**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**FORT MYERS DIVISION**

JOEL PRICE,
Plaintiff,

vs. **CASE NO.: 2:18-cv-802-FtM-99MRM**

HENDRY COUNTY, FLORIDA
Defendant.
_____/

**DEFENDANT, HENDRY COUNTY'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW, Defendant HENDRY COUNTY ("Defendant" or "the County"), by and through its undersigned counsel moves this Honorable Court, pursuant to Local Rule 3.10 and Fed. R. Civ. P. Rule 12(b), to Dismiss Plaintiff's Complaint [ECF 1] and the action against this Defendant for failure to state a claim upon which relief may be granted.

**STATEMENT OF THE CASE**

Plaintiff JOEL PRICE ("Plaintiff" or "Price") initially filed a complaint on December 10, 2018 in the United States District Court for the Middle District of Florida, Fort Myers Division. [ECF 1] Defendant, HENDRY COUNTY, was served on December 19, 2018. [ECF 3].

Plaintiff PRICE alleges he is a Florida resident (and who is believed to live in Daytona Beach, Volusia County, Florida) and has brought a two-count complaint seeking declaratory and injunctive relief for violations of Title II of the Americans With Disabilities Act, 42 U.S.C. §13132, et seq. ("ADA") (Count I), and Section 504 of the Rehabilitation Act, 29 U.S.C. §794, *et seq*. (Count II) against the County, a local governmental entity and political subdivision of the State of Florida.[1] Defendant's county seat is geographically located in Labelle, Florida, which is

1 This Court (Ft. Myers Division) currently has jurisdiction over another similar pending suit by Plaintiff versus

approximately 45 miles from Volusia County, Florida.

Plaintiff alleges that the County, in its capacity as a local governmental entity, has a website that contains certain documents that are not accessible to the blind and visually-impaired in apparent violation of Title II of the ADA, and Section 504 of the Rehabilitation Act of 1973. Plaintiff seeks a "permanent injunction which directs Defendant to take all steps necessary to bring the electronic documents which it provides on its electronic media into full compliance with the requirements set forth in the ADA, and its implementing regulations (which have never been promulgated as explained herein), so that all electronic documents are fully accessible to, and independently usable by, blind and low sighted individuals, and which further requests that the Court should retain jurisdiction for a period to be determined to ensure that Defendant has adopted and is following an institutional policy that will in fact cause Defendant to remain fully in compliance with the law." [ECF 1, ¶108(c)]. Specifically, Plaintiff demands that the County's website provide documents in "accessible format or provided in HTML format." [ECF 1, ¶108(d)].

The Defendant now moves to dismiss Plaintiff's Complaint for failure to state a cause of action upon which relief may be granted pursuant to Rule 12(b)(1) & (6) of the Federal Rules of Civil Procedure.

## ISSUES

(1) Whether this Court has jurisdiction to consider Plaintiff's complaint where the primary jurisdiction doctrine requires action by the Executive branch and/or Congress *before* this

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Glades County, Case No.: 2:18-cv-799-FtM-99-CM. Plaintiff Price, through the law firm of Dinin P.A., has also filed a similar lawsuit in this Court in the Tampa Division, Joel Price v. Hardee County, Florida, Case No.: 8:18-cv-2994-T33AEP, has filed and more than 110 other substantially similar lawsuits in the Federal Court for the Southern and Middle, and Northern Districts of Florida against various public and private entities since April 3, 2017, alleging website accessibility impediments, and which include over 50 unrelated and geographically separate municipalities, counties or other political subdivisions of the State of Florida.

Court can determine if a legal duty, or even an Article III case or controversy, exists; (2) whether the lack of any promulgated guidelines, rules, technical guidance, and most importantly, regulations on website accessibility standards prevents Plaintiff from bringing an action against this local governmental entity without violating Defendant's due process rights.

The ADA, signed into law on July 26, 1990, applies generally speaking to the COUNTY as it is a "public entity" as defined by Title II, which provides that:

> Under Title II of the ADA, a "qualified individual with a disability" cannot, "by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

*See* 42 U.S.C. §12132(1).

To make a prima facie case under Title II, however, a plaintiff must show that: "(1) he is a qualified individual with a disability; (2) that he was either excluded from participation in, or denied the benefits of, a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability." *See Smith v. Rainey*, 747 F.Supp.2d 1327, 1338 (M.D. Fla. 2010) *quoting Bricoll v. Miami-Dade County*, 480 F.3d 1072, 1083 (11th Cir. 2007). Plaintiff alleges, inter alia, that Defendant violated Title II and Section 504 of the Rehabilitation Act by not utilizing an "accessible HTML or PDF format" for the provision of documents on the Defendant's website in order that the blind and visually impaired are provided full access. [ECF 1 at ¶34].

**A. Plaintiff's claims should be dismissed under the primary jurisdiction doctrine because no regulations governing website content accessibility standards have been properly adopted under Title II of the ADA by the Department of Justice or Attorney General as required by 42 U.S.C. §12134(a).**

Plaintiff's complaint must be dismissed pursuant to Fed. R. of Civ. P. 12(b)(6) for failure

to state a claim because currently, no legal duty exists under the current law and Plaintiff merely alleges that the County is liable for failing to comply with voluntary ADA website accessibility guidelines despite the fact that no regulations have been enacted by the United States Attorney General, through the United States Department of Justice ("DOJ") according to the appropriate rule-making process. Such regulations need to first be created in order for there to be any legal mandate under Title II that those regulations apply to local governmental entities. The simple fact is that the DOJ, charged with the rule-making responsibility pursuant to 42 U.S.C. §12134(a), has totally failed to promulgate **any** regulations uniformly adopting the authoritative website accessibility guidelines for Title II ADA entities websites to be brought into conformity with, and thus there is currently no mandate under the law for local governmental entities to do so.

The threshold issue of whether the ADA, and in particular Title II, ***currently*** applies to a public or local governmental entity website is neither clear nor unambiguous, and in fact, nowhere within Title II of the ADA are websites mentioned. Nevertheless, as it applies to the enactment and enforcement of the ADA, it is clear that the Attorney General is first ***required*** to promulgate regulations to carry out Title II, Part A, of the ADA. *See* 42 U.S.C. §12134(a) (("The Attorney General **shall** promulgate regulations in an accessible format that implement this part.") (emphasis added) (applicable to equal opportunities for disabled individuals and prohibits discrimination in Public Services.)); *see also Bircoll v. Miami-Dade County*, 480 F. 3d 1072, 1082 (11th Cir. 2007); *Access Now Inc. v. Southwest Airlines Co*., 227 F.Supp.2d 1312, 1317-18 (S.D. Fla. 2002), *aff'd* 385 F.3d 1324 (11th Cir. 2004) (citing 28 C.F.R. §36.104 in the context of ADA Title III applicability to websites). The DOJ has, however, repeatedly failed to adopt any such regulations, despite numerous ***proposed*** guidelines being issued over time for public

comment and future adoption.

To date, the DOJ has never enacted a single regulation mandating website accessibility for the visually disabled. The **only** previously proposed guidelines were withdrawn in December 2017, and no formal website accessibility guidelines, or even recommendations, have been forthcoming since. In short, no regulations currently exist. Defendant therefore moves this Court to dismiss the Complaint because deference to the DOJ's rulemaking authority under the "primary jurisdiction" doctrine is not only entirely appropriate, but is, in fact, mandated. Unless and until the DOJ promulgates regulations to carry out Title II, Part A, of the ADA pursuant to 42 U.S.C. §12134(a), there exists no case or controversy under Article III of the U.S. Constitution and thus no articulable cause of action.

The "primary jurisdiction" doctrine provides that a "court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency. *See Smith v. GTE Corp*., 236 F.3d 1292, FN. 3 (11th Cir. 2001); *see also* C*lark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). Application of this doctrine is appropriate when there is "(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *See Clark,* at 1115.

The Eleventh Circuit has held recently in a website ADA case, *Sierra v. City of Hallandale Beach, Florida,* 904 F.3d 1343 (11th Cir. 2018) that the primary jurisdiction doctrine applies "when a court maintains jurisdiction over a matter but nonetheless abstains for prudential reasons. *See Sierra*, 904 F.3d at 1350. The *Sierra* Court utilized a two-factor test to determine whether the primary jurisdiction doctrine is appropriate. The factors are: (1) the "expertise of the

agency deferred to" and (2) the need for a uniform interpretation of a statute of regulation." *Id.*, at 1351.

The current morass and high volume of website accessibility ADA lawsuits in federal courts, the inconsistent and varied manner in which courts deal with such cases, and "the DOJ's multi-year campaign to issue a final rule on this subject" (*see Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 205 (1st Cir. 2000) all demonstrate the unquestioned need for the DOJ to **first** define, promulgate, and enact regulations adopting clearly-defined and easily-enforceable website accessibility guidelines. "Primary jurisdiction applies where a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body." *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 58–59 (2d Cir. 1994).

The recent history of the DOJ's failure to promulgate clearly-defined and easily-enforceable Title II ADA website accessibility guidelines demonstrates the deferential necessity of the "primary jurisdiction" doctrine in this case. Clearly Congress, in enacting 42 U.S.C. §§12134(a), contemplated that the U.S. Attorney General had the requisite expertise to implement Title II, Part A of the ADA and that that agency would be responsible for enacting a uniform interpretation of whether and under what circumstances local governmental agencies would be subject to Title II website accessibility requirements.

In 2010, the DOJ published an Advanced Notice of Proposed Rulemaking (ANPRMs) to revise the regulations implementing Title II of the ADA to the websites of local governmental entities. *See* RIN 1190-AA61 located at 75 Fed. Reg. 43460-01. In that ANPRM, the DOJ solicited public comment on whether and how the agency should adopt the Web Content

Accessibility Guidelines (WCAG) as its standard for website accessibility for both Title II and III entities. *See* 75 Fed. Reg. at 43465. No rule or regulation was, however, adopted as a result of the 2010 ANPRM. Five years later, in 2015, the DOJ announced that it would pursue separate rulemaking addressing Web accessibility for websites falling under both Title II (public entities) and Title III (private entities providing public accommodations), and that the DOJ would address rulemaking for Title II entities first. *See* DOJ-Fall 2015 Statement of Regulatory Priorities.[2] This, however, has never taken place.

Since that time, however, the DOJ withdrew the previously-issued ANPRM and on May 9, 2016, issued a Supplemental ANPRM (SANPRM), which importantly was seeking input only related to the websites of public entities covered by Title II. The DOJ in this SANPRM specifically sought "public input regarding a wide range of issues **pertaining to the accessibility of Web information and services of state and local governments**." *See* 81 Fed. Reg. 28658-01 (emphasis added). The 2016 SANPRM (RIN 1190-AA65) expressly recognizes the uncertainty of the application of Title II to the websites of local and state governments. *See* 81 Fed. Reg 28678. The DOJ acknowledged that although its goal was to bring website accessibility within the ADA's "promise to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of the programs, services and activities provided by State and local governments, ***such will only occur if it is clear to public entities that their websites must be accessible***." (emphasis added). Thus, as a matter of law, it is laid bare by the DOJ itself that no legal mandate for Title II entities currently applies, or will apply, absent enactment of such regulations.

Further, even when (or once) a regulation is adopted and enacted for purposes of

2 Available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1190-AA61 (last visited Oct 29, 2018).

requiring local governmental entity website accessibility, the DOJ does not know when in the future a governmental entity will be required to comply with said requirement. *See* 81 Fed. Reg. at 28665. Specifically, RIN 1190-AA65, based on DOJ comments and requests for information, makes it clear that enforceability by a private cause of action does not exist until formal regulations are adopted, as evidenced by the 2010 ANPRM comment "ask[ing] for public comment regarding the effective date of compliance with any Web accessibility requirements the Department would adopt. *See* 81 Fed. Reg. at 28664 (Section 2. Timeframe for Compliance). Evidence that website accessibility is not yet required under Title II is located in the DOJ's own statement that application and enforceability of any website standard **will not occur until a final regulation is adopted** (as contemplated by the enacting statute), and except as follows:

> ***Effective two years from the publication of this rule in final form***, a public entity shall ensure that the Web sites and Web content it makes available to members of the public comply with Level A and Level AA Success Criteria and Conformance Requirements specified in 2008 WCAG 2.0, except for Success Criterion 1.2.4 on live-audio content in synchronized media, unless the public entity can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.
>
> Under such a proposal, ***public entities would have two years after the publication of a final rule to make their Web sites and Web content accessible in conformance with WCAG 2.0 Level AA***, unless compliance with the requirements would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

*See* 81 Fed. Reg., at 28665 (emphasis added).

Notwithstanding these instructions, and in a move which is fatal to Plaintiff's case, the DOJ revoked and withdrew these proposed guidelines as of December 26, 2017, and at that time, the DOJ announced the withdrawal of all four previously proposed ANPRMs, including RIN 1190-AA65, for the purpose of allowing the DOJ to determine "whether promulgating regulations about the accessibility of web information and services is necessary and appropriate."

*See* 82 Fed. Reg. 60932. Thus, at the present time (since December 26, 2017), there are no formal rules, guidelines, or regulations whatsoever on website accessibility for Title II entities under the ADA.

Applying the "primary jurisdiction" doctrine in this case is consistent with *Sierra*, *supra*. Here, absent clear and concrete regulations, Title II local governmental entities are at risk of continued exposure to civil litigation (*see, e.g.,* Plaintiff's other 110 or more similar lawsuits as examples), because there are no uniform guidelines, different standards are still being constantly developed, or updated, and as a result, one court may opine that an entity meets ADA accessibility requirements under one standard, while another court may opine that an entity fails to meet ADA accessibility requirements under a different standard. Defendant herein invokes the "primary jurisdiction" doctrine for the proposition that until the DOJ, the agency wholly responsible for drafting and interpreting the ADA, promulgates and enacts regulations on Title II ADA website compliance, this case is legally unripe for this Court's adjudication. *See Clark, supra*.[3]

Plaintiff's claims of an ADA violation in this matter must fail under Rule 12(b)(6) because absent the promulgation and adoption of clearly-defined and easily-enforceable website accessibility regulations applicable to Title II local governmental entities, there is no case or controversy yet existing under Article III and thus no cognizable cause of action or claim upon which relief can be granted.

**B. Plaintiff's claims should be dismissed as application of the ADA to public entity websites prior to formal adoption of website accessibility standards and regulations**

3 Application of this doctrine is appropriate when there is "(1) [a] need to resolve an issue (ADA website accessibility requiremet6ns for Title II local governmental entities) that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (the DOJ through the Attorney General, *see* 28 C.F.R. Part 35) (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority (42 U.S.C. §12134(a))) that (4) requires expertise or uniformity in administration." *See Clark*, 523 F.3d at 1115.

**results in violation of the Defendant's due process rights, and rights of fundamental fairness.**

Courts, having no legislative power, "cannot create law where none exists." *Gomez v. Bang & Olufsen Am., Inc*., 2017 WL 1957182, n.3 (S.D. Fla. Feb. 2, 2017); *see also J.H. by & through Holman v. Just for Kids, Inc*., 248 F.Supp.3d 1210 (D. Utah 2017) ("[T]he law's remedial purpose cannot overcome its plain meaning as written."); *Access Now, Inc. v. Southwest Airlines, Co*., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002), aff'd 385 F.3d 1324 (11th Cir. 2004) ("[C]ourts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights..."); *Rome v. MTA/New York City Transit,* No. 97-cv-2945 (JG), 1997 WL 1048908, at *1 (E.D.N.Y. Nov. 18, 1997) ("[W]hile such reasoning [including non-physical spaces as places of public accommodation] may have a certain logic to it, it is contrary to the statute.").

Title II of the ADA delegates to the DOJ, through the Attorney General, the "sole responsibility for the promulgation of those standards that fall within the Department's jurisdiction and for enforcement of the regulations" **in order to put covered entities on notice of their specific obligations under the law**. *See* 28 C.F.R. Part 35 (describing purpose of DOJ's regulations) (emphasis added). For Courts to require more is itself a due process violation and violates the principles of fundamental fairness. Existing regulations, as stated above, contain no provisions governing the accessibility of local governmental websites or online content for purposes of Title II; in fact, all proposed regulations are, and have been, shelved as of December 26, 2017. *See* 82 Fed. Reg. 60932. As such, any Title II public entity lacks sufficient legal notice of what, if anything, Title II may require for website access issues. *See U.S. v. AMC Entm't, Inc*., 549 F.3d 760 (9th Cir. 2008) (holding that compliance with undefined accessibility requirements violates fundamental principles of fairness and due process).

Without formal regulations setting forth the appropriate and specific standard to which a public entity must ensure website accessibility, which in this case is something that has yet to be proposed, adopted or enacted as a regulation, there can be no violation of Title II's general prohibitions. *See U.S. v. Nat'l Amusements, Inc*., 180 F. Supp.2d 251, 258-260 (D. Mass. 2001) ("The Attorney General argues that because the Cinemas' theaters are in violation of these general regulatory provisions, he should be able to state a claim...absent a violation of a specific regulation...The Court disagrees."). The DOJ itself informed Congress on October 11, 2018, that "noncompliance with a specific voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA, that ADA compliance must be "reasonable and sustainable" and that "absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication.").[4]

Nowhere within the ADA and/or in the voluntary, suggested guidelines are **any** technical requirements or standards set forth such that a public entity can determine which website accessibility design standards must be employed to provide access to a visually disabled individual. The DOJ's failure thus far to adopt necessary minimum website standards for accessibility regulations is all the more problematic as several different website accessibility standards exist including, but not limited to:

1) The World Wide Web Consortium's (W3C) development of "Web Content Accessibility Guidelines (WCAG);
2) Common Look and Feel 2.0 Standards for the Internet;
3) Authoring Tool Accessibility Guidelines (ATAG);
4) User Agent Accessibility Guidelines (UAAG);

4 See DOJ Letter, available at: https://www.judiciary.senate.gov/imo/media/doc/2018-10-11%20Justice%20Dept.%20to%20CEG%20-%20Website%20Accessibility%20Under%20ADA.pdf.

5) the Electronic and Information Technology Accessibility Standards, more commonly known as the section 508 standards.[5]

Even more relevant to this analysis is the fact that although certain Courts, including the Eleventh Circuit, have evaluated website accessibility under Title III of the ADA utilizing the WCAG guidelines, *see, e.g., Haynes v. Hooters of America*, 893 F.3d 781 (11th Cir. 2018), these guidelines are continuously being modified or updated. For example, the first Web Content Accessibility Guidelines (WCAG 1.0) was formulated in 1999, with WCAG 2.0 being released in December 2008. As of June 5, 2018, version WCAG 2.1 was released, and WCAG 3.0 is under development. Also at issue is the fact that even within WCAG 2.0 and/or WCAG 2.1, there are three separate levels of compliance; levels A, AA, and AAA.

In *Robles v. Domino's Pizza LLC*, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017), the court held it would violate Domino's due process rights to hold that its website violates the ADA, because the DOJ has not promulgated regulations defining website accessibility – despite issuing a notice of proposed rulemaking in 2010. The *Robles* court stated that the DOJ's application of the WCAG 2.0 standards in statements of interest and consent decrees does not impose a legally binding standard on all public accommodations. *Id*. at *6. The same result should apply in this case.

Absent the DOJ's formal adoption of specific regulations, adopting public entities cannot determine what, if any, standard may, or does, apply to their website, and even while attempting compliance with one such standard, a governmental entity could continue to face being pulled into court for other, or subsequent, allegations of ADA violations each time a new website

5 Additionally, numerous countries including Australia, Brazil, Canada, European Union, Ireland, Israel, Italy, Japan, Norway, Philippines, Spain, Sweden, and the United Kingdom have formulated various regulations which have either created separate website accessibility standards, or which adopt or exclude portions of the above guidelines. *See* website 3Play Media, available at https://www.3playmedia.com/2017/08/22/countries-that-have-adopted-wcag-standards-map/ outlining various countries which have adopted, in all or in part, portions of various accessibility guidelines published by the World Wide Web Consortium (W3C).

content accessibility guideline version or standard is released, or where a disabled individual uses a new or different device incompatible with the accessibility standard currently being implemented. Therefore, it would be wholly improper to judicially impose such a requirement since it would violate the County's due process rights and its rights of fundamental fairness. *See U.S. v. AMC Entm't, Inc*., supra.

**C. Plaintiff Has Admittedly Been Provided A Reasonable Accommodation As Required.**

Currently, the ADA requires a public entity to furnish appropriate "auxiliary aids" and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity, but the regulation presupposes and conditions such provision only after a request from a disabled person for such an accommodation from the public entity. *See* 28 C.F.R. §35.160(b)(1); *see also* 28 C.F.R. pt. 35, Appx. A to DOJ Regulation §35.160 (stating "[t]he public entity shall honor the [disabled individual's] choice [of auxiliary aid] unless it can demonstrate another effective means of communication exists or that use of the means chosen would not be required under §35.164."); *see also* 28 C.F.R. §35.160(b)(2) ("In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.").

The ADA's "reasonable modification" principle, however, does not require a public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities, but only to make "reasonable modifications" that would not fundamentally alter the nature of the service or activity of the public entity, or impose an undue burden. *See Tennessee v. Lane*, 541 U.S. 509, 531–32, (2004); *Bircoll v. Miami-Dade Co*., 480 F.3d 1072, 1081 (11th Cir. 2007).

Here, the attachments to Plaintiff's Complaint make it clear that Hendry County promptly responded in full to Plaintiff's "request for accommodation" dated Sept. 18, 2018 [ECF 1-1, Ex. A] six days later by written letter dated Sept. 24, 2018 [ECF 1-2, Ex. B], noting the County was expediting the provision of the specific documents that Plaintiff had requested and noted that County was "actively working towards Level AA ADA compliance according to the Web Content Accessibility Guidelines 2.0." *Id.* On October 24, 2018, the County also admittedly sent a follow-up letter to Plaintiff informing Plaintiff not only that all of the documents he requested had been converted to an accessible format, but "we have converted and migrated our entire electronic document repository to the new ADA compliant platform." [ECF 1-3, Ex. C]. As such, the four corners of Plaintiff's Complaint plead the fact that Defendant has admittedly fully complied with Plaintiff's only request for ADA accommodation from Defendant to date and long before this suit was filed.[6]

The DOJ's failure to promulgate and adopt formal regulations establishing website accessibility standards, as stated above, prevents a governmental public entity from formulating any concrete method to ensure accessibility by any number of different types of assistive devices or screen readers, each of which reacts differently and with various degrees of success depending upon the computer code or website design method being used. A design that may provide access to one individual using one type of screen reader, for example, may produce barriers to another individual using another make or model of screen reader. As recently as September 25, 2018, the U.S. Department of Justice, Office of Legislative Affairs issued a response to a formal letter

6 Defendant, long before Plaintiff's request for accommodation, engaged in an extensive review of its website and accessibility issues and began a remediation plan which included the creation of an entirely separate and distinct document repository as well as the development of a new website fully compliant with WCAG 2.0 standards. All new documents being placed on the website were converted to an accessible format and the conversion was being monitored through the use of NVAccess.org downloadable software, utilized in 120 countries worldwide and translated into 43 languages. This program, developed by two blind individuals, is widely praised for its ease of use and accuracy. NVAccess.org was created as a free screen reader.

from U.S. Senator Grassley seeking clarification and guidance on ADA website accessibility requirements.[7] Assistant Attorney General Boyd, in drafting the response to the U.S. Senate, recognized that, at least in the Title III realm, that "absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communications." *Id*. To impose a requirement that a website be made "accessible" without setting forth the exact standard to which accessibility is determined, is pragmatically impossible for local governments to comply with. As a result, until such time as formal regulations and standards are adopted by the DOJ, assistive devices and auxiliary aids should only be required based upon allegations of an actual request of a disabled individual.

Plaintiff submitted a "Request for Accommodation" to the County on Sept. 18, 2018. [ECF 1-1 Ex. A]. In response, the County informed Plaintiff it was in the process of expediting the Plaintiff's request for four years of financial documents in an accessible format at the same time informing Plaintiff that it was working to make sure its website was WCAG 2.0, Level AA complaint. [ECF 1-2, Ex. B]. While it did take time (6 days) to convert four years' worth of requested budget documents from their original PDF format, the documents were converted to an accessible format on the website and Plaintiff was given specific instructions on where to find the documents. [ECF 1-2, Ex. C]. Plaintiff was also informed the entire electronic document repository was migrated to a new ADA compliant platform on the website, the exact relief that Plaintiff requested. *Id.*

Plaintiff notably does not allege in his complaint that he ever sought additional accommodations from the County, or subsequent records. Plaintiff's "boilerplate" grievance in

7 See DOJ Letter, available at: https://www.judiciary.senate.gov/imo/media/doc/2018-10-11%20Justice%20Dept.%20to%20CEG%20-%20Website%20Accessibility%20Under%20ADA.pdf.

his stock complaint is effectively that the website does not provide the visually impaired with the same online experience as non-disabled individuals; however, "the ADA does not require full-service websites for disabled persons." *See Bang v. Olufsen Am., Inc.*, 2017 WL 1957182 at *4.

Plaintiff also does not allege the County refused, at any time, to provide him with information, or that the County failed to respond to his request. In fact, the opposite is true. The County timely responded to Plaintiff's specific request for accommodation. [ECF 1-2, Ex. C]. The County, in providing this reasonable accommodation to which Plaintiff never objected or even sought a reasonable alternative, has met its obligation under the ADA, and thus Plaintiff's Complaint fails to state a cognizable ADA cause of action.

**D. Plaintiff lacks Article III standing to bring this case because he has failed to plead an injury in fact.**

To establish standing, a plaintiff must plead an injury in fact which is concrete and particularized, and actual or imminent. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendant contends that this individual Plaintiff has failed to allege that any access barriers as to the Defendant's website resulted in any actual harm or prevented him from accessing any program or service of the Defendant. In this regard, Plaintiff lives in Volusia County, is not a resident of Hendry County, and fails to plead any facts, beyond a mere conclusory statement, supporting any actual injury but instead was admittedly provided the specific accommodation he requested long before he filed this suit on December 10, 2018, and Plaintiff made no further requests for any additional material, or other accommodations. As a result, he cannot establish the threshold injury necessary to proceed herein.

"Standing is limited to claims for which the plaintiff is 'among the injured.'" *Access Now, Inc. v. S. Fla. Stadium Corp*., 161 F. Supp. 2d 1357, 1364 (S.D. Fla. 2001). In addition, "a party has standing to seek injunctive relief only if the party alleges...a real and immediate - as

opposed to a merely conjectural or hypothetical - threat of future injury." *Id*. In an ADA case, the plaintiff "lacks standing to seek injunctive relief unless he alleges facts giving rise to an inference that he will suffer future immediate discrimination by the defendant." *Id*.

Here, Plaintiff's likelihood of suffering a future injury is purely speculative and/or conjectural. The Plaintiff fails to set forth any set of facts to support that he is a resident of Hendry County, and does not allege that he lives in, or plans to live within, or has even visited, Hardee County. *See Rosenkrantz v. Markopoulos*, 254 F. Supp. 2d 1250, 1253 (M.D. Fla. 2003) (holding that plaintiff's claimed injuries were speculative or conjectural as the plaintiff lived hundreds of miles away and had been to the establishment only once). Similarly, Plaintiff's alleged future injury from the Defendant's website is not real or immediate. Plaintiff fails to allege a "concrete, particularized, actual, and imminent" injury sufficient for Article III standing to state an ADA claim, since it is clear that Defendant complied pre-suit with Plaintiff's Sept. 18, 2018 specific request for specific documents as well as Plaintiff's request to make "other documents" accessible. [ECF 1-2, Ex. C].

## III. CONCLUSION

Plaintiff cannot maintain his claims under the primary jurisdiction doctrine and 42 U.S.C. §12134(a) against the Defendant. The ADA does not set forth any required or mandatory website accessibility guidelines, rules or regulations which would provide notice to the County and other local governmental entities subject to Title II of the ADA as to what, if any, accessibility standards must apply to any public entity website. Furthermore, Plaintiff has failed to allege that any request for accommodation, or attempt to avail himself of any alternative auxiliary aid or service provided by the County to enable his access to the information being sought, was ignored or not responded to by Defendant; in fact, the opposite is alleged, and Plaintiff admits that

Plaintiff provided these accommodations by October 24, 2018. Finally, Plaintiff has failed to show any injury-in-fact sufficient to establish standing under Article III of the U.S. Constitution. Therefore, for all of the above stated reasons, Plaintiff's claims should be dismissed.

**WHEREFORE**, the Defendant, HENDRY COUNTY, respectfully moves for entry of an Order dismissing this action.

**CERTIFICATE OF SERVICE**

I HREEBY CERTIFY that on this 8th day of January, 2019, a true and correct copy of the foregoing was filed via the Florida District Courts' CM-ECF portal, which will notify the following via e-mail: **Scott R. Dinin, Esquire,** Law Offices of Scott R. Dinin, P.A., 4200 NW 7th Avenue, Miami, Florida 33137, inbox@dininlaw.com, Attorneys for Plaintiff.

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