: phermosa@bellroperlaw.com;
nlehman@bellroperlaw.com
Bell & Roper, P.A.
2707 E. Jefferson Street
Orlando, FL 32803
Telephone: (407) 897-5150
Facsimile: (407) 897-3332
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2018, the undersigned electronically filed a true and correct copy of the foregoing with the Clerk of the Court by using CM/ECF.

/s/ Frank Mari
Michael J. Roper, Esquire
Florida Bar No. 0473227
Frank M. Mari, Esquire
Florida Bar No. 93243
Primary: mroper@bellroperlaw.com;
fmari@bellroperlaw.com
Secondary: phermosa@bellroperlaw.com;
nlehman@bellroperlaw.com
Bell & Roper, P.A.
2707 E. Jefferson Street
Orlando, FL 32803
Telephone: (407) 897-5150
Facsimile: (407) 897-3332
Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-61195-CIV-DIMITROULEAS

ANDRES GOMEZ,

Plaintiff,

vs.

LA CARRETA ENTERPRISES INC.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT

THIS CAUSE is before the Court on the Motion to Dismiss Amended Complaint with Prejudice [DE 27] ("Motion"), filed herein on November 1, 2017. The Court has carefully reviewed the Amended Complaint [DE 26], the Motion [DE 27], Plaintiff's Response in Opposition [DE 28], Defendant's Reply [DE 29], and is otherwise fully advised in the premises.

I. Background

Plaintiff Dennis Hayes is visually impaired. Defendant runs a chain of Cuban restaurants located throughout South Florida. Plaintiff brought this suit against Defendant La Carreta Enterprises, Inc. for allegedly violating Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*, by owning and operating a website inaccessible to persons who are visually impaired. Title III makes it unlawful to discriminate against disabled persons in the full and equal enjoyment of public accommodations. *Id.* § 12182(a). As an advocate for persons with disabilities, Gomez serves as a "tester" who files lawsuits against entities that maintain websites he believes are not compliant with the ADA's requirements.

Plaintiff utilizes JAWS Screen Reader software that enables him to read computer materials and access the Internet. Defendant runs the website www.lacarreta.com ("lacarreta.com"). According to Plaintiff, he attempted to access and use the lacarreta.com, but

was unable to since it does not interface with his screen reader software. His complaint seeks declaratory and injunctive relief to make lacarreta.com accessible to persons with visual impairments.

The Court previously dismissed Plaintiff's Complaint [DE 1] for failure to state a claim upon which relief can be granted. *See* [DE 25]. Plaintiff was given an opportunity to amend the Complaint "to adequately allege that lacarreta.com has impeded his access to Defendant's physical restaurants." *Id.* at 7. Defendant has moved to dismiss the Amended Complaint, arguing that it suffers from the same deficiencies that necessitated dismissal of the Complaint. The Court agrees.

III. Standard of Review

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This pleading standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A pleading that asserts mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. And "on the assumption that all the allegations are true (even if doubtful in fact)," the factual allegations pleaded "must be enough to raise a right to relief above the speculative level." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

To survive a motion to dismiss under Rule 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.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Id.* This plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (brackets in original) (quoting Fed. R. Civ. P. 8(a)(2)). "The Supreme Court has employed a 'two-pronged approach' in applying the foregoing principles: first, a reviewing court should eliminate any allegations in the complaint that are merely legal conclusions; and second, where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Boyd v. Warden, Holman Correctional Facility*, 856 F.3d 853, 864 (11th Cir. 2017) (quoting *Iqbal*, 556 U.S. at 679).

IV. Discussion

Title III of the ADA prescribes, as a "[g]eneral rule":

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). To state a claim for relief under Title III, a plaintiff must plausibly allege, first, that he is disabled within the meaning of the ADA; second, that the defendant is a private entity that owns, leases, or operates a place of public accommodation; and, third, that because of his disability the plaintiff was denied full and equal enjoyment of the public accommodation by the defendant. *Gomez v. Bang & Olufsen America, Inc.*, No. 16-cv-23801, 2017 WL 1957182, at *2 (S.D. Fla. Feb 2, 2017); *see Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 151 (D.C. Cir. 2015) (per curiam); *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010); *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 151 (D.C. Cir. 2015)

(per curiam); *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008) (per curiam).

Title III sets forth a "comprehensive definition of 'public accommodation,'" *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 667 (2001), in which a private entity is covered "if the operations of such entit[y] affect commerce" and the entity fits into one of the statute's 12 enumerated sets of categories.[1] *See* 42 U.S.C. § 12181(7).[2]

The ADA delegates authority to the Attorney General to issue regulations to carry out the provisions of Title III. *See id.* § 12186(b). However, rules concerning website accessibility have yet to be promulgated, and to date, neither the Supreme Court nor any of the Circuit Courts of Appeal have addressed the issue head on. It should be noted, however, that resolving the more basic question of whether Title III even applies beyond physical spaces and into cyberspace requires the Court to "wad[e] into a thicket of a circuit split." *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1334 (11th Cir. 2004). Decisions of the Third, Fifth, Sixth, and Ninth Circuits suggest that Title III's coverage is limited to physical spaces. *See Ford v.*

---

1 Title III covers the following entities:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
> (B) a restaurant, bar, or other establishment serving food or drink;
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
> (G) a terminal, depot, or other station used for specified public transportation;
> (H) a museum, library, gallery, or other place of public display or collection;
> (I) a park, zoo, amusement park, or other place of recreation;
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7)(A)-(L).

2 Congress has the power to amend this statute by explicitly including websites among the enumerated categories. The Court does not have this legislative power.

Schering-Plough Corp., 145 F.3d 601, 613-14 (3d Cir. 1998); *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534-36 (5th Cir. 2016), *cert. denied*, 2017 WL 4339924 (U.S. Oct. 2, 2017); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000). By contrast, the First, Second, and Seventh Circuits have held that Title III does not always require a connection to a physical space. *See Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 18-20 (1st Cir. 1994); *Pallozi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31-33 (2d Cir. 1999); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001).

The Eleventh Circuit has charted a middle path. In *Rendon v. Valleycrest Productions, Ltd.*, a telephone selection process that allegedly screened out disabled contestants from aspiring to compete on the show *Who Wants To Be a Millionaire?* was covered by Title III. 294 F.3d 1279 (11th Cir. 2002). In reaching this conclusion, the Court reasoned that the ADA's plain text "reveals that the definition of discrimination provided in Title III covers both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges, and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges." *Id.* at 1283 (citations omitted). Though *Rendon* concluded that Title III extends to non-physical spaces, it does not establish that a virtual space like a website is necessarily covered, especially when the claimed denial of equal access is altogether unmoored from a physical space.

> District courts within the Eleventh Circuit that have considered the question of whether websites are public accommodations have uniformly held that the ADA does not apply to a website that is wholly unconnected to a physical location. However, district

> courts in the Eleventh Circuit have found that websites are subject to the ADA if a plaintiff can establish a nexus between the website and the physical premises of a public accommodation.

Gil v. Winn Dixie Stores, Inc., 242 F. Supp. 3d 1315, 1320 (S.D. Fla. 2017) (citations omitted). *See., e.g., Bang & Olufsen*, 2017 WL 1957182, at *4 ("[T]he ADA does not require places of public accommodations to create full-service websites for disabled persons. In fact, the ADA does not require a place of public accommodation to have a website at all. All the ADA requires is that, if a retailer chooses to have a website, the website cannot impede a disabled person's full use and enjoyment of the brick-and-motar [*sic*] store.").

Here, upon a careful review of the allegations in the Amended Complaint, Plaintiff does not adequately allege that his inability to access lacarreta.com impedes his access to enjoy the physical restaurant. Rather, Plaintiff alleges that his inability to use lacarreta.com prevented him from being able to gain information about the restaurant, such as location, "hours of operation, and menus including daily specials, and . . . information concerning political events occurring at particular restaurants." [DE 26 ¶ 8]. This ground, without more, is insufficient to state a claim.

Courts in this district require the website to provide more than information about a defendant's business in order to state a claim under the ADA for website inaccessibility. *Compare Kidwell v. Florida Comm'n on Human Relations*, No. 2:16-CV-403-FTM-99CM, 2017 WL 176897, at *5 (M.D. Fla. Jan. 17, 2017) ("Plaintiff is unable to demonstrate that either Busch Gardens' or SeaWorld's online website prevents his access to 'a specific, physical, concrete space such as a particular airline ticket counter or travel agency.'") (citation omitted); *Bang & Olufsen*, 2017 WL 1957182, at *4 (plaintiff's "grievances are wholly unconnected to any harm he actually suffered at the place of public accommodation (i.e. the concrete, physical store) and are therefore insufficient to survive a motion to dismiss."); *with Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d

1315, 1321 (S.D. Fla. 2017) (motion to dismiss denied where plaintiff alleged that defendant Winn–Dixie's website allows customers to locate physical Winn–Dixie store locations *and* fill and refill prescriptions for in-store pick-up or delivery); *Gomez v. J. Lindeberg USA, LLC*, No. 16–22966, at 2–3 (S.D. Fla. Oct. 17, 2016) (finding that plaintiff stated a claim under the ADA by alleging inaccessibility of defendant's website prevented him from searching for defendant's physical clothing store locations and from purchasing defendant's clothing online).

Businesses are not required to have websites. If a business has a website, it cannot impede a disabled person's full use and enjoyment of the physical space the business occupies. Nearly all websites associated with a physical business location provide information about location, hours, and goods and services provided by the business. Some of these websites do not interface with screen readers. If the Court allows ADA accessibility claims to proceed for these websites under a theory that a visually impaired plaintiff was denied access to *information* about the physical business location, then this Court would be saying, in effect, that *all* websites must interface with screen readers. The Court is not willing to take that leap because it would eviscerate the framework established by district courts within the Eleventh Circuit construing *Rendon.*

Plaintiff has not plausibly alleged that the inaccessibility of lacarreta.com has impeded his access to the physical location, so the Amended Complaint is dismissed. Rule 15 says that courts "should freely give leave when justice so requires." Fed.R.Civ.P. 15(a)(2). Despite this generally permissive approach, a district court need not grant leave to amend where (1) "there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed"; (2) "allowing amendment would cause undue prejudice to the opposing party"; or (3) the "amendment would be futile." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir.2001) (per curiam). Plaintiff's Amended Complaint is dismissed with prejudice because

Plaintiff's initial Complaint was dismissed on identical grounds, and the Amended Complaint failed to cure the defect explained in the Court's previous dismissal Order. *See* [DE 25].

V. Conclusion

For the reasons stated, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss [DE 27] is **GRANTED**. Plaintiff's Complaint [DE 26] is **DISMISSED with prejudice**. The Clerk is directed to **CLOSE** this case and **DENY** any pending motions as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of December, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-CIV-61072-DIMITROULEAS/SNOW

DENNIS HAYNES,

Plaintiff,

v.

DUNKIN' DONUTS LLC and DD IP HOLDER, LLC,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT

THIS CAUSE is before the Court on Defendants Dunkin' Donuts LLC and DD IP Holder, LLC (collectively, "Defendants")' Motion to Dismiss Third Amended Complaint. [DE 27] (the "Motion"). The Court has carefully reviewed Plaintiff's Third Amended Complaint [DE 25], the Motion, Plaintiff's Opposition [DE 29], Defendants' Reply [DE 32], and is otherwise fully advised in the premises.

I. Background[1]

Plaintiff Dennis Hayes is blind. [DE 25] at ¶ 1. He brought this suit against Defendants for allegedly violating Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*, by owning and operating a website inaccessible to persons who are visually impaired. Title III makes it unlawful to discriminate against disabled persons in the full and equal enjoyment of public accommodations. *Id.* § 12182(a). As an advocate for persons with disabilities, Haynes serves as a "tester" who files lawsuits against entities that maintain websites

[1] All facts set forth in the background are according to the allegations of the Third Amended Complaint [DE 25], which the Court assumes as true for purposes of this Motion.

he believes are not compliant with the ADA's requirements. [DE 24] ¶ 3.[2] Plaintiff utilizes JAWS Screen Reader software that enables him to read computer materials and access the Internet. *Id.* ¶ 2. Defendants run the website www.dunkindonuts.com ("dunkindonuts.com" or "the website"). *Id.* ¶ 5.

Plaintiff initiated this action on May 30, 2017, alleging that he attempted to access and use the website dunkindonuts.com, but was unable to do so because numerous portions of the website do not interface with his screen reader software. Plaintiff seeks declaratory and injunctive relief to require Defendant to make dunkindonuts.com accessible to persons with visual impairments. Plaintiff filed an Amended Complaint on July 31, 2017, as a matter of course. [DE 8]. Defendants moved to dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. [DE 14].

On October 16, 2017, following full briefing and careful consideration, the Court entered an Order Granting Defendants' Motion to Dismiss Amended Complaint. [DE 22] (hereinafter, the "Dismissal Order"). Therein, the Court held, in relevant part, as follows:

> In the absence of allegations that Plaintiff's inability to use dunkindonuts.com impedes his access to one of Defendants' physical locations, the Amended Complaint must be dismissed. Plaintiff will be given leave to file a second amended complaint in which he may attempt to plausibly allege that dunkindonuts.com has impeded his access to Defendants' retail stores.

[DE 22] at p. 11. The Court allowed Plaintiff 14 days to file a second amended complaint, consistent with the Court's Dismissal Order. *See id.*

Plaintiff filed a Second Amended Complaint on October 30, 2017. [DE 23]. Defendant moved to dismiss the Second Amended Complaint on November 13, 2017. [DE 24]. Plaintiff filed a Third Amended Complaint on November 27, 2017, adding CashStar, Inc. as an additional

[2] The instant case is just one of more than one hundred (100) that Haynes has initiated in this Court since 2017.

Defendant.[3] On November 28, 2017, upon the filing of Plaintiff's Third Amended Complaint, the Court entered an Order Denying as Moot Defendants' Motion to Dismiss. *See* [DE 26]. Defendants moved to dismiss the Third Amended Complaint on December 11, 2017. *See* [DE 27]. Defendants argue that, despite his four chances to adequately plead his ADA claim, Plaintiff has failed to do so yet again. The Motion is now fully briefed and ripe for review.

II. Standard of Review

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." This pleading standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A pleading that asserts mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. And "on the assumption that all the allegations are true (even if doubtful in fact)," the factual allegations pleaded "must be enough to raise a right to relief above the speculative level." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

To survive a motion to dismiss under Rule 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.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility

[3] There is no indication in the record that Defendant CashStar, Inc. has been served in this case.

of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (brackets in original) (quoting Fed. R. Civ. P. 8(a)(2)). "The Supreme Court has employed a 'two-pronged approach' in applying the foregoing principles: first, a reviewing court should eliminate any allegations in the complaint that are merely legal conclusions; and second, where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Boyd v. Warden, Holman Correctional Facility*, 856 F.3d 853, 864 (11th Cir. 2017) (quoting *Iqbal*, 556 U.S. at 679).

III. Discussion

Title III of the ADA prescribes, as a "[g]eneral rule":

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). The Court's October 16, 2017 Dismissal Order undertook an analysis of the law regarding the requirements for pleading claims of website inaccessibility in the Eleventh Circuit. *See* [DE 22]. The Court concluded that, in order to state a claim, Plaintiff must plead factual allegations demonstrating that his inability to use dunkindonuts.com impeded his access to one of Defendants' physical locations. *See id.* The Court adopts and incorporates its October 16, 2017 Dismissal Order herein. To the extent that Plaintiff's Opposition to Defendants' Motion to Dismiss is, instead, a motion for reconsideration of the Dismissal Order, such motion is denied. Plaintiff's disagreements with the Court's prior ruling are insufficient to defeat a motion to dismiss. Rather, the Court will analyze the new factual allegations in the Third Amended Complaint and determine if they comply with the pleading requirements set forth in the Dismissal Order.

Plaintiff was granted leave to attempt to plausibly allege that dunkindonuts.com has impeded his access to Defendants' retail stores. Plaintiff's Third Amended Complaint now alleges that he was unable to use the store locator portion of the website and that he was unable to purchase a "DD Card" on the website, which he wanted to use for in store purchases at 300 E. Atlantic Blvd., Pompano Beach, FL 33060. *See* [DE 25] at ¶¶ 10-15. As explained below, these allegations are insufficient to state a claim.

First, regarding the store locator function, this Court recently granted a motion to dismiss in a Title III website accessibility case, ruling in pertinent part as follows:

> Businesses are not required to have websites. If a business has a website, it cannot impede a disabled person's full use and enjoyment of the physical space the business occupies. Nearly all websites associated with a physical business location provide information about location, hours, and goods and services provided by the business. Some of these websites do not interface with screen readers. If the Court allows ADA accessibility claims to proceed for these websites under a theory that a visually impaired plaintiff was denied access to *information* about the physical business location, then this Court would be saying, in effect, that *all* websites must interface with screen readers. The Court is not willing to take that leap because it would eviscerate the framework established by district courts within the Eleventh Circuit construing *Rendon*.

See Gomez v. La Carreta Ent. Inc., case no. 17-61195-civ-WPD (S.D. Fla. Dec. 7, 2017) at p. 7 (emphasis in original). For those same reasons, the Court finds Plaintiff's allegation that he was unable to use the store locator portion of the website insufficient to state a claim.

Second, Plaintiff's claim that he was unable to purchase a "DD Card" on the website, which he wanted to use to make in-store purchases, fails to plausibly allege facts demonstrating that his inability to purchase a DD Card was an impediment to Plaintiff's ability to access Defendants' physical stores and enjoy the goods and services offered there. Plaintiff does not allege that a DD Card is the only method of payment accepted at physical Dunkin' Donuts stores. Nor does Plaintiff allege that he tried and was denied access to a Dunkin' Donuts retail

store, or to the full use and enjoyment of one of the Dunkin' Donuts franchisees' stores, as a result of not being able to purchase a DD Card on the website. Plaintiff alleges that he often uses prepaid loadable cards for in-store use because it is difficult for him to distinguish between different paper money denominations. *See* ¶ 11. However, he does not allege sufficient facts to plausibly demonstrate the impediment to his access Defendants' physical store and enjoyment of the goods and services offered there. Plaintiff presumably would have needed a credit card, a debit card or other non-cash methods of payment to purchase a DD Card online to in turn use at Defendants' physical store, which same forms of payment he could also use at Defendants' physical store to purchase a DD Card to use at Defendants' physical store and/or to purchase any other goods he wished to purchase there. While this Court might attempt to hypothesize a set of facts to plausibly support such a claim, it is Plaintiff's burden to affirmatively plead such facts to withstand a motion to dismiss.

IV. Conclusion

For the reasons stated, it is **ORDERED AND ADJUDGED** as follows:

1. Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint [DE 27] is **GRANTED IN PART.**[4]
2. Plaintiff's Third Amended Complaint [DE 25] is **DISMISSED** without prejudice. Plaintiff shall have 14 days from the filing of his Order to file a fourth amended

[4] The Court rejects Defendants' two additional arguments raised in support of dismissal. First, even if the filing of the Third Amended Complaint was procedurally improper under Fed. R. Civ. P. 15(a), the remedy would have been to require Plaintiff to ask the Court's permission to amend, which the Court would have granted. Second, Defendants' argument that the online purchase of DD Cards is handled by a third party vendor on a website that is not owned, operated, or controlled by Defendants involves the resolution of factual issues outside of the four corners of the complaint.

complaint, consistent with this Order. The Court is unlikely to allow any further amendments in this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 19th day of January, 2018.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies to:
Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 0:17-cv-61641-KMM

DENNIS HAYNES,

Plaintiff,

v.

GENESCO, INC.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE is before the Court on Defendant Genesco, Inc.'s Motion to Dismiss the Complaint. (ECF No. 10). Plaintiff Dennis Haynes filed a Response. (ECF No. 19). Defendant filed a Reply. (ECF No. 21). The Motion is now ripe for review. For the following reasons, Defendant's Motion to Dismiss is GRANTED.

I. BACKGROUND

Plaintiff, who is blind, sues Defendant under Title III of the Americans with Disabilities Act ("ADA" or "Title III")—which prohibits discrimination in places of public accommodation—alleging that Defendant maintains a website that is partially inaccessible to the visually impaired. (ECF No. 1 at ¶ 11). Plaintiff uses screen-reader software designed for the visually impaired to access websites. (*Id*. at ¶¶ 1–2). Defendant sells specialty footwear and accessories at physical stores located throughout the country. (*Id*. at ¶ 4). Associated with these stores, Defendant has a website at www.journeys.com ("the Website"). (*Id*. at ¶¶ 5, 8). Plaintiff alleges that he has visited the Website, but that portions of it—"graphics, links, headings, functions, forms, and some text"—do not interface with screen-reader software and are thus

inaccessible to the visually impaired. (*Id*. at ¶ 10). Contending that this inaccessibility violates Title III, Plaintiff seeks (1) injunctive relief, including an order requiring Defendant to make the Website fully accessible to the visually impaired; and (2) a declaratory judgment that the Website violates Title III of the ADA. (*Id*. at ¶¶ 19–20).

Defendant moves to dismiss, arguing that the alleged inaccessibility of the Website does not violate Title III because (1) the Website itself is not a place of public accommodation; and (2) Plaintiff does not allege that he was denied access to the goods and services offered at Defendant's physical stores.[1] (ECF No. 10 at 3–7). Plaintiff responds, (1) insisting that the Website itself is a public accommodation, and (2) arguing that because the Website is an extension of the physical stores, his inability to fully access the Website impedes his access to Defendant's stores. (ECF No. 19 at 2, 4–12).

II. LEGAL STANDARD

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This requirement "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal citation and alteration omitted). When considering a motion to dismiss, the court takes the factual allegations as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

A complaint must contain enough facts to plausibly allege the required elements. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1302 (11th Cir. 2007). A pleading that offers "a formulaic

[1] Defendant also argues, in the alternative, that a ruling in Plaintiff's favor would violate due process and the primary jurisdiction doctrine. (ECF No. 10 at 7–11). In light of the Court's following analysis, the Court need not address these arguments.

recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "[C]onclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

III. DISCUSSION

Plaintiff alleges that Defendant is violating Title III of the ADA by maintaining a website that is not fully accessible to the visually impaired. (ECF No. 1 at ¶ 8). Title III prohibits disability-based discrimination "in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). To allege discrimination in violation of Title III, a Plaintiff must allege facts plausibly suggesting that "(1) he is a disabled individual; (2) the defendant owns, leases, or operates a place of public accommodation; and (3) the defendant discriminated against the plaintiff within the meaning of the ADA." *Norkunas v. Seahorse NB, LLC*, 444 F. App'x 412, 416 (11th Cir. 2011) (citing 42 U.S.C. § 12182(a)). The central question here is whether the Website qualifies as a public accommodation under Title III.

Under Title III, a private entity qualifies as a public accommodation if its operations "affect commerce" and the entity falls within one of the statute's twelve enumerated categories. 42 U.S.C. §12181(7)(A)–(L). The enumerated categories identify only physical locations, including "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." *See* 42 U.S.C. §12181(7)(E). The Eleventh Circuit has not addressed whether a website qualifies as a public accommodation. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004) (stating that it is an open question in this Circuit whether Title III applies to websites).

The Eleventh Circuit has, however, held that "Title III covers both tangible barriers . . . and intangible barriers" that impede access to a place of public accommodation. *Rendon v. Valleycrest Prods., Inc.*, 294 F.3d 1279, 1283 (11th Cir. 2002) (holding that television-show's contestant hotline, which was inaccessible to individuals with certain disabilities, qualified as an intangible barrier to access a public accommodation—the television studio). Extending the principle set forth in *Rendon*, district courts in this Circuit have uniformly held that Title III does not regulate websites unless the plaintiff alleges a sufficient nexus between the website and restricted access to a public accommodation. *See Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp.3d 1315, 1320 (S.D. Fla. 2017); *Gomez v. Bang & Olufsen Am., Inc.*, No. 17-cv-23801, 2017 WL 1957182, *3 (S.D. Fla. Feb. 2, 2017). Plaintiff here contends that the Website itself is a public accommodation and an extension of Defendant's stores. Plaintiff does not, however, allege that the partially-inaccessible website impedes his access to Defendant's physical stores. In the absence of such allegations, Plaintiff has failed to state a violation of Title III.

IV. CONCLUSION

For the foregoing reasons, it is ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (ECF No. 10) is GRANTED. Plaintiff's Complaint is hereby DISMISSED WITHOUT PREJUDICE. Plaintiff shall have fourteen (14) days from the date of this Order to file an amended complaint that cures the deficiencies identified above.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of January, 2018.

_____
K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record