

Appeal No. 17-13467

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

WINN-DIXIE STORES, INC.,

Defendant-Appellant,

v.

JUAN CARLOS GIL,

Plaintiff-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Southern District of Florida

Lower Court Case No. 16-cv-23020-SCOLA

ANSWER BRIEF OF PLAINTIFF-APPELLEE JUAN CARLOS GIL

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Plaintiff-Appellee, JUAN CARLOS GIL, by and through undersigned counsel and pursuant to 11th Cir. R. 26.1-2(c), hereby submits a complete list of all persons and entities known to have an interest in the outcome of the instant matter:

1. Ackerbaum Cox, Esq., Joyce
2. American Bankers Association
3. American Hotel & Lodging Association
4. American Resort Development Association
5. Amador, Esq., Angelo I.
6. Asian American Hotel Owners Association
7. ARP Ballentine, LLC
8. ARP Chickamauga, LLC
9. ARP Hartsville LLC
10. ARP James Island LLC
11. ARP Moonville LLC
12. ARP Morganton LLC
13. ARP Winston Salem LLC
14. Baker & Hostetler, LLP

15. BI-LO Finance Corp.
16. BI-LO Holding Finance, Inc.
17. BI-LO Holding Finance, LLC
18. BI-LO Holdings Foundation, Inc.
19. BI-LO Holding, LLC
20. BI-LO, LLC
21. Chamber of Commerce of the United States of America
22. Cronan, Esq., Candace Diane
23. Della Fera, Esq., Richard
24. Dinin, Esq., Scott R.
25. District Judge Robert N. Scola, Jr.
26. Dixie Spirits Florida, LLC
27. Dixie Spirits, Inc.
28. Entin & Della Fera, P.A.
29. Entin, Esq., Joshua M.
30. Florida Justice Reform Institute
31. Galeria, Esq., Janet

32. Gil, Juan Carlos
33. Harned, Esq., Karen R.
34. International Council of Shopping Centers
35. Lumpkin, Esq., Carol C.
36. Milito, Esq., Elizabeth
37. Moot, Esq., Stephanie N.
38. National Association of Convenience Stores
39. National Association of Realtors
40. National Association of Theatre Owners
41. National Federation of Independent Businesses
42. National Multifamily Housing Council
43. National Retail Federation
44. Nelson Mullins Riley & Scarborough LLP
45. Opal Holdings, LLC
46. Postman, Esq., Warren
47. Samson Merger Sub, LLC
48. Scott R. Dinin, P.A.

49. Shaughnessy, Esq., Kevin W.
50. Southeastern Grocers, LLC
51. Vermuth, Justin, Esq.
52. Warner, Esq., Susan V.
53. We Care Fund, Inc.
54. Winn-Dixie Logistics, LLC
55. Winn-Dixie Montgomery, LLC
56. Winn-Dixie Montgomery Leasing, LLC
57. Winn-Dixie Properties, LLC
58. Winn-Dixie Raleigh Leasing, LLC
59. Winn-Dixie Raleigh, LLC
60. Winn-Dixie Stores Leasing, LLC
61. Winn Dixie Stores, Inc.
62. Winn-Dixie Supermarkets, Inc.
63. Winn-Dixie Warehouse Leasing, LLC

/s/ Joshua M. Entin
Joshua M. Entin, Esq.

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Juan Carlos Gil (“Gil”) does not request oral argument. Gil believes this Court can adequately assess the correctness of the District Court’s Order denying Appellant, Winn-Dixie Stores, Inc.’s (“Winn-Dixie”) Motion for Judgment on the Pleadings and the District Court’s entry of Final Judgment in favor of Gil based on the record on appeal and the parties’ written submissions.

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JURISDICTIONAL STATEMENT

Gil concurs with Winn-Dixie's Jurisdictional Statement.

STATEMENT OF ISSUE FOR REVIEW

Whether the District Court correctly entered Final Judgment in favor of Gil and correctly entered an injunction requiring Winn-Dixie to make its Website compliant with the Americans with Disabilities Act, 42 U.S.C. 12181 *et seq.*, (the “ADA”).

Whether the District Court correctly denied Winn-Dixie’s Motion for Judgment on the Pleadings on the issue of whether Winn-Dixie’s website, www.winndixie.com (the “Website”), denies Gil equal access to the services, privileges, and advantages of Winn-Dixie’s physical stores and pharmacies.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal concerns an Order of the District Court denying Winn-Dixie's Motion for Final Judgment on the Pleadings. Additionally, Winn-Dixie appeals entry of Final Judgment in favor of Gil following a two-day bench trial.

B. Course of Proceedings and Disposition in the Court Below

1. The Pleadings and Discovery

On July 12, 2016, Gil filed a Complaint against Winn-Dixie pursuant to the ADA alleging that Winn-Dixie's Website is inaccessible to the visually impaired and requested declaratory and injunctive relief, as well as attorneys' fees and costs. D.E. 1. On August 5, 2016, Winn-Dixie filed its Answer and Affirmative Defenses. D.E. 7. Thereafter, the parties participated in discovery.

2. Winn-Dixie's Motion for Judgment on the Pleadings

On October 24, 2016, Winn-Dixie filed its Motion for Judgment on the Pleadings, asserting that websites are not places of public accommodation under the ADA, and thus its website could not have violated the ADA. D.E. 15.

The District Court entered an Order Denying Winn-Dixie's Motion for Judgment on the Pleadings finding the Website heavily integrated with and, in many ways, operated as a gateway to Winn-Dixie's physical store locations. D.E. 32 at 7-8. The District Court found "[t]he [W]ebsite's alleged inaccessibility therefore

denies [Gil] equal access to the services, privileges, and advantages of Winn-Dixie's physical stores and pharmacies.” *Id.* at 8. The District Court determined, consistent with *Rendon v. Valleycrest Products, Inc.*, that Gil had sufficiently pled a nexus between Winn-Dixie's Website and its physical stores. *Id.*

3. The Verdict and Order Following Trial

On June 5 and 6, 2017, the District Court held a non-jury trial. D.E. 65. Prior to trial, the parties submitted a Joint Pretrial Stipulation, D.E. 34, as well as their proposed findings of fact and conclusions of law. D.E. 38, 39. At trial, the District Court heard testimony from three witnesses: (1) Gil, (2) Rodney Cornwell, Winn-Dixie's corporate representative, and (3) Gil's expert on website accessibility, Chris Keroack. D.E. 65.

The District Court entered a Verdict and Order Following Non-Jury Trial (the “Verdict”), finding that, in violation of the ADA, “the inaccessibility of the Website has denied Gil the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to sighted individuals.” D.E. 63 at 10. The District Court found that remediation of the Website was readily achievable and reasonable for Winn-Dixie. *Id.* at 10-11. Since Winn-Dixie did not offer any alternatives, the District Court ordered Winn-Dixie to undertake remediation measures on its Website in conformity with the industry-

consensus Web Content Accessibility Guidelines (WCAG) 2.0 standards proposed by Gil. *Id.* at 11.

The Verdict further directed the parties to meet and confer on the time periods for the remediation tasks outlined in the injunction, and to denote which, if any, time periods were disputed. *Id.* at 12. On June 30, 2017, the parties filed their Joint Report, which reflected the parties' agreement on the majority of the issues to be addressed. D.E. 66. On July 6, 2017, the District Court entered an Order and Injunction as well as (Final) Judgment in favor of Gil and against Winn-Dixie. D.E. 67-68. On July 31, 2017, Winn-Dixie noted its appeal. D.E. 71.

C. Statement of the Facts

1. Juan Carlos Gil

Gil is visually impaired and has a qualified disability under the ADA. D.E. 34 at 4, § V at ¶ A. He lives in the area of SW 27th Avenue and Coral Way in Miami. D.E. 65 at 41:20-25. He wears glasses to address optic nerve hypoplasia and to protect his eyes from foreign objects. *Id.* at 19:24-20:6, 20:2-6.

Gil's inability to see a computer screen does not prevent him from using properly formatted website. He uses screen reader software to access the internet and comprehend website content. D.E. 1 at ¶ 23; D.E. 65 at 20:16-21:13. His screen reader works with the operating system web browser to discover and vocalize to him

the contents of web pages. D.E. 65 at 30:7-21. He uses keyboard commands instead of a mouse to interact with websites. D.E. 65 at 20:12-17, 21:14-20.

Gil has used screen reader software to navigate and comprehend websites for over 25 years. D.E. 65 at 22:8-10. Gil utilizes the Job Access With Speech (“JAWS”) screen reader software 95% of the time. *Id.* at 21:22-22:7. JAWS is the industry standard for screen reader programs that allows blind and visually impaired users to operate computers with text-to-speech output. *Id.* at 22:17-19. If JAWS is not available, Gil uses alternate screen reader programs such as NVDA. *Id.* at 22:2-7, 22:21-24:1. Gil has successfully employed screen reader software to use 500-600 websites. *Id.* at 51:22-24.

Gil has been a customer of Winn-Dixie for many years. *Id.* at 25:13-28:17. In approximately 1999-2000, Gil started school at the Florida School for the Deaf and Blind, and graduated in 2002. *Id.* at 25:15-26:22. As part of his studies in a vending program, students went to Winn-Dixie to learn how to buy products for the vending stand they were operating. *Id.* at 25:21-26:19. After graduation, since Gil’s income was limited, he continued to shop at Winn-Dixie due to its low prices. *Id.* at 27:4-21. Many, but not all, of the Winn-Dixie stores have pharmacies, and Gil sometimes used the pharmacies to fill his prescriptions. *Id.* at 27:22-28:17.

Gil most recently went to a Winn-Dixie store in the area of 27th Avenue in the summer of 2015. *Id.* at 42:25-43:13. Before that, he had shopped at Winn-Dixie

about 30 to 40 times as his main grocery store because of its low prices. *Id.* at 43:23-44:1, 44:2-4. He has a Winn-Dixie rewards card. *Id.* at 43:15-16.

Gil last filled a prescription at Winn-Dixie approximately 2.5 to 3 years ago. *Id.* at 44:5-14. To refill a prescription, he would go into one of Winn-Dixie's physical stores and ask someone to assist him. *Id.* at 44:15-24. A store employee would walk him to the pharmacy area and Gil would tell the pharmacist what he needed. *Id.* Gil felt uncomfortable doing this because he did not know who else was nearby listening. *Id.* at 44:2-4.

The only way for Gil to obtain store coupons is to have a friend read the coupons to him from a newspaper, unless the particular store has an accessible website. *Id.* at 45:10-15, 46:4-5, 8-11. Gil would ask Winn-Dixie employees to find coupons for him, but sometimes the Winn-Dixie employees seemed annoyed by his request for help. *Id.* at 47:5-14.

In 2015-2016, Gil learned Winn-Dixie had a Website. D.E. 65 at 28:18-20. Gil was interested in utilizing the services offered on the Website since it would allow him to finally do things independently without asking somebody at Winn-Dixie, "please help me." *Id.* at 29:19-25. Gil wanted to learn more about the Winn-Dixie brand items, store locations and to avail himself of the goods and services provided by the Website, including but not limited to utilizing online pharmacy services through the Website. D.E. 1 ¶ 26; D.E. 65 at 28:18-29:18. He was interested

in filling and re-filling pharmacy prescriptions on-line, as offered through the Website. D.E. 1 at ¶ 22.

Gil attempted on several occasions to utilize the Website to re-fill his pharmacy prescriptions through the Website's online pharmacy services, and to obtain information regarding Winn-Dixie's in-store products and savings. D.E. 1 ¶¶ 22, 27. Gil wanted to avail himself of online coupons available on the Website, and to have those coupons applied to his Winn-Dixie rewards account. *Id.*

Gil used multiple internet browsers and different computers but the barriers on the Website made it impossible for him to navigate the Website or understand what it was intended to communicate to him. D.E. 65 at 30:4-31:22, 55:5-9, 61:3-9.

Ninety percent of the Website was inaccessible. *Id.* at 30:4-15. A navigation barrier on the Website homepage is one example. Typically, a screen reader user on a homepage would use the "Tab" key until the user encountered either a feature of the business (e.g., "store hours" or "pharmacy"), or a "search box" to manually search the website. *Id.* at 30:24-31:22. If the website is designed properly, a user could access a specific sub-category or begin a search via keyboard commands. *Id.* at 31:23-32:17. When Gil tabbed through the Website, he could not access anything other than "home." *Id.* at 31:14-22.

Gil spent approximately half an hour on the Website but was not able to access any information, including a store locator.¹ *Id.* at 33:15-22. On hundreds of other websites, Gil has been able to access store locations while using his screen reader software. *Id.* at 31:17-22. By pressing “control s,” most websites take you to a search box in which you can type the specific information you are looking for. *Id.* at 34:3-18. This, however, was not available on the Winn-Dixie Website. *Id.* at 30:4-31:22. Ultimately, Gil was unable to avail himself of the goods and services provided by Winn-Dixie through its Website. *Id.* at 36:25-37:3.

Gil is certain that he will return to using Winn-Dixie stores when the Website is accessible, but the barriers have deterred him. D.E. 1 at ¶ 31-32; D.E. 65 at 37:4-6, 16-38:7; 38:15-22. Gil wants to be able to refill prescriptions online so he does not have to orally announce to the person at the store what medications he is filling to protect his privacy under HIPAA, and to spare himself from embarrassment. *Id.* at 38:8-14.

Gil often travels to several cities in Florida, including Jacksonville, Tampa, Orlando, and Tallahassee, to participate in Paralympic events. *Id.* at 39:1-7. He travels with a laptop with screen reader software that he wants to use to find a nearby Winn-Dixie store through the Website. *Id.* at 39:16-40:14.

¹ Gil also uses search engines such as Google to locate businesses, but it is a much faster process to go directly to the business’ websites. D.E. 65 at 42:15-21.

Gil has used other grocery stores because, from their websites, he can: (1) create shopping lists and hand them to store employees, (2) use coupons he obtains from the store website, and (3) carry out transactions in privacy regarding prescriptions that would otherwise require a discussion in public. *See* D.E. 65 at 37:20-38:22; 68:22-69:7; 70:6-13; Both Publix and Walgreens have websites which he can access using his screen reader software. *Id.* at 68:5-13; 68:22-69:7. Gil desires to use the Website in the immediate future. D.E. 1 ¶ 31; D.E. 65 at 37:4-6 (Q. “Now Mr. Gil, are you interested in continuing to be a customer at Winn-Dixie stores and pharmacies?” A: “Well, 100 percent, yes, once the website’s accessible.”). However, the Website’s inaccessibility prohibits Gil from using and enjoying its services as experienced by the general public. D.E. 1 ¶ 32; D.E. 65 at 37:20-38:22.

2. The Website

Winn-Dixie owns and operates a regional chain of grocery stores, some of which contain pharmacies, in the Southeastern United States. D.E. 1 at ¶¶ 13-14; D.E. 34 at 4, § V at ¶ B. There are currently 495 stores in Georgia, Florida, Alabama, Louisiana, and Mississippi. D.E. 65 at 85:5-6.

Winn-Dixie offers the Website, which enables members of the public to locate Winn-Dixie’s physical stores; refill prescriptions for in-store pick up; transfer prescriptions from one store to another; select and load digital coupons to a rewards card for in-store purchases; and obtain information, cooking recipes, and tips

regarding products sold at Winn-Dixie's physical stores. D.E. 1 at ¶¶ 19, 21; D.E. 34 at 4, § V at ¶¶ B, D, F. Winn-Dixie has no pharmacy delivery service. D.E. 65 at 118:15-18. Only some of the physical Winn-Dixie grocery stores have pharmacies. D.E. 34 at 4, § V at ¶ B. Information concerning each store location and the services offered at that particular location is provided on the Website. *Id.* at ¶ F. The current version of the Website was launched in September 2015. *Id.* at ¶ E.

The Website enables customers to browse digital coupons and activate coupons by adding them to their rewards card. D.E 65 at 77:10-20. The only way to get a digital coupon to link up with a rewards card is through the Website. *Id.* at 89:25-90:2. The coupons functionality is "embedded" in the Website. *Id.* at 107:22-24. When a customer accesses the digital coupons portion of the Website, the experience is entirely seamless and the customer does not know that a third-party is involved; the header and footer of the Website still read, "Winn-Dixie." *Id.* at 108:6-13.

In early 2017, Winn-Dixie partnered with Plenti, a rewards program operated by American Express. *Id.* at 99:4-7. Customers can use a Plenti Card to accumulate additional points at Winn-Dixie through the Plenti program. *Id.* at 77:10-20. The Website also allows customers to select and link extra offers to their Plenti rewards account. *Id.* at 113:12-16. For example, a customer can activate or select and link an

extra 50 points on a specific product (five times the normal amount of points for produce) in a particular week. *Id.* at 113:12-22.

The Website is not designed to provide effective communication with users of screen reader software, and it does not meet the WCAG 2.0 standards for web accessibility that are often an indication of compliance with the ADA. D.E. 1 at ¶33; D.E. 34 at 4, § V at ¶ H. Winn-Dixie does not utilize any web accessibility testing programs and never took steps to evaluate or conduct testing on accessibility of the Website. D.E. 65 at 75:13-16. The Website is inaccessible to visually impaired persons, including Gil. *Id.* at 30:4-15.

3. Winn-Dixie's Corporate Representative, Rodney Cornwell

Rodney Cornwell testified in his capacity as the corporate representative for Winn-Dixie. *Id.* at 72:15-135:21. Cornwell is the Vice President of Information Technology, Application and Delivery for Southeastern Grocers, the parent company of Winn-Dixie. *Id.* at 72:24-73:23. He testified as the person with the most knowledge regarding the Website. *Id.* at 74:7-16.

During trial, Cornwell was asked whether he would agree that as it exists today, the Website is not compatible with screen-reading software. *Id.* at 75:10-18. Mr. Cornwell's testimony was, "I have not tested it, so I do not know the answer to

that.” *Id.* at 75:16. Winn-Dixie does not have an accessibility policy for the Website. *Id.* at 74:7-11.

Cornwell admitted that technology exists that allows a website to be coded in such a way as to interface with screen reader software. *Id.* at 90:3-9. Cornwell expressly testified that it is feasible for the Website to be modified to be accessible to the disabled, and has set aside \$250,000 to do this. *Id.* at 80:22-23, 91:15-17. Winn-Dixie is considering the WCAG guidelines in determining how to address the accessibility of the Website. *Id.* at 91:6-8.

The current Website was created in September 2015 at a cost of \$2 Million and, at that time, there was no discussion about the Website’s accessibility. *Id.* at 98:17-19. The modifications made to the Website in early 2017 to add the Plenti rewards program cost \$7 Million, but there was no effort to make the Website accessible to the disabled. *Id.* at 98:8-24; 100:25-101:4.

4. Gil’s Website Accessibility Expert, Chris Keroack

Chris Keroack (“Keroack”) testified as an expert witness on website accessibility. D.E. 64 at 9:21-22. Keroack has more than 23 years’ experience working in the information technology industry, particularly in testing and evaluating the accessibility of websites. *Id.* at 4:25-5:2. Keroack started at Microsoft in 1994 and was a software tester on the team for Microsoft Works. *Id.* at 5:2-11. He later worked on the Windows development group and was responsible for

accessibility testing advice. *Id.* at 5:12-21. Keroack is currently an Accessibility Consultant for Equal Entry LLC, a firm that provides advice and consultation to businesses for purposes of achieving compliance with the ADA. *Id.* at 4:15-21; Supp. Appx., Plaintiff's Trial Exhibit No. P-4, Keroack Curriculum Vitae.

Keroack testified as to industry standards, best practices, requirements for websites to be accessible to the disabled, including the visually impaired; the access barriers Gil encountered on the Website; and the manner in which the Website could and should be brought into compliance with the ADA. D.E. 64.

After a high-level audit of the Website using manual and automated methods, Keroack determined it was not equally accessible to persons who are blind or visually impaired, including Gil. *Id.* 64 at 16:16-18, 19:4-6, 20:6-8; Supp. Appx., Plaintiff's Trial Exhibit No. P-1, Priority Accessibility Issues for Winn-Dixie. Keroack prepared a written report of his findings which reflected the most significant accessibility problems for screen reader users:

1. Keyboard accessibility is not thoroughly available on the Website. Some items in the tab order are not visible but still receive focus, such as menu items and filter pane options, and other essential items do not receive focus at all.

2. Timed items (such as carousel control) cannot be paused by users of assistive technology who may need additional time to read and understand the content; and
3. A variety of user controls (such as buttons and checkboxes) are not labeled programmatically and without programmatic description, an assistive technology such as screen reader software will not be able to describe these elements.

Id.; D.E. 64 at 18:10-12.

Keroack testified that Winn-Dixie could address the access barriers on the Website by following WCAG standards. D.E. 64 at 31:18-22. He stated that “WCAG is the standard for accessibility for the web the current version, WCAG 2.0 was finalized in December of 2008.... It was also adopted as a[n] international organization standard in 2012. It’s an ISO standard...WCAG is very commonly known in web development.” *Id.* at 32:1-6. He further explained that “[t]he United States Access Board adopted aspects of WCAG as part of a refresh to Section 508 of the Rehabilitation Act and that was finalized in January of this year.” *Id.* at 32:12-14.

According to Keroack, Winn-Dixie’s Website falls short in a number of critical respects under the WCAG 2.0 standards,² confirming the difficulties Plaintiff had in accessing the Website. *See* Supp. Appx., Plaintiff’s Trial Exhibit No. P-1, Priority Accessibility Issues for Winn-Dixie; Supp. Appx., Plaintiff’s Trial Exhibit No. P-2, Five Automated Areas of Accessibility in Excel; and Supp. Appx., Plaintiff’s Trial Exhibit No. P-3, Automated Scan in Excel.

For example: (1) on the Pharmacy Account page of the Website, a keyboard-only user will not be able to interact with the list to expand and collapse the sections; a mouse or other pointing device (i.e., sight) is required; (2) throughout the Website, when using the Tab key to navigate, the “Log In” and “Sign Up” links are not in the Tab order, so the keyboard user moves from the logo link to the search edit box, unwittingly skipping over those two links; (3) the ad carousel in the middle of the top-third of the page is not designed to be paused by a keyboard user; (4) the main page is programmed to tell a screen reader user that all of the links are the same (they are all announced as “Learn More”) even they are not; and (5) on the main page, directions under the locator control are not described to the user, the text for the

² The WCAG 2.0 standards are published by W3C, which is the main international standards organization for the World Wide Web, and have been widely adopted as an appropriate measure to evaluate and ensure the accessibility of commercial websites for visually-impaired persons by the United States Department of Justice (“DOJ”), courts, and private parties. *See National Federation of the Blind, et al. v. HRB Digital LLC*, No. 1:13-cv-10799-GAO [ECF No. 60 at 5] (D. Mass. Mar. 24, 2014).

locator control is hard to interpret, and the buttons next to each edit control are not programmatically labeled. Supp. Appx., Plaintiff's Trial Exhibit Nos. P-2 and P-3.

Equal access to the Website is only possible upon remediation that is both technologically and financially feasible. *Id.* Keroack estimated that it would cost only \$37,000 to remediate the Website. D.E. 64 at 55:6-8.

Winn-Dixie did not call an ADA expert or compliance specialist to offer any contrary or rebuttal testimony.

D. Standard of Review

Gil concurs with Winn-Dixie's statement of the applicable standard of review.

SUMMARY OF THE ARGUMENT

The District Court correctly entered Final Judgment in favor of Gil and an injunction requiring Winn-Dixie to make its Website compliant with the ADA. The evidence adduced at trial demonstrated the Website's inaccessibility denied Gil the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to sighted individuals. Winn-Dixie's corporate representative admitted it was entirely feasible to make the Website accessible to visually impaired individuals such as Gil. Since Winn-Dixie did not offer any alternatives, the District Court correctly ordered Winn-Dixie to undertake remediation measures on its Website in conformity with the industry-consensus WCAG 2.0 Guidelines.

Additionally, the District Court was correct in denying Winn-Dixie's Motion for Judgment on the Pleadings. The Complaint sufficiently alleged the Website is heavily integrated with, and in many ways operates as a gateway to, Winn-Dixie's physical stores. Thus, the District Court correctly determined Gil sufficiently alleged a nexus between the Website and Winn-Dixie's physical stores such that Winn-Dixie was not entitled to judgment as a matter of law.

Gil respectfully requests the Court affirm in all respects the District Court's Verdict and Order Following Non-Jury Trial, the subsequent Injunction, and the District Court's Order on Winn-Dixie's Motion for Judgment on the Pleadings.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND WINN-DIXIE VIOLATED THE ADA BECAUSE ITS WEBSITE THAT HAS A NEXUS WITH ITS PHYSICAL STORES IS INACCESSIBLE TO THE BLIND.

Gil prevailed below because he proved: (1) he is a disabled individual;³ (2) Winn-Dixie owns, leases, or operates grocery stores and pharmacies that are public accommodations;⁴ and (3) Winn-Dixie discriminated against Gil within the meaning of the ADA. *See e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676 (2001) (citing 42 U.S.C. § 12182(a)).

The first two elements having been stipulated, this case turned on the question of whether the Website, which the company conceded was not accessible to Gil and other blind patrons, deprived Gil of full and equal access to Winn-Dixie's goods, services, facilities, privileges, advantages, or accommodations. *See* D.E. 63 at 10. The District Court simply applied the "nexus" test created by this Court in *Rendon v. Valleycrest Prods.*, 294 F.3d 1279 (11th Cir. 2002) to find that the Website, which Gil sought to use in connection with visits to physical store locations, was discriminatory because it was not accessible to Gil. That decision should be upheld on appeal.

³ The parties stipulated that Gil is disabled. D.E. 34 at 4, § V at ¶ A.

⁴ The parties stipulated that Winn-Dixie's grocery stores and in-store pharmacies are public accommodations. *Id.* at 4, § V at ¶ C.

A. Because Winn-Dixie Is a Public Accommodation, its Website Must Provide Effective Communication and Otherwise Be Accessible to Blind Patrons.

Title III of the ADA broadly prohibits the owner of a public accommodation from discriminating “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” 42 U.S.C. § 12182(a). The ADA further explains that public accommodations must, among other things, “make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities,” and to “take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services” *Id.* § 12182(b)(2)(A)(ii)-(iii).

The District Court was correct to apply these mandates to the Website because: (1) the Website has a sufficient nexus with Winn-Dixie’s physical stores; (2) Congress’ intent was for the ADA to be responsive to changes in technology, and therefore apply to websites; and (3) the Department of Justice has interpreted the ADA to apply to websites.

1. **A Nexus Exists Between the Website and Winn-Dixie's Physical Stores.**

This Court has not squarely addressed whether the websites associated with physical places of public accommodations are covered by the ADA, but that issue has been all but decided in the affirmative under this Court's decision in *Rendon v. Valleycrest Prods.*, that the ADA forbids "intangible" barriers that need not exist "on site" to be covered by the ADA. 294 F.3d 1279, 1283-84 (11th Cir. 2002).

Rendon involved an automated telephone answering system that the television show "Who Wants to Be a Millionaire" used to select contestants to appear on the program. *Id.* at 1280. The plaintiffs, as persons with hearing and upper-body mobility impairments, could not register their answers to the automated questions, because the limitations of the automated system prevented them from either hearing the questions or entering the answers fast enough. *Id.* As such, they could not be considered as contestants on the show held later at a studio location. *Id.*

This Court held that the plaintiffs stated a valid ADA claim because the inaccessibility of the automated system effectively denied them access to a privilege (competing in the television show) of a public accommodation (the television studio). *Id.* at 1282-83 ("[T]o state a valid claim, Plaintiffs must allege that they suffer from disabilities, and that Defendants' imposition or application of unnecessary eligibility criteria has screened them out or tended to screen them out from accessing a privilege or advantage of Defendants' public accommodation.")

(emphasis added); *see also id.* at 1284-86. The *Rendon* Court emphasized the ADA was intended to reach “*communication barriers*” as much as physical ones. *Id.* at 1286 (emphasis in original).

The holding was supported by the plain language of Title III,

[T]he definition of discrimination provided in Title III covers both tangible barriers, that is, physical and architectural barriers....[a]nd 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....[T]here is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA.

Id. at 1283-84.

In following the logic of *Rendon*, a place of public accommodation must make its website accessible under the ADA if it is demonstrated that, “a nexus between the challenged service and the premises of the public accommodation” exists. *Id.* at 1284 n.8. Indeed, district courts within this Circuit have so held. *E.g.*, *Gomez v. J. Lindeberg USA, LLC*, No. 16-22966, 2016 WL 9244732 at *2-3 (S.D. Fla. Oct. 18, 2016) (recognizing the “nexus” test, the Court ordered defendant to undertake remedial measures to make its website accessible to the visually impaired); *Gomez v. Bang & Olufsen Am., Inc.*, No. 16-23801, at 9 (S.D. Fla. Feb. 2, 2017) (Lenard, J.) (“[i]f a plaintiff alleges that a website’s inaccessibility impedes the plaintiff’s access to a specific, physical concrete space, and establishes some nexus between

the website and the physical place of public accommodation, the plaintiff's ADA claim can survive a motion to dismiss.") (internal quotations omitted).

In a case remarkably similar to this one, another federal court has applied the lessons of *Rendon* to websites that serve as an extension of brick-and-mortar stores. In *Nat'l Fed'n of the Blind v. Target Corp.*, the court denied a motion to dismiss a claim that Target's website failed to comply with the ADA. 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006). The plaintiff alleged Target's website, which was inaccessible to blind individuals, allowed customers to perform functions related to Target stores, such as accessing information about store locations and hours, refilling prescriptions, and ordering photo prints for pick-up at a store. *Id.* The *Target* court noted that, in *Rendon*, although the plaintiffs did not contest the actual physical barriers of the studio, the ADA was implicated because the plaintiffs were deprived of the opportunity to compete to be a contestant on the show. *Id.* at 955. The *Target* court further noted the statutory language of the ADA "applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation," and concluded Target's website was "heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores." *Id.* at 953, 955 (emphasis added) (citations omitted).

Here, the District Court correctly determined that the Website is subject to Title III because of its nexus with Winn-Dixie's physical stores. D.E. 63 at 10. The

Website “augments” Winn-Dixie’s physical store locations by assisting customers in finding physical store locations; educating the public as to the line of Winn-Dixie brand and other grocery items; allowing customers to fill and re-fill prescriptions and transfer them from one store to another; selecting and loading digital coupons to a rewards card for purchases in-store; and obtaining information, cooking recipes, and tips regarding products sold at Winn-Dixie’s physical stores. D.E. 1 at ¶¶ 5, 17, 19-21; D.E. 65 at 88:10-16; D.E. 34 at 4, § V at ¶ F. Winn-Dixie’s own corporate representative conceded that the Website serves as a “gateway” to physical stores, including for pharmacy services that Gil wished to utilize. D.E. 1 at ¶¶ 21-22, 25-26; D.E. 65 at 89:3-9 (testimony of R. Cornwell) (Q: “It is a gateway, correct?” A: “For re-filling prescriptions, yep.”).

Like the website in *Target*, the Website here is heavily integrated with, and in many ways operates as a gateway to, Winn-Dixie’s physical store locations. Because of this close nexus between the physical stores and the Website, the Website’s inaccessibility denied Gil equal access to the services, privileges, and advantages of Winn-Dixie’s physical stores, pharmacies, and other services.

2. **The Website is a Form of Communication and Congress Intended the ADA to Be Interpreted so as to Make the Benefits of New Technology Available to Persons with Disabilities.**

The dispositive factor in construing a statute is Congress’s intent. *United States v. Alpers*, 338 U.S. 680, 682 (1950). There is an abundance of evidence that

Congress intended the ADA to be construed in a way that its protections would be applied to new technology, such as websites.

During the enactment of the ADA, Congress stated that “the types of accommodation and services provided to individuals with disabilities . . . **should keep pace with the rapidly changing technology of the times.**” *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (citing H.R. Rep. 101-485(II), at 108 (1990)) (emphasis added); *see also Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 574 (D. Vt. 2015) (same). For example, Congress identified “information exchange” – the principal function of Winn-Dixie’s Website – as an important area of concern where expanding technology would be subject to the ADA. *Scribd*, 97 F. Supp. 3d at 574 (citing H.R. Rep. 101-485(II), at 108 (1990)).

As Representative Nadler observed about the era in which the ADA was enacted:

[W]e were not filling virtual shopping carts with clothes, books, music, and food; we weren’t banking, renewing our driver’s licenses, paying taxes or registering for and taking classes online. Congress could not have foreseen these advances in technology. Despite Congress’ great cognitive powers, it could not have foreseen these advances in technology, which are now an integral part of our daily lives. ***Yet Congress understood that the world around us would change and believed that the nondiscrimination mandate contained in the ADA should be broad and flexible enough to keep pace.***

Scribd, 97 F. Supp. 3d at 574 (quoting *Achieving the Promises of the Americans with Disabilities Act in the Digital Age -- Current Issues, Challenges and Opportunities: Hearing before the H. Subcomm. on the Constitution, Civil Rights, and Civil*

Liberties of the House Comm. on the Judiciary, 111th Cong., 2d Sess. 111-95 (2010)). As such, while Congress could not predict specific tools made available through technological advances, it clearly intended for the ADA to cover new means of access.⁵

Furthermore, the legislative history of the definition of “public accommodation” shows Congress wanted the list of 12 exemplars enumerated in 42 U.S.C. § 12181(7) to be “construed liberally” in harmony with the ADA’s broad purpose. *Netflix*, 869 F. Supp. 2d at 200 (citing S. Rep. No. 116, at 59 (1990) (“[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase ‘other similar’ entities. ***The Committee intends that the ‘other similar’ terminology should be construed liberally*** consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.”) (emphasis added)); *Scribd*, 97 F. Supp. 3d at 572-73 (same). Congress intended the defining characteristic of public accommodations be that they offer goods or services to the public, not that they offer goods or services to the public at

⁵ In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Supreme Court noted in interpreting the Rehabilitation Act of 1973, which was the model for the ADA, that “[i]t is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities. . . .” *Id.* at 412.

a physical location. *Scribd*, 97 F. Supp. 3d at 574 (citing H.R. Rep. 101-485(III), at 54 (1990)).

Here, adoption of Winn-Dixie's interpretation of the ADA (relegating its protections to physical locations only) would contradict the ADA's purpose and prevent the statute from adapting to technological changes as Congress intended.

3. The DOJ Has Interpreted Title III to Apply to Websites.

This Court should defer to the DOJ's consistent interpretation that Title III of the ADA applies to websites.

In *Skidmore v. Swift & Co.*, the Supreme Court opined that an agency administrator's determinations are entitled to some respect because they are "made in pursuance of official duty, and based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." 323 U.S. 134, 139-40 (1944); *see also United States v. Mead Corp.*, 553 U.S. 218, 234 (2001) (holding an agency's interpretation of a statute may merit some deference given the "specialized experience and broader investigations and information" available to the agency); *Scribd*, 97 F. Supp. 3d at 575 ("Given the DOJ's body of experience, the Court will give some deference to its conclusion that the ADA applies to websites covered by one of the categories in the statute.").

The DOJ has consistently told courts, Congress, and businesses that Title III applies to websites and services provided over the Internet. *See e.g.*, Letter from

Deval L. Patrick, Assistant Att’y Gen., to Senator Tom Harkin (Sept. 9, 1996), <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal712.txt>

(“Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet.”); *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong., 2d Sess. 65 (2000), http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_Of.htm;

(“[I]t is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services.”), Brief for United States of America as Amicus Curiae Supporting Appellant, *Hooks v. Okbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000); *Nondiscrimination on the Basis of Disability, Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460, 43464 (July 26, 2010) (“The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of ‘public accommodations,’ as defined by the statute and regulations.”); *see also Gorecki v. Hobby Lobby Stores, Inc.*, No. CV-17-1131, 2017 WL 2957736 at *6 (C.D. Cal. June 15, 2017) (collecting additional examples).

B. Winn-Dixie’s Website Does Not Comply with Title III.

Based on the evidence presented at trial, the District Court properly determined the Website does not comply with the requirements of the ADA. The Website does not provide effective communication to individuals with visual impairments, including Gil, and prevents those individuals from having full and equal access to the goods, services, facilities, privileges, advantages, or accommodations of Winn-Dixie’s stores.

1. The Website Does Not Provide “Effective Communication.”

The ADA requires that public accommodations “take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services” 42 U.S.C. § 12182(b)(2)(A)(iii). ADA regulations, in turn, require public accommodations to “furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.” 28 C.F.R. § 36.303(c). Winn-Dixie’s Website failed to provide that effective communication.

When Gil attempted to access the Website, he found that 90% of what it communicated was inaccessible to him. D.E. 65 at 30:4-15. The Website is not compatible with JAWS or any other commercially available screen-reader software, which would enable a blind individual to access the Website. D.E. ¶ 33. On the

homepage of a website, a screen reader user would usually hit “tab” until either a “combo box” is found, such as a box announcing “store hours” or “pharmacy,” or a “search” box is found. D.E. 65 at 30:24-31:22. Normally, if the website is interfacing properly with the JAWS, a user would then press enter and that would take the user into the specific sub-category. *Id.* at 31:23-32:17. Unfortunately, when Gil tabbed through the Website, he could not access anything other than “home.” *Id.* at 31:14-22.

Gil spent about a half an hour on the Website but was not able to access any information, including a store locator. *Id.* at 33:15-22. On hundreds of other websites, Gil has been able to access store locations while using his screen reader software. *Id.* at 31:17-22. By pressing “control s,” most websites take you to a search box in which you can type the specific information you are looking for. *Id.* at 34:3-18. This, however, was not available on the Website. *Id.* at 30:4-31:22.

Gil’s accessibility expert’s undisputed testimony was that the Website in its current form is simply not accessible by visually impaired individuals who use screen reader software. The Website did not integrate with Gil’s screen-reader software nor contain any function for Gil to comprehend the website through other means. D.E. 64 at 12:21-23.

Thus, the evidence adduced at trial demonstrates Winn-Dixie failed to provide effective communication through its Website and supports the District Court’s

conclusion that Winn-Dixie violated the ADA. Winn-Dixie presented no evidence to establish it would be unduly burdensome to make the information on the Website accessible – or that it has even considered this question. In fact, Winn-Dixie’s own corporate representative stated it was entirely feasible to make the Website accessible and integrated with screen reader software. D.E. 65 at 92:25-93:12.

C. The District Court Properly Entered an Injunction Requiring Winn-Dixie To Make Its Website Accessible to Gil.

The District Court followed the process it must before prescribing injunctive relief in this case: it weighed the specific evidence presented and, in its wide discretion, properly enjoined Winn-Dixie to make the services and advantages it provides through its Website accessible to Gil and other blind users. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (requiring an individualized, fact-bound determination of whether accessibility modifications are reasonable); *Ass’n for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1362 (S.D. Fla. 2001) (Highsmith, J.) (“The determination of whether a particular modification is ‘reasonable’ involves a fact specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.”) (citations omitted).

- The District Court Properly Ordered Winn-Dixie To Remediate Its Website in Conformity with The WCAG 2.0 Guidelines.**

"Title III of the ADA authorizes the award of injunctive relief to 'any person who is being subjected to discrimination on the basis of disability.'" *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 11 (1st Cir. 2004) (quoting 42 U.S.C. § 12188(a)(1)). The Court's broad equity powers allow it to fashion injunctive relief necessary. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). When district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise. For "several hundred years," courts of equity have enjoyed "sound discretion" to consider the "necessities of the public interest" when fashioning injunctive relief. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330, 88 L. Ed. 754, 64 S. Ct. 587 (1944); *see also id.* at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it").

Framing an injunction appropriate to the facts of a particular case is a matter peculiarly within the discretion of the District Judge. *J. M. Fields of Anderson, Inc. v. Kroger Co.*, 330 F.2d 686, 687 (5th Cir. 1964). Such discretion is displaced only by a "clear and valid legislative command." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 90 L. Ed. 1332, 66 S. Ct. 1086 (1946); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496, 121 S. Ct. 1711, 1720-21 (2001)

An order granting such relief is subject to Federal Rule of Civil Procedure 65(d)(1), in that it must "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). "Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).

Keroack (Gil's expert) testified about the ways in which the Website was inaccessible to Gil; the manner in which the Website could and should have been made accessible to Gil; and the industry standards, best practices, and requirements for websites to be accessible to the disabled. Keroack performed an audit to identify the inaccessible features on the Website and testified at length as to these issues. D.E. 64 at 9:25-59:15.

Keroack testified that remediating the Website according to WCAG Guidelines would address all of the barriers encountered on the Website regarding accessibility for screen reader users. *Id.* at 31:18-22. He explained that "WCAG is the standard for accessibility for the web....the current version, WCAG 2.0 was finalized in December of 2008....It was also adopted as a[n] international organization standard in 2012. It's an ISO standard...WCAG is very commonly known in web development." *Id.* at 32:1-6. He further noted that "[t]he United States

Access Board adopted aspects of WCAG as part of a refresh to Section 508 of the Rehabilitation Act and that was finalized in January of this year.” *Id.* at 32:12-14.

According to Keroack, under the WCAG 2.0 Basic Level Guidelines, the Website falls short in a number of critical respects, confirming the difficulties Plaintiff had in accessing the Website. *See* Supp. Appx., Plaintiff’s Trial Exhibit No. P-1, Priority Accessibility Issues for Winn-Dixie; Supp. Appx., Plaintiff’s Trial Exhibit No. P-2, Five Automated Areas of Accessibility in Excel; and Supp. Appx., Plaintiff’s Trial Exhibit No. P-3, Automated Scan in Excel. These barriers to access were presented at trial. D.E. 64 at 9:25-59:15. Keroack testified the Remediation measures to correct the Website’s significant block issues in many WCAG 2.0 categories is necessary and feasible to afford equal access to the Website. *Id.* Keroack estimated the cost to remediate the Website is approximately \$37,000. D.E. 64 at 55:6-8.

Winn-Dixie had an opportunity at trial to make a record about why WCAG 2.0 was not appropriate for the Website and why some other standard was better, but it failed to do so in both respects. Winn-Dixie did not call an ADA expert or compliance specialist to offer any contrary or rebuttal testimony. Winn-Dixie presented no alternative guidelines to be applied, or any evidence that it was not feasible to apply WCAG 2.0 to the Website. Winn-Dixie’s own corporate representative, Cornwell, revealed Winn-Dixie was considering the WCAG

guidelines among other sources in determining how to address the accessibility issue, Winn-Dixie knows it is feasible to make the Website accessible for screen reader software, and has set aside \$250,000 to do this. D.E. 65 at 80:22-23, 91:6-8.

Further, instead of challenging the fact-driven process that the District Court went through, Winn-Dixie makes a collateral attack that the text of the ADA explicitly rejects. Winn-Dixie argues it is infeasible for it to mandate third-party vendors to maintain these standards, “other than ceasing business which would cause undue harm.” App. Br. at 37. Winn-Dixie cites to no portion of the record to support this assertion, nor could it.

Contrary to Winn-Dixie’s position, the text of Title III and its regulations make it clear that public accommodations cannot “contract away” their liability. 42 U.S.C. § 12182(b)(1)(A) (referring to licensing, etc.); 28 C.F.R. § 36.202(a)-(c) (same)). A public accommodation cannot discriminate against an individual or class of individuals on the basis of a disability “directly, or through contractual, licensing, or other arrangements.” 42 U.S.C. 12182(b)(1)(A)(i). A public accommodation is responsible for its own ADA violations, and such violations cannot be contracted away. *United States v. AMC Entm't Inc.*, 232 F. Supp. 2d 1092, 1118 (C.D. Cal. 2002), *rev'd on other grounds by* 549 F.3d 760 (9th Cir. 2008); *see Figueroa v. Islands Rests. L.P.*, No. CV 12-00766-RGK (JCGx), 2012 U.S. Dist. LEXIS 89422, at *10 (C.D. Cal. June 22, 2012)(a defendant cannot contract away its liability under

the ADA since the statute makes clear that defendants are responsible for violations happening on their own premises).

Based on the undisputed evidence, the District Court correctly determined that remediation of the Website would be aided by reference to the WCAG 2.0 Guidelines.

2. Winn-Dixie Had Sufficient Notice to Meet the Requirements of Due Process.

Winn-Dixie argues that by ordering compliance with the ADA by following certain WCAG 2.0 Guidelines, the District Court’s injunction creates “new rights without well-defined standards.” App. Br. at 38. An *amicus* seeking reversal argues that to hold Winn-Dixie liable for violating Title III in the absence of regulations imposing more specific website accessibility standards would violate its right to due process. Brief of Florida Justice Reform Institute as Amicus Curiae at 4-17. These arguments both ignore Winn-Dixie’s long-standing obligations under the ADA that do not depend on website-specific regulations, and misstate the narrow role that the WCAG standards play as a guideline for Winn-Dixie’s remediation efforts.

As explained above, the ADA itself – which Winn-Dixie does not challenge as impermissibly vague – has, for decades, mandated that public accommodations’ communications and services be accessible to disabled patrons. While website-specific regulations may provide Winn-Dixie and other public accommodations with

additional guidance for complying with Title III, the absence of such regulations does not invalidate the law's existing mandates.

Courts have regularly held that technical standards are not required to carry out the mandates of the ADA. *E.g., Fortyune v. City of Lomita*, 766 F.3d 1098, 1102 (9th Cir. 2014) (holding that "[t]he lack of specific regulations cannot eliminate a statutory obligation" and rejecting the defendant's argument that it lacked notice that the ADA's general mandate applied even absent technical specifications); *Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 445 (9th Cir. 1994) (finding that a statute's general duties apply even when there are no specific standards, and that more specific regulations would only serve to "amplify and augment" a defendant's general duties under the statute); *Access Now, Inc. v. Holland Am. Line-Westours, Inc.*, 147 F. Supp. 2d 1311, 1312-13 (S.D. Fla. 2001) ("[t]his case will proceed despite the absence of applicable regulations promulgated by the DOJ and the DOT." *Scharff v. Cnty. of Nassau*, No. 10 CV 4208, 2014 WL 2454639 at *12 (E.D.N.Y. June 2, 2014) (discussing cases and finding there is no requirement that the ADA explicitly reference or discuss accessibility standards for a particular thing in order for same to be subject to the ADA's requirements); *Disability Rights Council of Greater Wash. v. D.C.*, No. 04-0529 (JDB), 2005 WL 513495 at *2 (D.D.C. March 3, 2005) (finding that plaintiff's claims "[d]o not depend upon any alleged finalized guidelines or legal reciprocity requirement, but rather are based on the ADA, the

Rehabilitation Act, the D.C. Human Rights Act, and the Commerce Clause plaintiff's ADA accessibility claims do not depend upon any alleged finalized guidelines or legal requirements, but are based on provisions of law for which relief may be granted.”).

Numerous courts have rejected Winn-Dixie's and its supporting *Amici's* argument: “[t]he lack of specific regulations does not eliminate [the defendant's] obligation to comply with the ADA or excuse its failure to comply with the mandates of the ADA.” *Hobby Lobby*, 2017 WL 2957736, at *4; *see also, e.g., Gorecki v. Dave & Buster's, Inc.*, No. 17-cv-1138-PSG, slip. op. at 9 (C.D. Cal. Oct. 10, 2017) (concluding the defendant “was under notice that it was obligated to” comply with Title III despite absence of guidelines); *see also Reed v. CVS Pharmacy, Inc.*, No. 17-cv-3877-MWF, slip. op. at 9 (C.D. Cal. Oct. 3, 2017) (finding whether or not CVS's website must comply with the WCAG or any other set of guidelines, is a question of remedy, not liability).

Whether an auxiliary aid or service is too burdensome, or would cause a fundamental alteration to the nature of the service is an individualized assessment for the trier of fact and the burden of proof is on the defendant. *See Andrews v. Blick Art Materials, LLC*, No. 17-CV-767, 2017 WL 3278898, at *17-18 (E.D.N.Y. Aug. 1, 2017) (“The defendant's principal complaint appears to be that it wants there to be black-and-white rules for ADA compliance, and here, there may be shades of

gray. But the anti-discrimination provisions the defendant is accused of violating are not simple checklists of clear-cut rules—they are standards that are meant to be applied contextually and flexibly. The “gray” the defendant complains of is a feature of the Act.”).

Congress charged the DOJ with issuing regulations under Title III of the ADA, 42 U.S.C. § 12186(b), rendering technical assistance, *id.* § 12206(c), and enforcing Title III in court, *id.* § 12188(b). It has not, however, charged the DOJ with determining whether a defendant’s actions, or lack thereof, violate the ADA. This remains solely within the jurisdiction of the court. *Access Now, Inc. v. Blue Apron, LLC*, 2017 U.S. Dist. LEXIS 185112 at *23 (D.N.H. 2017). The District Court here carefully and properly exercised its discretion to conclude the Website, which the parties agree Gil could not access, failed to comply with the ADA.

Here, “the issue at present is strictly one of liability, and a ‘determination of liability does not necessarily require the Court to master complicated web standards, but rather asks the Court to make exactly the same sort of accessibility determinations that it regularly makes when evaluating the accessibility of physical locations.’” *Dave & Buster’s*, slip. op. at 7 (quoting *Reed*, slip. op. at 10). The record demonstrates Gil relied on Title III of the ADA as governing Winn-Dixie’s potential liability and offered the WCAG 2.0 standards as a sufficient condition for such

compliance (a potential remedy), but not a necessary condition. D.E. 1; D.E. 64 at 30:12-15.

Gil presented evidence, including expert testimony, of the extent the Website did not afford him equal access to the goods and services provided by Winn-Dixie, and a proposed manner in which the Website could be modified to provide equal access. Winn-Dixie presented no contrary evidence or testimony. Winn-Dixie had ample opportunity to present evidence of alternative remedies, which several other courts have cited as the appropriate time to oppose the consideration of WCAG 2.0, *Hobby Lobby*, 2017 WL 2957736, at *6 (“if [the plaintiff] prevails, [the defendant] will have ample opportunity to present evidence of an appropriate remedy”), but Winn-Dixie did not do so.

D. Gil Had Standing to Bring the Underlying Suit.

Gil has satisfied the three requirements to establish standing under Article III: (1) he has suffered an “injury-in-fact” because he was and would continue to be denied Winn-Dixie’s services, (2) there is a causal connection between that denial and Winn-Dixie’s failure to make its Website accessible, and (3) that denial could be and was redressed by the injunction requiring the removal of the Website’s access barriers. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted).

1. Injury-In-Fact

The “injury-in-fact” demanded by Article III requires that, in addition to past injury, a plaintiff seeking injunctive relief “[m]ust show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future.” *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001).

Gil used multiple internet browsers such as Firefox, Internet Explorer, and Safari on his different computers when attempting to access the Website. D.E. 65 at 61:6-9. He used a Dell laptop and Mac computers to try to access the Website. *Id.* at 55:5-9; 61:3-9. Due to several barriers to access on the Website, Gil was unable to navigate the Website. *Id.* at 30:4-31:31:22. When Gil attempted to access the Website, 90% of the Website was inaccessible. *Id.* 65 at 30:4-15. Gil spent about a half an hour on the Website but was not able to access any information, including a store locator. *Id.* at 33:15-22. When Gil tabbed through the Website, he could not access anything other than “home.” *Id.* at 31:14-22. By pressing “control s,” most websites take you to a search box in which you can type the specific information you are looking for. *Id.* at 34:3-18. This was not available on the Website. *Id.* at 30:4-31:22.

The testimony of Cornwell revealed Winn-Dixie is considering the WCAG guidelines among other sources in determining how to address the accessibility issue. *Id.* at 91:6-8. The present version of the Website has not been tested by Winn-Dixie for use with universal screen readers. *Id.* at 75:5-9.

Winn-Dixie knows it is feasible to make the Website accessible to screen reader software and has set aside \$250,000 to do this. *Id.* at 80:22-23. Nonetheless, the current Website was created in September 2015 and, at that time, there was no discussion whatsoever about the Website's accessibility to the disabled. *Id.* at 98:17-19. When the Plenti rewards program was rolled out in early 2017 there were modifications made to the Website at the cost of \$7,000,000.00, but there was no effort to make the Website accessible to the disabled. *Id.* at 98:8-24; 100:25-101:4.

Gil suffered an injury-in-fact when he was unable to avail himself of the good and services on the Website and when the Website interfered with his ability to equally enjoy the goods and services of Winn-Dixie's stores. *Id.* at 36:25-37:3. Moreover, Gil presented testimony he has been deterred from accessing Winn-Dixie's stores due to the inaccessibility of the Website and that he has a firm intention to return to Winn-Dixie stores once the Website is accessible. Absent an injunction, Gil will continue to be affected by Winn-Dixie's unlawful conduct in the future.

2. Causation

To establish Article III standing, Gil must demonstrate a causal connection between his injury and Winn-Dixie's conduct. *Lujan*, 504 U.S. at 560-61; *see Lugo v. 141 Nw 20th St. Holdings, LLC*, 878 F. Supp. 2d 1291, 1295 (S.D. Fla. 2012)

(holding plaintiff's allegation he intended to return to the property in the near future was sufficient to support standing to seek injunctive relief under the ADA).

The testimony of Gil (and that of Keroack describing his audit of the Website), demonstrates a causal connection exists between Gil's injury-in-fact and the action of Winn-Dixie. Gil desires to use the Website in the immediate future. D.E. 1 at ¶ 31. However, the Website's inaccessibility prohibits Gil from using and enjoying its services as experienced by the general public. *Id.* ¶ 32. Gil is 100% certain that when the Website is accessible, he will return to using Winn-Dixie stores. D.E. 65 at 37:4-6. Gil wants to be able to refill prescriptions online so he does not have to orally announce to the person at the store what medications he is filling to protect his privacy under HIPAA, and to spare himself from embarrassment. *Id.* at 38:8-14. Gil often travels to several cities in Florida, including Jacksonville, Tampa, Orlando and Tallahassee, to participate in Para-Olympic events. *Id.* at 39:1-7. He travels with a laptop with screen reader software and he would want to be able to find a Winn-Dixie store nearby through the Website. *Id.* at 39:16-40:14. Gil has used other grocery stores because, from their websites, he can: (1) create shopping lists and hand them to store employees, and (2) use coupons he obtains from the store website and pick up prescriptions in privacy. Both Publix and Walgreens have websites which he can use with his screen reader software. *Id.* at 68:5-13.

A causal connection exists between Gil's injury-in-fact and the action of Winn-Dixie because Gil intends to immediately use the Website and return to Winn-Dixie's stores when the Website is made accessible.

3. Evidence of Redressability

The third prong considers whether it is likely the plaintiff's injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560.

The inaccessibility of the Website has deterred Gil from the full and equal enjoyment of Winn-Dixie's goods and services. D.E. 65 at 37:16-38:7, 38:15-22. At trial, Keroack confirmed that the Website is inaccessible to Gil and not equally accessible to persons that are blind or have significant vision loss. D.E. 64 at 16:16-18. Keroack testified the WCAG Guidelines would address all of the issues encountered on the Website regarding accessibility for screen reader users. D.E. 64 at 31:18-22. Both Gil and Keroack testified at length about the barriers to access on the Website, what needs to be corrected, and that Gil would be able to avail himself of the good and services on the Website once those issues are redressed. D.E. 65 at 37:4-6.

Accordingly, Gil satisfied his burden of demonstrating Article III standing.

II. THE DISTRICT COURT CORRECTLY DENIED WINN-DIXIE'S MOTION FOR JUDGMENT ON THE PLEADINGS.

Winn-Dixie's Motion for Judgment on the pleadings was properly denied.

A motion for judgment on the pleadings may be granted “when material facts are not in dispute and judgment can be rendered by looking at the substance of the pleadings and any judicially noticed facts.” *Stoneeagle Servs. v. Pay-Plus Solutions*, 2015 U.S. Dist. LEXIS 15144, at *3 (M.D. Fla. 2015) (citing *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998)). In reviewing a motion for judgment on the pleadings, the court must accept all facts in the pleadings as true and view them in the light most favorable to the non-moving party. *IMX, Inc. v. E-Loan, Inc.*, 748 F. Supp. 2d 1354, 1356 (S.D. Fla. 2010).

The pleadings sufficiently demonstrated Gil alleged the Website’s inaccessibility denied him equal access to the services, privileges, and advantages of Winn-Dixie’s physical stores and pharmacies, and the District Court’s Order Denying Winn-Dixie’s Motion for Judgment on the Pleadings should be affirmed. D.E. 32 at 8.

On July 12, 2016, Gil filed the instant lawsuit, claiming the Website violated the ADA because it is inaccessible to the visually impaired. D.E. 1. In the Complaint, Gil pled he is legally blind and suffers from a learning disability “therefore [he] is substantially limited in performing one or more major life activities” D.E. 1 ¶ 12. Gil pled that in order to access and comprehend information on the internet, he must use screen reader software. *Id.* ¶¶ 23-24. It was alleged Winn-Dixie is a grocery

and pharmacy store chain and operates the Website, which allows customers to locate physical Winn-Dixie store locations, fill and refill prescriptions for instore pick-up or delivery, learn about Winn-Dixie brand items, access homecooking recipes, and receive information about product recalls. *Id.* ¶¶ 14, 17, 19.

Gil pled that when he attempted to access the Website, it did not integrate with his screen reader software, “nor was there any function within [the] website to permit access for [the] visually impaired through other means.” *Id.* ¶¶ 27-28. Further, Gil pled that due to the Website’s inaccessibility, Winn-Dixie has not provided full and equal enjoyment of the services, facilities, privileges, advantages and accommodations provided by and through its Website. *Id.* ¶ 46. Gil alleged that, for individuals “who are limited in their ability to travel outside their home, the internet is one of the few available means of access to the goods and services in our society.” *Id.* ¶ 49.

On October 24, 2016, Winn-Dixie filed its Motion for Judgment on the Pleadings, asserting that websites are not places of public accommodation under the ADA, and thus its website could not have violated the ADA as a matter of law. D.E. 15. After the briefing was complete, the United States filed a Statement of Interest pursuant to 28 U.S.C. § 517. D.E. 23.

The Motion for Judgment on the Pleadings was properly denied because the Complaint alleged the Website is heavily integrated with, and in many ways operates

as a gateway to, Winn-Dixie's physical store locations. D.E. 32 at 8. The District Court correctly found the pleadings demonstrated "the website's alleged inaccessibility therefore denies the Plaintiff equal access to the services, privileges, and advantages of Winn-Dixie's physical stores and pharmacies." *Id.* Thus, the District Court determined Gil sufficiently alleged a nexus between the Website and Winn-Dixie's physical stores such that Winn-Dixie was not entitled to judgment as a matter of law. *Id.*

CONCLUSION

This Court should affirm in all respects the District Court's Verdict and Order Following Non-Jury Trial, the District Court's Order on Winn-Dixie's Motion for Judgment on the Pleadings, and the Injunction.

Dated this 13th day of December, 2017

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion and notice of electronic filing was sent via CM/ECF on December 13, 2017 to:

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