Docket No. 17-55504

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUILLERMO ROBLES,

PLAINTIFF-APPELLANT,

v.

DOMINOS PIZZA, LLC,

DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DISTRICT COURT CASE NO.: 2:16-CV-06599-SJO-FFM

OPENING BRIEF FOR PLAINTIFF-APPELLANT

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I. JURISDICTIONAL STATEMENT

A. BASIS FOR THE DISTRICT COURT'S JURISDICTION

The United States District Court for the Central District of California had jurisdiction over this case because this case arises out of violation of federal law under Title III of the Americans with Disabilities Act ("ADA" or "Title III"), 42 U.S.C. § 1281, et seq.

B. BASIS FOR THE APPELLATE COURT'S JURISDICTION

The United States Court of Appeals for the Ninth Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

C. FILING DATE OF THE APPEAL

The District Court issued the judgment that is the subject of this appeal on March 20, 2017 (E.R. 001-012). Appellant filed a timely Notice of Appeal on April 12, 2017 (E.R. 427-446)

D. ASSERTION THAT APPEAL IS FROM A FINAL ORDER OR JUDGMENT THAT DISPOSES OF ALL PARTIES' CLAIMS

This appeal is from a final order on motion for summary judgment or in the alternative, dismissal or stay, dismissing the action without prejudice pursuant to the primary jurisdiction doctrine, and appealable pursuant to the "final judgment rule," see 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err when it treated the allegations of the Complaint as an effort to "impose on all regulated persons and entities a requirement that they "compl[y] with the WCAG 2.0 Guidelines", despite the clearly pled allegations of the Complaint and the Prayer for Relief asking only for equal accessibility?

2. Did the District Court err when it dismissed each of Appellant's causes of action pursuant to the primary jurisdiction doctrine stating that "regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III", despite the DOJ's existing directive to ensure disabled individuals have as full and equal enjoyment of the Dominos website and mobile application as non-disabled individuals?

3. Was the District Court's statement (in dicta) that Domino's due process challenge to the Complaint was "meritorious" erroneous and premature given that this is a question of remedy, not liability and no specific remedy beyond equal accessibility is sought in Appellant's Prayer for Relief?

4. Did the District Court err when it gave "little or no deference" to the DOJ's interpretation of its own regulations regarding website accessibility despite this Court's holding that a Statement of Interest by the DOJ in an ADA case is due deference and respect?

5. Was the District Court's statement (in dicta) that Plaintiff failed to articulate why Dominos' provision of a telephone hotline for the visually impaired does not satisfy the ADA erroneous?

III. STATEMENT REGARDING ADDENDUM

All applicable statutes and agency rulings are contained within the Addendum at the end of the Opening Brief. See Fed. R. App. P. 28-2.7.

IV. STATEMENT OF THE CASE

This appeal concerns an order of the District Court for the Central District of California dismissing Appellant Guillermo Robles' ("Mr. Robles") complaint for damages and injunctive relief against Dominos Pizza LLC ("Dominos") for failure to design, construct, maintain, and operate its website www.dominos.com (the "Website") and mobile application (the "Mobile App") to be fully accessible to and independently usable by Mr. Robles and other blind or visually-impaired people, in violation of the ADA and California's Unruh Civil Rights Act ("UCRA"). The District Court dismissed Mr. Robles causes of action without prejudice pursuant to the primary jurisdiction doctrine because it found that

"regulations and technical assistance [from the Department of Justice] are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III [and] the issue of web accessibility obligations [] require both expertise and uniformity in administration, as demonstrated by the Department of Justice's ("DOJ") multi-year campaign to issue a final rule on this subject" E.R. 011-012.

The complaint was filed on September 1, 2016 (E.R. 408-426). On September 29, 2016, Dominos filed an Answer (E.R. 447-461). On February 22, 2017, Dominos filed its Dominos' Motion for Summary Judgment, or in the Alternative, Dismissal or Stay (E.R. 013-043). The motion was directed at the allegations of the Complaint that alleged the inaccessibility of the Dominos Website and "Mobile Website". Significantly, the Complaint did not contain any allegations concerning, any "Mobile Website" offered by Dominos. Rather, the Complaint alleged separate violations of the ADA and Unruh Civil Rights Act as to the Dominos Website (Causes of Action 1 and 3) and the Domino's Mobile App (Causes of Action 2 and 4). The bases for the motion were that Dominos' Website should not be subject to the ADA, that Mr. Robles' case violates due process because there is no published regulatory standard that is violated, Defendant did not have "fair notice" of the barriers, and the court should dismiss the case pursuant to the primary jurisdiction doctrine. Mr. Robles filed an Opposition on

March 6, 2017 (E.R. 147-173). Dominos filed a Reply on March 15, 2017 (E.R. 347-382). The District Court found Dominos' Motion for Summary Judgment, or in the Alternative, Dismissal or Stay suitable for disposition without oral argument and granted Defendant's alternative motion to dismiss and dismissed each of Mr. Robles' causes of action (including Causes of Action 2 and 4 which related to the Domino's Mobile App and which were not even mentioned in the Motion) without prejudice pursuant to the primary jurisdiction doctrine on March 20, 2017. (E.R. 001-012, ECF #42).

V. STATEMENT OF FACTS

Dominos operates several restaurants in Los Angeles and its Website connects its customers to Dominos' restaurants. (E.R. 411, ¶13, *see also* E.R. 154:17-18:) The features on the Website include a restaurant locator and permit users to order food for pick-up and delivery. (E.R. 415, ¶24) The Website is heavily-integrated in the operation of Defendant's restaurant locations. (E.R. 421, ¶49, *see also* E.R. 154:22-23) Mr. Robles is permanently blind and uses a screen reader to access the internet and read website content. (E.R. 410-411, ¶10) Screen reading software vocalizes visual information on a computer screen, and is the only method for a blind person to independently access the internet. (E.R. 412, ¶17) Unless websites are designed to be read by screen reading software, blind persons

cannot fully access websites and its information, products and services. (E.R. 412, ¶17)

There are well-established industry adopted guidelines for making websites accessible to visually-impaired people who require screen-reading software programs. (E.R. 413, ¶21) These guidelines have existed for several years and are successfully followed by large business entities who want to ensure their websites are accessible to all persons. The Web Accessibility Initiative ("WAI"), an initiative of the World Wide Web Consortium, developed guidelines on website accessibility. (E.R. 413, ¶21) Through Section 508 of the Rehabilitation Act, the federal government also promulgated website accessibility standards establishing WCAG 2.0 AA, promulgated by the WAI, as the standard for federal government websites. These guidelines, easily found on the Internet, recommend several basic components for making websites accessible, including, but not limited to: adding invisible alt-text to graphics; ensuring all functions can be performed using a keyboard and not just a mouse; ensuring that image maps are accessible and adding headings so blind and visually-impaired people can navigate websites and mobile applications just as sighted people do. (E.R. 413-415, ¶23) Without these basic components, websites and mobile applications are inaccessible to a blind person using screen-reading software. (E.R. 413-415, ¶23) The use of the WCAG 2.0 AA

standard is one way, but not the only way, to measure the accessibility of a website.

In July 2015, Mr. Robles attempted to access the Website to customize and order a pizza from a Domino's physical location closest to him in Los Angeles County using screen-reader software. (E.R. 155:9-11) Due to several access barriers on the Website, including barriers that prevented Mr. Robles from independently building a pizza and adding it to his online shopping cart, Mr. Robles was unable to independently navigate the Website and order a pizza for pick-up or delivery. (E.R. 155:12-13) Mr. Robles offered evidence, including expert testimony, that the Website for the pizza chain was inaccessible in numerous respects including the most obvious and important measure of a pizza restaurant website, **he could not order a pizza**. (E.R. 417, ¶29, *see also* E.R. 174-197)

The record and the undisputed evidence shows that the determination of whether the Dominos Website was accessible to Mr. Robles, a blind man using a screen reader to access website content, is the type of straightforward claim that Dominos failed to provide disabled individuals full and equal enjoyment of goods and services offered by its physical stores by not maintaining a fully accessible website. There nothing unique about this case, as federal courts have resolved effective communication claims under the ADA in a wide variety of contexts—

including cases involving allegations of unequal access to goods, benefits and services provided through websites. Therefore, Dominos Motion for Summary Judgment, or in the Alternative, Dismissal or Stay should have been denied.

VI. SUMMARY OF ARGUMENT

A. STANDARD OF REVIEW

A challenge to a district court's decision to invoke the primary jurisdiction doctrine is reviewed *de novo*. See *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1162 n.11 (9th Cir. 2007); *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1155 (9th Cir. 2000); *Reid v. Johnson & Johnson*, __ F.3d __, Case No. 12-56726 (9th Cir. March 13, 2015).

The Ninth Circuit reviews "*de novo* the district court's grant of summary judgment." *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 954 (9th Cir. 2013).

B. THE DISTRICT COURT ERRED WHEN IT TREATED THE ALLEGATIONS OF THE COMPLAINT AS AN EFFORT TO "IMPOSE ON ALL REGULATED PERSONS AND ENTITIES A REQUIREMENT THAT THEY "COMPL[Y] WITH THE WCAG 2.0 GUIDELINES", DESPITE THE CLEARLY PLED ALLEGATIONS OF THE COMPLAINT PRAYING ONLY FOR EQUAL ACCESSIBILITY

The Complaint seeks compliance with the ADA's equal access and effective communication requirements (E.R. 409-410, Introduction, ¶¶ 1-5). It explains in detail Mr. Robles' efforts to access the Website (E.R. 410-411, Parties, ¶¶ 10-12). It refers to "well-established guidelines for making websites accessible" to the blind and visually impaired and also describes in general terms common barriers to

access found on websites and apps that do not comply with the law. (E.R. 413-415, ¶¶ 21-23). The Complaint alleges it is Dominos' policy to deny access to the blind and visually impaired by not removing barriers to access on the Website. (E.R. 415-417, ¶¶ 26-29). Mr. Robles alleges that because Dominos could make the Website accessible Dominos discriminates by continuing to operate with its inaccessible Website. (E.R. 418-419, ¶¶ 36-38). Mr. Robles then asks the District Court, because the Dominos Website has never been accessible, to order Dominos to comply with the ADA by providing accessible content and effective communication. (E.R. 419, ¶ 43). Mr. Robles request is made, not because he alleges that Domino's failure to abide by the WCAG 2.0 guidelines by itself violates the law, but because doing so is one means of making the website equally accessible. This is made clear when read together with the sections of the Complaint setting forth the Causes of Action and in the Prayer for Relief where Mr. Robles seeks only "full and equal access" to the Website and Mobile App and does not mention WCAG. (E.R. 425-426, Prayer, ¶¶ 1-10).

The District Court treats the Complaint as requiring compliance with WCAG 2.0 because, ostensibly, Mr. Robles asserts it is the law (he does not) as opposed to requiring equal access and suggesting WCAG 2.0 as a means of accomplishing equal access (he does), led the District Court far afield into a discussion of whether imposing WCAG 2.0 "on all regulated persons and entities"

would offend due process principles. The District Court's departure here culminated to the dismissal of the Complaint when in fact this is a straightforward claim that Dominos failed to provide disabled individuals full and equal enjoyment of goods and services offered by its physical stores by not maintaining a fully accessible website. If this reading of the Complaint is not already clear, this interpretation can certainly be reached by making the type of plausible inference that should be drawn in favor of the non-moving party in the context of a motion to dismiss (or motion for summary judgment).

C. THE DISTRICT COURT ERRED WHEN IT DISMISSED EACH OF MR. ROBLES CAUSES OF ACTION PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE STATING THAT "REGULATIONS AND TECHNICAL ASSISTANCE ARE NECESSARY FOR THE COURT TO DETERMINE WHAT OBLIGATIONS A REGULATED INDIVIDUAL OR INSTITUTION MUST ABIDE BY IN ORDER TO COMPLY WITH TITLE III", DESPITE THE DOJ'S EXISTING DIRECTIVE TO ENSURE DISABLED INDIVIDUALS HAVE AS FULL AND EQUAL ENJOYMENT OF THE DOMINOS WEBSITE AND MOBILE APPLICATION AS NON-DISABLED INDIVIDUALS

The issue presented by the Domino's motion to dismiss on primary jurisdiction grounds is one of liability, which did not require the District Court to master complicated web standards, but rather asked the Court to make exactly the same sort of accessibility determinations that courts regularly make when evaluating the accessibility of physical locations. See *Order Denying Motion for Summary Judgment*, *Sean Gorecki v. Dave & Buster's, Inc.*, Case No. 2:17-cv-

01138-PSG-AGR (C.D.C.A. Oct. 10, 2017) (Gutierrez) at *7, ("*D&B Order*") [Request for Judicial Notice ("RJN") 1]. [1] For this reason, and because a finding of liability regarding the Website's compliance with the ADA does not require sophisticated technical expertise beyond the ability of the Court, the primary jurisdiction doctrine is inapposite in this case. See *Fortyune v. City of Lomita*, 766 F. 3d 1098, 1106 n.13 (9th Cir. 2014) (explaining that "further consideration of the City's due process argument would be premature because due process constrains the remedies that may be imposed").

D. THE DISTRICT COURT ERRED WHEN IT DETERMINED (IN DICTA) THAT DOMINO'S DUE PROCESS CHALLENGE TO THE COMPLAINT WAS "MERITORIOUS," GIVEN THAT THIS IS A QUESTION OF REMEDY, NOT LIABILITY, AND NO SPECIFIC REMEDY BEYOND EQUAL ACCESSIBILITY IS SOUGHT IN MR. ROBLES' PRAYER FOR RELIEF

Although the District Court granted Domino's motion to dismiss the action "without prejudice" based upon the primary jurisdiction doctrine, the District Court made references to violations of due process in its Order. (E.R. 001-012) However, in the Complaint and the Prayer for relief Mr. Robles seeks only that the Website and Mobile App must be made accessible, (E.R. 425, Prayer, ¶4) (praying

[1] "Instead, 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.'" *D&B Order*, citing *Order Re Motion to Dismiss, Kayla Reed v. CVS Pharmacy, Inc.*, Case No. 2:17-cv-03877-MWF-SK (C.D.C.A. Oct. 3, 2017) (Fitzgerald) ("*CVS Order*") [RJN 2].

for judgment including a "permanent injunction requiring Defendant to take the steps necessary to make Dominos.com readily accessible to and usable by blind and visually-impaired individuals"). Given that Dominos was on notice as early as 1996 that the Website was subject to the ADA and because Robles seeks only that the Website and Mobile App be made accessible, due process principles are not implicated. See e.g. *D&B Order* at *4 [RJN 1]; *Principal Deputy Assistant Attorney General for Civil Rights Samuel R. Bagenstos Testimony Before House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties*, April 22, 2010 [RJN 2]. Further, Robles references WCAG 2.0 as "well-established guidelines for making websites accessible (E.R. 413, Compl., ¶ 21) and as one means of making a website accessible (E.R. 419-420, Compl., ¶ 43), but does not seek to implement it, or mention it, in his prayer for relief. (E.R. 425-426, Prayer, ¶¶ 1-10). As such, any opinion that Dominos' due process challenge is "meritorious" is premature and to find to the contrary the District Court "puts the cart before the horse". *D&B Order* at *4, quoting *CVS Order* [RJN 1].

E. THE DISTRICT COURT ERRED WHEN IT GAVE "LITTLE OR NO DEFERENCE" TO THE DOJ'S INTERPRETATION OF ITS OWN REGULATIONS REGARDING WEBSITE ACCESSIBILITY DESPITE THIS COURT'S HOLDING THAT A STATEMENT OF INTEREST BY THE DOJ IN AN ADA CASE IS ENTITLED TO DUE DEFERENCE AND RESPECT

Because the District Court granted Domino's motion to dismiss the action "without prejudice" based upon the primary jurisdiction doctrine, the District

Court's references to violations of due process in its Order are dictum. Further, because the District Court's due process concerns were motivated by its misinterpretation of the allegations of the complaint – that Mr. Robles sought to impose WCAG guidelines on all "regulated persons and entities" – when he did not, the questions raised by Domino's due process concerns need not be addressed by this Court.

But should the Court reach them, the position of the DOJ on these issues should be afforded due deference and respect according to the binding authority of this court. In Dominos the District Court stated, "the Court concludes that little or no deference is owed to statements made by the DOJ through documents filed in the course of litigation with regulated entities." (E.R. 008, Order of 3/20/17 at *8; ECF #42.) That is wrong. The published Ninth Circuit decision, M.*R. v. Dreyfus*, *697 F.3d 706*, 735 (9th Cir. 2012), makes this clear because in that decision, the Ninth Circuit relied on the DOJ's Statement of Interest in an ADA case (involving Title II) as entitled to deference and "respect" and compared the Statement of Interest "to an amicus brief because of its interest in ensuring a proper interpretation and application of the [ADA] mandate." 697 F.3d at 735. It added, "DOJ's interpretation is not only reasonable; it also better effectuates the purpose of the ADA 'to provide clear, strong, consistent, enforceable standards addressing

discrimination against individuals with disabilities.'" Id. (citing 42 U.S.C. § 12101(b)(2)).

F. GIVEN THAT THE DISTRICT COURT APPLIED THE PRIMARY JURISDICTION DOCTRINE, THE DISTRICT COURT'S REFERENCES TO THE TELEPHONE SERVICE AFFIRMATIVE DEFENSE ARE DICTUM, AND DOMINOS' LACKS ADMISSIBLE EVIDENCE TO PROVE EVEN MINIMALLY EFFECTIVE COMMUNICATION.

The auxiliary aid provision of the ADA, 42 U.S.C. § 12182(a)(2)(A)(iii), which requires that a public accommodation provide an auxiliary aid to ensure disabled individuals are not excluded, denied services, segregated, or otherwise treated differently, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden, "allows a public accommodation to provide the information in any format, so long as it results in effective communication."

The only evidence Dominos submitted in support of its motion (a single page declaration) is conclusory and does not provide any information to determine whether the telephone is even minimally effective to guarantee the "full and equal enjoyment" that an accessible website would deliver. (E.R. 067-069). Without such findings showing that Defendant met ***its burden*** (Dominos offered no evidence for the court to even consider with respect to this burden), Defendant cannot prevail in invoking its affirmative defense under 42 U.S.C. §

12182(a)(2)(A)(iii). Of critical importance here, and dispositive of the issue for Dominos, the Declaration of Mandi Galluch also fails to allege that the Domino's "accessibility banner" presented on the Website is accessible to screen reader users. This alone constitutes a triable issue of material fact and precludes summary judgment for Dominos.

VII. ARGUMENT

A. THE DISTRICT COURT ERRED WHEN IT TREATED THE ALLEGATIONS OF THE COMPLAINT AS AN EFFORT TO "IMPOSE ON ALL REGULATED PERSONS AND ENTITIES A REQUIREMENT THAT THEY "COMPL[Y] WITH THE WCAG 2.0 GUIDELINES", DESPITE THE CLEARLY PLED ALLEGATIONS OF THE COMPLAINT PRAYING ONLY FOR EQUAL ACCESSIBILITY

In its March 20, 2017, Order, the District Court proclaimed that Mr. Robles request for injunctive relief "flies in the face of due process" because Mr. Robles "seeks to impose on all regulated persons and entities a requirement that they 'compl[y] with the WCAG 2.0 Guidelines' without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic" (E.R. 008). The District Court incorrectly transformed Mr. Robles' request from (1) a recommendation that Dominos uses WCAG guidelines and compliance to fix its inaccessible website, into (2) an inflexible demand to impose WCAG guidelines as the legal standard that implicates due process. But as plainly set forth in the Prayer and Causes of Action of the Complaint, Mr. Robles seeks "full and equal access" to the Website and Mobile App with no mention of WCAG. (E.R. 425-

426, Prayer, ¶¶ 1-10). The District Court therefore erred, misclassified the Complaint and the remedy Mr. Robles sought, and failed to assess evidence read in the "light most favorable to the nonmovant." *See Mankaruse v. Raytheon Co.*, 2016 WL 7324154, at *2 (C.D. Cal. Dec. 8, 2016) (Selna, J.). "The moving party has the initial burden of establishing the absence of a material fact for trial." Id. (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

1. The District Court's Analysis Misclassified The Complaint And Flows From A False Premise

The Complaint seeks compliance with the ADA's equal access and effective communication requirements (E.R. 409-410, Introduction, ¶¶ 1-5). It explains in detail Mr. Robles' efforts to access the Website (E.R. 410-411, Parties, ¶¶ 10-12) and refers to "well-established guidelines for making websites accessible" to the blind and visually impaired and also describes in general terms common barriers to access found on websites and apps that do not comply with the law. (E.R. 413, ¶¶ 21-23). The Complaint alleges it is Dominos' policy to deny access to the blind and visually impaired by not removing barriers to access on the Website. (E.R. 415-416, ¶¶ 26-29). Mr. Robles alleges that because Dominos could make the Website accessible, Dominos discriminates by continuing to operate its Website. (E.R. 418-419, ¶¶ 36-38). Mr. Robles then asks the District Court, because the Dominos Website has never been accessible, to order Dominos to comply with the ADA. (E.R. 419-420, ¶ 43). Mr. Robles request is made, not because he alleges

that Domino's failure to abide by the WCAG 2.0 guidelines by violates the law, but because doing so is one means of making the website equally accessible. This is made clearer when read together with the sections of the Complaint setting forth the Causes of Action and in the Prayer for Relief where Mr. Robles seeks only "full and equal access" to the Website and Mobile App and does not mention WCAG. (E.R. 425-426, Prayer, ¶¶ 1-10).

The District Court's treats the Complaint as requiring compliance with WCAG 2.0 because, ostensibly, Mr. Robles asserts it is the law (he does not) as opposed to requiring equal access and suggesting WCAG 2.0 as a means of accomplishing equal access (he does), which led the District Court far afield into a discussion of whether imposing WCAG 2.0 "on all regulated persons and entities" would offend due process principles and culminating in the dismissal of the Complaint. In fact, this is a straightforward claim that Dominos failed to provide disabled individuals full and equal enjoyment of goods and services offered by its physical stores by not maintaining a fully accessible website. Moreover, the District Court's approach contravenes this Court's guidance to "construe the language of the ADA broadly to advance its remedial purpose." *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014).

2. If the District Court Had Drawn Inferences In Favor Of Mr. Robles, As Required At This Stage, It Would Have Reached An Opposite Conclusion

If this reading of the Complaint is not clear, it can certainly be reached by making the type of plausible inference that should be drawn in favor of the non-moving party in the context of a motion to dismiss. "All reasonable inferences from the facts alleged are drawn in plaintiff's favor in determining whether the complaint states a valid claim." *Barker v. Riverside County Office of Education*, 584 F.3d 821, 824 (9th Cir. 2009) ("we must draw inferences in the light most favorable to the plaintiff") (. "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). "Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is implausible." *Id.*

B. THE DISTRICT COURT ERRED WHEN IT DISMISSED EACH OF MR. ROBLES' CAUSES OF ACTION PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE

The issue presented by Dominos' motion to dismiss on primary jurisdiction grounds is one of liability – not relief. To decide liability, the District Court did not have to master complicated web standards, but rather needed to make exactly the same sort of accessibility determinations that courts regularly make when evaluating the accessibility of physical locations. See *D&B Order* at *7 [RJN 1]. For this reason, and because a finding of liability regarding the Website's

compliance with the ADA does not require sophisticated technical expertise beyond the ability of the Court, the primary jurisdiction doctrine is inapposite in this case.[2]

1. *AMC Entertainment* Does Not Require Dismissal

As the foundation for its due process and primary jurisdiction discussion, the District Court cites *United States v. AMC Entertainment, Inc.*, 549 F. 3d 768 (9th Cir. 2008) and states that it "finds AMC to be squarely on point" (E.R. 008). The District Court is mistaken. At issue in *AMC* was ambiguity between the meaning of "lines of sight," which resulted in conflicting positions between district courts in different circuits. The DOJ eventually took a position in the form of an amicus brief in L*ara v. Cinemark USA, Inc.* after district courts had taken respective positions. *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, at *2 (W.D. Tex.Aug. 21, 1998), rev'd, 207 F.3d 783 (5th Cir. 2000). The DOJ then brought a lawsuit against AMC arguing AMC was required to **retrofit theaters, including those built before the DOJ's amicus brief** in *Lara*, which the Ninth Circuit reversed on due process grounds. *AMC Entertainment, Inc.*, 549 F. 3d. at 770. The *AMC* court found that as little as the filing of an amicus brief in separate litigation by the DOJ

[2] *See also Gorecki v. Hobby Lobby Stores, Inc.*, No. 2:17-cv-01131-JFW-SK, 2017 WL 2957736, at *6-*7 (C.D. Cal. June 15, 2017) (Walter, J.)(Ruling on similar motion distinguishes the AMC decision as both "factually and procedurally distinguishable.")

could provide adequate prospective notice of prohibited conduct. Id. at 770. In so doing, the court observed that, "[d]ue process requires that the government provide citizens and other actors with sufficient notice as to what behavior complies with the law." *AMC*, 549 F. 3d at 768. The *AMC* court's decision turned on the notice provided to AMC in the *Lara* amicus brief and the violation of due process found by the Ninth Circuit related only to pre-Lara amicus brief retrofit requirements. The distinction between *AMC* and Dominos here is that AMC did not have notice to satisfy due process for theaters built *before* the amicus brief, while Dominos had notice of the ADA's basic mandate that commercial websites must be accessible to the disabled, since as early as 1996 (See Part IV.C.1 infra).

The Court's due process concerns in *AMC* were motivated in part by the theater chain receiving "pre- and post-construction approval for their stadium-seating theaters from multiple states, whose own programs had been certified by the DOJ as 'meeting or exceeding' the federal requirements promulgated by the Access Board." *AMC*, 549 F.3d at 769 n.3. Here, however, there is no evidence that Dominos has had its website certified as accessible by any government entity. Nor was there any evidence that Dominos.com was created before 1996, when DOJ made clear that the ADA applied to websites, or that Dominos' website has not been altered since then.

Nor did the 9th Circuit disturb the district court's finding of liability in *AMC*. Id. at 767 n.2. Instead, the due process holding concerned only the court's remedial relief. In explaining its due process concerns, this 9th Circuit focused heavily on the evidence of how costly it would be for the defendant to retrofit its theaters. Id. at 767-68. In contrast, the District Court dismissed this case at the pleadings stage, where liability is to be established. If there were any due process concerns in this case akin to those in *AMC*, which there are not, they would not surface until the Mr. Robles prevailed on the merits and the District Court was considering the scope of injunctive relief. *AMC* provides no support for dismissal at the pleadings stage on due process grounds (or relatedly pursuant to primary jurisdiction because of due process concerns). See *Fortyune v. City of Lomita*, 766 F. 3d 1098, 1106 n.13 (9th Cir. 2014) (explaining that "further consideration of the City's due process argument would be premature because due process constrains the remedies that may be imposed").

2. The District Court Inappropriately Invoked The Primary Jurisdiction Doctrine

Primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). It "allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *N.*

Cnty. Commc'ns Corp. v. Cal. Catalog & Tech., 594 F.3d 1149, 1162 (9th Cir. 2010). It may be employed when a case "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Syntek Semiconductor Co. v. Microchip Tech.*, Inc., 307 F.3d 775, 789 (9th Cir. 2002). It "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision making responsibility should be performed by the relevant agency rather than the courts." *Id.*

Primary jurisdiction, however, does not "require that all claims within an agency's purview . . . be decided by the agency." *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1172 (9th Cir. 2002). It is not used to "secure expert advice" from agencies "every time a court is presented with an issue conceivably within the agency's ambit." Id. Courts must determine "whether any set of facts could be proved which would avoid application of the doctrine." *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1088 (9th Cir. 2006); *See also County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1252 (9th Cir. 2009). There is no case law suggesting that a court should abdicate its responsibility to apply and enforce existing law because of anticipated regulations that would set forth specific technical standards. To be sure, a stay based on the possibility that the DOJ may at some unknown, future time adopt new regulations would deprive disabled individuals of relief from discriminatory conditions addressed by existing law.

Courts look to four factors to decide whether to apply primary jurisdiction: "(1) the 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 scheme that (4) requires expertise or uniformity in administration." Id. at 1086-87. If the primary jurisdiction doctrine applies, the case is "referred" to the DOJ. *Syntek*, 307 F.3d at 782 n.3. There is no formal transfer mechanism, rather "the parties are responsible for initiating the appropriate proceedings before the agency." *Id.* "In practice, it means that a court either stays proceedings, or dismisses the case without prejudice, so that the parties may pursue their administrative remedies." *Id.*

Turning to the four factors courts traditionally consider in primary jurisdiction cases, the Court is guided by a combination of factors one and two, as well as factor four. Invoking primary jurisdiction would not send the parties to the DOJ to "initiat[e] the appropriate proceedings before the agency," and the parties cannot "pursue their administrative remedies." *Syntek*, 307 F.3d at 782 n.3. The parties have no administrative remedies to pursue. Rather, the parties would be forced to wait for an administrative rulemaking process to conclude. The parties are not direct participants in the DOJ rulemaking process. They have no ability to impact that process beyond the general public right to comment.

While the DOJ is responsible for issuing ADA regulations, Courts routinely decide the extent to which accommodations are required under the ADA and when such accommodations constitute an undue burden. Further, Congress has not provided a mechanism for the DOJ to resolve disputes regarding undue burden. The DOJ cannot resolve the parties' dispute before this Court. Although the DOJ is responsible for issuing regulations for the ADA, this alone does not invoke primary jurisdiction. *Brown*, 277 F.3d at 1172 (primary jurisdiction does not "require that all claims within an agency's purview . . . be decided by the agency."). The Court need not "secure expert advice" from DOJ "every time a court is presented with an issue conceivably within the agency's ambit." *Id.*[3]

[3] Despite citing and relying upon the magistrate judge's Report and Recommendation in *Nat'l Ass'n of the Deaf v. Harvard Univ., Case 3:15-cv-30023-MGM, 2016 WL 6540446, at *1-*3 (D. Mass. Nov. 3, 2016) (Mastroianni, J.)* [ECF #50], in *Dominos* the District Court's Order did not address the fact that such magistrate judge elsewhere stated the following in her detailed Report and Recommendation: "[T]here is no inherent reason for concluding that DOJ has any specialized technical expertise regarding internet accessibility. Moreover, the ANPRM counsels the opposite conclusion. In it, DOJ seeks input from "experts in the field of computer science, programming, networking, assistive technology, and other related fields" to assist it in formulating regulations addressing website accessibility. 75 Fed. Reg. at 43,464. If DOJ had specialized technical expertise, it would not need to solicit it from the outside. Thus, the magistrate judge's analysis in the foregoing decision, which the district court adopted in *Harvard Univ.* stands in stark contrast to the *Dominos* Court's Order. The magistrate judge's reasoning and rationale for not applying the primary jurisdiction doctrine is more persuasive than the *Dominos* Court's analysis, the latter of which completely omitted the foregoing analysis of Magistrate Judge Robertson.

Referral to the DOJ will not resolve the question presented in this case: to what extent, if at all, the ADA and Unruh Act require Dominos to provide effective communication to blind and visually-disabled persons with respect to its Website and Mobile App and what constitutes effective communication. If and when the DOJ issues a final rule, the Court must still determine at what point, if at all, remediating the website imposes an undue burden on Dominos. This stands in contrast to *Syntek*. In *Syntek*, the plaintiff asserted the defendant's copyright registration was invalid. *Syntek*, 307 F.3d at 781. The *Syntek* court found it "important to note" the plaintiff sought a declaratory judgment that the defendant's copyright registration was invalid, not that the copyright itself was invalid. *Id.* at 781. As such, the "resolution of the question at hand require[d] an analysis of whether the agency acted in conformance with its own regulations when it granted the registration." *Id.* "[A] declaration of registration invalidity . . . is indistinguishable from the remedy of copyright registration cancellation." *Id.* at 781. The Copyright Office has statutory authority to cancel a registration and therefore provided "an administrative remedy for the relief which [the plaintiff sought]." *Id.* Thus, in *Syntek*, the parties were direct participants in an administrative procedure capable of resolving the parties' dispute. The Ninth Circuit applied primary jurisdiction to refer the matter to the Copyright Office. *Id.*

Unlike the Copyright Office in *Syntek*, the DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute. The absence of such an administrative process argues against referral to an agency under the primary jurisdiction doctrine. *Compare Rosado v. Wyman*, 397 U.S. 397, 406 (1970) (refusing to apply primary jurisdiction doctrine where a Department of Health Education and Welfare "has no procedures whereby recipients may trigger and participate in the department's review of state welfare programs."), and *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) Again, the parties cannot initiate and directly participate in an administrative process that will resolve their dispute.

As set forth in the Complaint and Mr. Robles' evidence supports, there are barriers on the Website that prevent Plaintiff from full and equal access to the services and privileges offered by Defendant's website that are violations of title III ADA and the Unruh Civil Rights Act (E.R. 410-411, ¶¶ 10-12). It is further undisputed that the ADA applies to commercial websites (*75 Fed. Reg. 43460-01* (July 6, 2010)) and the Ninth Circuit has adopted this position. *See Target*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) ("Commercial websites that are not accessible for blind and visually-impaired individuals using screen-readers and keyboards only, violate [the] basic mandate of the ADA."); *Shields*, 279 F.R.D. 529 (C.D. Cal. 2011) ("The lack of a widely accepted standard for website accessibility does not preclude

injunctive relief that would improve access to Defendants' websites by the visually impaired.")

3. Referral To The DOJ Does Not Promote Efficiency And Would Prejudice Individuals With Disabilities

The District Court did not apply or make any findings as to whether the primary jurisdiction factors to determine whether a stay or referral of the issue to the DOJ is appropriate, or even possible. Efficiency, the "deciding factor in determining whether the primary jurisdiction doctrine should apply," *Reid v. Johnson & Johnson*, 780 F.3d 952, 967 (9th Cir. 2015), weighs heavily against dismissal on primary jurisdiction grounds. Accordingly, the District Court incorrectly applied the primary jurisdiction doctrine.

In sum, the District Court erred by dismissing this case pursuant to primary jurisdiction because: (1) As noted *supra*, this issue is not a complicated question of first impression; (2) Courts routinely decide these kinds of cases involving accommodations and undue burden; (3) Referral to the DOJ is not needed to obtain agency experience or to ensure uniformity in administration. As discussed *infra*, through many consent decrees and settlement agreements, DOJ has already made clear its position that a covered entity can ensure that its website provides equal access to individuals with disabilities by adhering to WCAG 2.0 level AA; (4) There is no administrative proceeding to which the Court can refer the parties, the parties will not directly participate in DOJ's rulemaking, and DOJ is incapable of resolving

the parties' dispute. Individuals with disabilities can only seek a remedial order from the courts. See *Arizona ex rel. Goddard*, 2011 WL 13202686, at *3 (reasoning that because "DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute," dismissal under the primary jurisdiction doctrine would be inappropriate)[4]; and (5) As of July 20, 2017, DOJ is prohibited from issuing a final rule and has published the fact of its abandonment of efforts to do so. [5]

C. THE DISTRICT COURT ERRED WHEN IT DETERMINED (IN DICTA) THAT DOMINO'S DUE PROCESS CHALLENGE TO THE COMPLAINT WAS "MERITORIOUS," GIVEN THAT THIS IS A QUESTION OF REMEDY, NOT LIABILITY, AND NO SPECIFIC REMEDY BEYOND ACCESSIBILITY IS SOUGHT IN MR. ROBLES' PRAYER FOR RELIEF

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[4] See, e.g., *Andrews v. Blick Art Materials, LLC*, -- F. Supp. 3d --, 2017 WL 3278898, at *15-*17 (E.D.N.Y. Aug. 1, 2017) (Weinstein, J.)(Rejecting the same the primary jurisdiction argument, "The court will not delay in adjudicating [plaintiff's] claim on the off-chance the DOJ promptly issues regulations it has contemplated issuing for seven years but has yet to make significant progress on." 2017 WL 3278898, at *17.)

[5] On July 20, 2017, the United States issued the Trump Administration's Unified Agenda of Regulatory and Deregulatory Actions, for the first time the Agenda separated regulatory actions into three categories: active, long-term, or inactive. Projected deadlines are published only for active and long-term matters. The Agenda places the DOJ's rulemakings under Title III of the ADA for websites on the 2017 Inactive Actions list indicating no intent to issue regulations now or in the "long-term". This is consistent with the prior Executive Order on Reducing Regulation and Controlling Regulatory Costs. (See 2017 Inactive Actions list at page 8; RIN# 1190-AA61; RIN# 1190-AA65.) [RJN 5] (https://www.reginfo.gov/public/do/eAgendaMain.); *See* Executive Order on Reducing Regulation and Controlling Regulatory Costs, dated January 30, 2017, (https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling)

Although the District Court granted Domino's motion to dismiss the action "without prejudice" based upon the primary jurisdiction doctrine, the District Court made references to violations of due process in its Order. (E.R. 001-012) However, in the Complaint and the Prayer for relief Mr. Robles seeks only that the Website and Mobile App must be made accessible, (E.R. 425-426, Prayer, ¶¶ 4-5) (praying for judgment including a "permanent injunction requiring Defendant to take the steps necessary to make Dominos.com readily accessible to and usable by blind and visually-impaired individuals"). Given that Dominos was on notice as early as 1996 that the Website was subject to the ADA and because Robles seeks only that the Website and Mobile App be made accessible, due process principles are not implicated. See e.g. *D&B Order* at *4 [RJN 1].

Further, Mr. Robles references "well-established guidelines for making websites accessible" (E.R. 413, Compl., ¶ 21), but does not seek to implement any particular standard , or mention one, in his prayer for relief. (E.R. 425-426, Prayer, ¶¶ 1-10).

As such, any opinion that Dominos' due process challenge is "meritorious" is premature and to find to the contrary the District Court "puts the cart before the horse". *D&B Order* at *4, citing *CVS Order* [RJN 1]. Dominos' due process argument relates only to the remedies that may be imposed **later** in the case, should Mr. Robles prevail. *Fortyune v. City of Lomita*, 766 F. 3d 1098 (9th Cir.

2014) (denying appeal of district court's refusal to grant motion to dismiss on due process grounds) at FN. 13 ("Any further consideration of the City's due process argument would be premature because due process constrains the remedies that may be imposed. *See* AMC, 549 F. 3d at 768 -70.

1. The General Mandate Of The ADA And Website Accessibility Since 1996

When faced with a lack of specific scoping regulations, as is the condition here, courts have commonly held that the general accessibility mandate of the ADA applies to websites. The general rule of Title III states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Thus, in circumstances closely akin to those of Mr. Robles here – where the DOJ has not yet promulgated a final rule governing the technical aspects of accessibility – courts have sustained the cause of action under the general accessibility mandate of the ADA set forth above.[6]

[6] Notably, the District Court ignored the Ninth Circuit's well-established holding that "**the lack of specific regulations cannot eliminate a statutory obligation**." *Fortyune v. City of Lomita*, 766 F. 3d 1098, 1102 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2888 (2015) (rejecting a defendant's due process argument that the defendant lacked notice that the ADA's general mandate to eliminate discrimination against disabled persons applied even absent technical

In *Gorecki v. Hobby Lobby Stores, Inc., No. 2:17-cv-01131-JFW-SK, 2017 WL 2957736, at *4-*6 (C.D. Cal. June 15, 2017) (Walter, J.)* ("*Hobby Lobby Order*") the Court discusses that due process notice Title III applies to websites existed as early as 1996:

> The department's position "that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services" was also discussed at length in 2000 at a congressional hearing regarding the ADA's applicability to private websites. *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. 8 (2000)
>
> A number of witnesses from the public and private sectors, including computer programmers, professors, lawyers, and executive officers appeared at the hearing. The witnesses universally acknowledged that the DOJ had taken the position in 1996 that the ADA applies to websites and that it was "beyond dispute" that the ADA applies to places that meet the definition a of public accommodation and their online publications. [Id at 114]. One speaker noted, "[a]lthough we know that the ADA does apply to a wide variety of private websites, no one has a very clear idea of what compliance may entail. It will be natural for litigants and courts, however, to look to what accessibility standards have been published with official support in deciding whether private sites are in compliance." Id.

Hobby Lobby Order at *5; Id. at FN.3.

The *Hobby Lobby* court therefore concluded that "**the lack of regulations does not eliminate [the] obligation to comply with the ADA or excuse [the] failure to comply with the mandates of the ADA.**" *Hobby Lobby Order* at *4.

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specifications) (emphasis added); *id.* at 1100-06 (holding that the plaintiff stated claims under the ADA and CDPA based on the City's alleged failure to provide accessible on-street diagonal stall parking irrespective of whether the DOJ has adopted technical specifications for on-street parking).

(emphasis added). Additionally, To the extent the 2010 ANPRM seeks to clarify existing obligations under the ADA to maintain accessible websites, those clarifications are best read as interpretations of existing and currently effective rules and not as legislative rules.[7]

2. ***Shields v. Walt Disney Parks and Resorts US* Supports Mr. Robles' Position**

In published decision, *Shields v. Walt Disney Parks and Resorts US, Inc.*, 279 F.R.D. 529(C.D. Cal. 2011), the plaintiffs prevailed on a contested motion for class certification involving a website class comprised of visually impaired individuals. Significantly, the district court in Shields rejected as "unpersuasive" Disney's argument that "there is no accepted accessibility standard" and the argument that the DOJ has yet to determine what standards to apply to websites. Significantly, the district court stated, "**The lack of a widely accepted standard for website**

[7] *See also Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1032-33 (9th Cir. 2008) (holding that the DOJ's change in its interpretation of a certain ADAAG section *did not require notice and comment for formal rule-making* because the DOJ's announcement of its change was an "interpretive rule," which is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers"). "[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule,' whereas legislative rules 'create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.'" *Id.* An interpretive rule clarifies the agency's view of ambiguous terms. "A rule does not become a legislative rule because it effects some unanticipated change; otherwise, only superfluous rules could qualify as interpretive rules." *Id.* The DOJ's various public pronouncements about website accessibility via its Statements of Interest, amicus briefs, and other public statements constitute "interpretive rules".

accessibility does not preclude injunctive relief that would improve access to Defendants' websites by the visually impaired." Id. at 559 (emphasis added.) That case was resolved via a class action settlement in which Disney agreed to follow WCAG 2.0 AA to resolve the matter.

3. ***Reed v. CVS* Order Supports Mr. Robles' Position**

On October 3, 2017, in case similar to here, the United States District Court Central District of California denied a motion to dismiss, holding (1) that Title III of the ADA applies to a website and mobile application where there is a "nexus" between its online offerings and its physical space (2) defendant had sufficient notice to meet the requirements of due process "because the DOJ has made it abundantly clear that websites fall under Title III's requirements"[8] and (3) the primary jurisdiction doctrine is inappropriate because a "determination of liability does not 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." See *CVS Order* [RJN 3].

[8] "The DOJ's position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA's requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process." *CVS Order* at *9.

4. *Gorecki v. Dave & Buster's* Order Supports Mr. Robles' Position

On October 10, 2017, in another web access case similar to the case here, the United States District Court Central District of California denied a motion for summary judgment, holding (1) defendant "had sufficient notice to meet the requirements of due process" and "[a]lthough the eventual remedy in this case might raise the specter of due process concerns, liability does not amended complaint to satisfy the requirements of due process," (2) "[b]ecause a finding of liability regarding the Website's compliance with the ADA does not require sophisticated technical expertise beyond the ability of the Court, the primary jurisdiction doctrine is inapposite in this case," (3) a triable issue as to ADA compliance exists because "[b]ased on the scant evidence presented in the papers the Court cannot conclude that D&B's website guarantees 'full and equal enjoyment'" and (4) plaintiff "needs neither to plead nor to prove intentional discrimination" to state a viable Unruh Act claim. See *D&B Order* (denying motion for summary judgment, or to dismiss, or in the alternative to stay virtually identical to the motion granted by the District Court in Dominos and authored by the same defense counsel.) [RJN 1].

5. *Andrews v. Blick* Order Supports Mr. Robles' Position

On August 1, 2017, Eastern District Court Judge Weinstein issued a lengthy 38-page order that, among other points, rejected the primary jurisdiction argument on the basis that it is the court's job to interpret and apply statutes and regulations and the risk of inconsistent rulings is outweighed by plaintiff's right to prompt adjudication of his claim. *Andrews v. Blick Art Materials, LLC,* __ F. Supp. 3d __, No. 17-CV-767, 2017 WL 3278898, at *17-18 (E.D.N.Y. Aug. 1, 2017). [RJN 6] The Blick court rejected the defendants' due process arguments, stating that no standard set by statute or regulation is needed for the ADA's requirements of "reasonable modifications," "auxiliary aids and services," and "full and equal enjoyment" to apply to website accessibility. Id at *17; 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii). "Blick does not point to any word or term that is unconstitutionally vague. A statute's use of the word "reasonable" and similar terms is not constitutionally problematic." Id. The *Blick* court rejected defendants' invocation of the District Court ruling in *Dominos* stating:

> "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." Id.

The *Blick* court also discussed the long history of the Justice Department's website accessibility rulemaking efforts before concluding that "t[]he court will not

delay in adjudicating [plaintiff's] claim on the off-chance the DOJ promptly issues regulations it has contemplated issuing for seven years but has yet to make significant progress on." Id.

6. The *Gil v. Winn-Dixie Stores, Inc.* Verdict Supports Mr. Robles' Position

In *Gil v. Winn-Dixie Stores, Inc., No. CV 16-23020-CIV, 2017 WL 2547242, at *9 (S.D. Fla. June 12, 2017)*, the court held, after completing a full bench trial, that a defendant Winn-Dixie violated Title III of the ADA by having an inaccessible website. In Winn-Dixie's briefing throughout the case (it filed and lost a MJOP) and in pre-trial filings, Winn-Dixie specifically argued that "without federal regulations in place, there is no clear guidance to a business entity as to what is required for website accessibility." (Joint Pretrial Stip. of 3/17/17 at 3; ECF #34.) [RJN 7] Winn-Dixie argued that it "is not required to design its website specifically to integrate with screen reader software under current federal law." Id. Winn-Dixie argued that "under current ADA statutes and regulations, websites are not places of public accommodation." Id. Also, Winn-Dixie's Proposed Findings of Fact and Conclusions of Law asserted, "The DOJ has not issued any accessibility guidelines for internet websites." (Def.'s Prop. FF/CL at 7; ECF #39.) [RJN 8] Winn-Dixie also asserted in that filing, "[Plaintiff's] requested modification of Winn-Dixie's website is not reasonable or readily achievable because no legal standards exist for website accessibility . . . ." Id. In addition,

Winn-Dixie's Answer alleged as the seventh affirmative defense failure to state a claim because "current federal law does not require Winn-Dixie to implement the policies and procedures demanded by Plaintiff." (Answer at 8; ECF #7.) [RJN 9] Further, Winn-Dixie's unsuccessful MJOP argued that the DOJ "has not promulgated any rules or regulations to govern website accessibility." (MJOP at 3; ECF #15.) [RJN 10] Winn-Dixie's Reply In Support of MJOP expressly argued that the DOJ had not issued any final or even proposed regulations in response to the DOJ's 2010 issuance of an Advance Notice of Proposed Rulemaking ("ANPRM"). (Reply ISO MJOP at 6-7; ECF #19.) [RJN 11] The foregoing amply demonstrates that the yet another court was presented with the argument that the DOJ has not promulgated any specific website standards, but was not persuaded.

D. THE DISTRICT COURT ERRED WHEN IT GAVE "LITTLE OR NO DEFERENCE" TO THE DOJ'S INTERPRETATION OF ITS OWN REGULATIONS REGARDING WEBSITE ACCESSIBILITY DESPITE THIS COURT'S HOLDING THAT A STATEMENT OF INTEREST BY THE DOJ IN AN ADA CASE IS ENTITLED TO DUE DEFERENCE AND RESPECT

Because the District Court granted Domino's motion to dismiss the action "without prejudice" based upon the primary jurisdiction doctrine, the District Court's references to violations of due process in its Order are dictum. Further, because the District Court's due process concerns were motivated by its misinterpretation of the allegations of the complaint – that Mr. Robles sought to impose WCAG guidelines on all "regulated persons and entities" – when he did

not, the questions raised by Domino's due process concerns need not be addressed by this Court. But should the Court reach them, the position of the DOJ on these issues should be afforded deference and respect according to the binding authority of this Court.

1. Ninth Circuit Cases Support Mr. Robles' Position

In Dominos, the District Court stated, "the Court concludes that little or no deference is owed to statements made by the DOJ through documents filed in the course of litigation with regulated entities." (E.R. 008, Order of 3/20/17 at 8; ECF #42.) That is wrong. An agency's interpretation of its own regulations is entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The published Ninth Circuit decision, M.*R. v. Dreyfus*, *697 F.3d 706*, 735 (9th Cir. 2012), makes this clear. In that decision, the Ninth Circuit relied on the DOJ's Statement of Interest in an ADA case (involving Title II) as entitled to deference and "respect" and compared the Statement of Interest "to an amicus brief because of its interest in ensuring a proper interpretation and application of the [ADA] mandate." 697 F.3d at 735. It added, "DOJ's interpretation is not only reasonable; it also better effectuates the purpose of the ADA 'to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.'" Id. (citing 42 U.S.C. §

12101(b)(2)).[9] Given the deference and respect required of the positions take by the DOJ in litigation with regulated entities and the fact that the DOJ has consistently required that commercial website owners and operators ensure that their websites conform to at least WCAG 2.0 Level AA Success Criteria, under appropriate circumstances, such as seeking to make a website accessible, it would not present an issue of due process for the District Court to require Dominos website to meet at least WCAG 2.0 Level AA Success Criteria. *See, e.g., National Fed. of the Blind, et al. v. HRB Digital LLC, et al.*, No. 1:13-cv-10799-GAO, Consent Decree [ECF #60 at pg. 5] (D. Mass. Mar. 24, 2014) ("By January 1, 2015, H&R Block shall ensure that www.hrblock.com . . . conform to, at minimum, the Web Content Accessibility Guidelines 2.0 Level A and AA Success Criteria ("WCAG 2.0 AA").") [RJN 4].[10]

Judge Walter in *Hobby Lobby Stores, Inc.*, Case No. 2:17-cv-01131-JFW-SK (June 15, 2017) (ECF #47) at p.4 fn 2 [RJN 12], in a similar web access case also stated, "Congress delegated authority to promulgate regulations to implement Title

[9] The District Court ignored the published Ninth Circuit decision in *Fortyune v. City of Lomita*, 766 F.3d 1098, 1102 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2888 (2015), whereby the Ninth Circuit held that "an agency's interpretation of its own regulations as advanced in an amicus brief is also entitled to deference." *Id.* at 1104. The only exception would be if such interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* (citation omitted). The District Court made no such finding.

[10] Courts also give DOJ's interpretation of its ADA implementing regulations "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

III to the DOJ. 42 U.S.C. § 12186(b). The DOJ also has authority to issue technical assistance for compliance with the ADA and to seek enforcement of its regulations in federal court. See 42 U.S.C. §§ 12186(b), 12188(b), 12206. ***Accordingly, the DOJ's interpretations of the ADA are entitled to substantial deference.***" (citing *Auer v. Robbins*, 519 U.S. 452, 463 (1997); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).) (emphasis added)

2. The DOJ's Many Statements of Interest And Consent Decrees Consistently Enforced and Endorsed Commercial Websites To Conform To At Least WCAG 2.0 Level AA Success Criteria

The DOJ has consistently stated that the general accessibility mandate of the ADA applies to websites, irrespective of whether rulemaking is still underway:

> On July 26, 2010, the Department issued an Advanced Notice of Proposed Rulemaking ("ANPRM") on Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations. The Department explained in the ANPRM that although the Department has been clear that the ADA applies to websites of public accommodations, inconsistent court decisions, differing standards for determining web accessibility, and repeated calls for Department action warranted further guidance.
>
> ***While the regulatory process may not have proceeded as quickly as Defendant expects, it is still very much ongoing. . . . The fact that []the regulatory process is not yet complete does not support any inference whatsoever that web-based services are not already covered by the ADA, or should not be covered by the ADA.***

(Statement of Interest of the United States, *National Association of the Deaf v. Netflix, Inc.*), at 11-12 (emphasis added). *See also New v. Lucky Brand Dungarees*

Stores, Inc., Statement of Interest of the United States, Case No. 14-CV-20574, at 7 (S.D. Fla.) (filed Apr. 10, 2014)("[T]he Department has long considered websites to be covered by title III despite the fact that there are no specific technical requirements for websites currently in the regulations or ADA standards[.]"); Consent Decree, *Nat'l Fed. of the Blind, et al., United States of America v. HRB Digital LLC and HRB Tax Group, Inc.*, No. 1:13-cv-10799-GAO, ¶ 3 (D. Mass) (entered Mar. 25, 2014). *See also* Statement of Interest of the United States, *Juan Carlos Gil v. Winn-Dixie Stores, Inc.*, Civil Action No. 16-23020 (S.D. Fla.) (ECF #23) at 5 ("[T]he goods and services of a public accommodation provided via website are covered by the ADA.") [RJN 13]

When the DOJ first intervened as a plaintiff in a lawsuit against H&R Block, the DOJ sought injunctive relief to make the website, mobile app, and online tax prep tool accessible to all persons with disabilities. H&R Block settled with a very detailed consent decree in which it agreed to make its website, mobile app, and online tax preparation tool accessible to individuals with disabilities, using WCAG version 2.0 Level AA. Consent Decree, HRB Digital LLC, No. 1:13-cv-10799-GAO (D. Mass. Mar. 25, 2014) (ECF #60) [RJN 4] (*available* at https://www.ada.gov/hrb-cd.htm)

In Dominos, the District Court's characterization of the H&R Block Consent Decree (E.R. 010, Order of 3/20/17 at 10; ECF #42.) is flawed and does not support

its conclusions. The District Court initially acknowledges that such consent decree requires conformance to "Level A and AA Success Criteria." That part is accurate. In the next paragraph, however, it claims that that same consent decree "obligated the defendants to instead comply with WCAG 2.0 Level AA **or** Level A Success Criteria." Id. (emphasis added) That is mistaken insofar as it is construing the consent decree to mean that defendant H&R Block in that consent decree can choose between Level A or Level AA for a particular guideline. This is implausible given the reality of how the WCAG 2.0 is actually written. If one reads the WCAG 2.0, each guideline is either Level A, Level AA, or Level AAA. Each level above the last encompasses all of the Success Criteria of the prior level:

> **Level A**: For Level A conformance (the minimum level of conformance), the Web page satisfies all the Level A Success Criteria, or a conforming alternate version is provided.
> **Level AA**: For Level AA conformance, the Web page satisfies all the Level A and Level AA Success Criteria, or a Level AA conforming alternate version is provided.
> **Level AAA**: For Level AAA conformance, the Web page satisfies all the Level A, Level AA and Level AAA Success Criteria, or a Level AAA conforming alternate version is provided."

"The first requirement deals with the levels of conformance. It basically says that all information on a page conforms or has a conforming alternate version that is available from the page. The requirement also explains that no conformance is possible without at least satisfying all of the Level A Success Criteria." *See* Web Guidelines 2.0 at 19-20. (RJN 14)

Insofar as the H&R Block Consent Decree required both Level A and Level AA, the redundancy to include both levels is to clarify that H&R Block is not to use a conforming "alternate version," but the Level AA Success Criteria that encompasses both Levels A and AA. The Dominos Order makes it seem as if H&R Block had a choice, when, in reality, there was no choice. The District Court's analysis therefore creates ambiguity where none exists.

An important effect of the H&R Block Consent Decree, and all others to promote civil rights, are their continuing enforceability. This begs the question: Did the DOJ act beyond its agency authority or "ultra vires" by entering into the H&R Block consent decree and requiring conformance to WCAG 2.0 AA? Specifically, if H&R Block violates the consent decree, then it could be hauled back to court, and would be required to enforce WCAG 2.0 AA. Taken to its logical conclusion, this necessarily means that the DOJ's H&R Block Consent Decree is an unlawful exercise of the DOJ's authority.

The DOJ has since secured commitments from public accommodations or state and local governments to make their websites and/or mobile apps accessible with an actual or threatened enforcement lawsuit, all of which adopted the WCAG 2.0 AA standard in the form of settlement agreements or consent decrees.[11]

[11] Settlement Agreement Between the *United States of America and edX Inc.*, DJ No. 202-36-255 (Apr. 2, 2015), https://www.ada.gov/edx_sa.htm; Settlement Agreement Between the *United States of America and Ahold U.S.A., Inc. and Peapod, LLC*, DJ

Thus, under the DOJ's explicit guidance, which is entitled to substantial deference and respect, it is clear that:

- Current regulations incorporate specific obligations for effective communication with disabled persons such as the visually impaired;
- The DOJ has consistently relied upon WCAG 2.0 Level AA Success Criteria as an appropriate measure to ensure that commercial websites are accessible to the visually impaired; and
- Until the process of establishing specific technical requirements is complete for certain topics, public accommodations must still comply with title III's more general requirements of nondiscrimination and effective communication.

If the DOJ has the legal authority to currently enforce the ADA against owners and operators of commercial websites to ensure that such websites are

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No. 202-63-169 (Nov. 17, 2014), https://www.ada.gov/peapod_sa.htm; Settlement Agreement Between the *United States of America and Carnival Corp.*, DJ No. 202-17M-206 (July 23, 2015), https://www.ada.gov/carnival/carnival_sa.html; Settlement Agreement Between the *United States of America and the National Museum of Crime and Punishment* (Jan. 13, 2015), https://www.ada.gov/crime_punishment_museum/crime_punishment_sa.htm; Settlement Agreement Between the *National Federation of the Blind & Law School Admission Council, Inc.* (Apr. 25, 2011), https://www.ada.gov/LSAC.htm; Settlement Agreement Between the *United States of America and Florida State Univ.*, DJ No. 205-17-13 (May 29, 2014), https://www.ada.gov/floridastate-t1-sa.htm; Joint Motion for Entry of Consent Decree by Intervenor Plaintiff United States of America, *Dudley v. Miami Univ.*, No. 1:14-cv-00038-SJD (S.D. Ohio Oct. 17, 2016) (ECF# 63), https://www.ada.gov/miami_university_cd.html.

accessible to visually-impaired persons as measured against the WCAG 2.0 Level AA Success Criteria, then there is no cogent reason why visually-impaired persons cannot enforce the ADA to address and remedy their own personal harm arising from barriers on commercial websites as measured against the WCAG 2.0 Level AA Success Criteria.[12]

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[12] *See e.g. Gorecki v. Hobby Lobby Stores, Inc.* 2017 WL 2957736 (Order Denying Motion to Dismiss on due process and primary jurisdiction grounds)(June 15, 2017); *Gil v. Winn-Dixie Stores, Inc., which is Gil v. Winn-Dixie Stores, Inc., -- F. Supp. --, No. 16-23020-Civ-Scola, 2017 WL 2547242, at *7-*9 (S.D. Fla. June 13, 2017)* (ECF #63) (Judgment for blind plaintiff in website accessibility case after two day bench trial ordering injunctive relief including compliance with WCAG 2.0 Criteria); *Andrews v. Blick Art Materials, LLC*, No. 17-CV-767, 2017 WL 3278898, at *17-18 (E.D.N.Y. Aug. 1, 2017) (rejecting due process challenge in Title III website case because the ADA's flexibility does not render it unconstitutionally ambiguous) *Nat'l Fed. of the Blind v. Target Corp.*, 45 F. Supp. 2d 952 (N.D. Cal. 2006) (denying, in part, motion to dismiss Title III website accessibility claims brought against large retailer); *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, 2017 WL 1437199 (W.D. Pa. Apr. 21, 2017) (denying separate motions to dismiss Title III website accessibility claims against a bank and a sports and gaming operator); *Natl. Assn. of the Deaf v. Harvard U.*, 2016 WL 3561622, at *13 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, 2016 WL 6540446 (D. Mass. Nov. 3, 2016) (recommendation that university's motion to dismiss Title III claims that its online content is inaccessible to deaf and hard of hearing individuals be denied); *Nat'l Ass'n of the Deaf v. Massachusetts Inst. of Tech., Case 3:15-cv-30024-MGM, 2016 WL 3561631 (D. Mass. Feb. 9, 2016) (Robertson, Mag. J.) (recommending the denial of a motion to dismiss or stay predicated on the primary jurisdiction doctrine), adopted in Nat'l Ass'n of the Deaf v. Massachusetts Inst. of Tech., Case 3:15-cv-30024-MGM, 2016 WL 6652471, at *1 (D. Mass. Nov. 4, 2016) (Mastroianni, J.)*; *Natl. Fedn. of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015) (denying a digital library operator's motion to dismiss); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (denying an Internet-based movie rental company's motion for judgment on the pleadings); *Sipe v. Huntington National Bank*, 15-CV

E. GIVEN THAT THE DISTRICT COURT APPLIED THE PRIMARY JURISDICTION DOCTRINE, THE DISTRICT COURT'S REFERENCES TO THE TELEPHONE SERVICE AFFIRMATIVE DEFENSE ARE DICTUM, AND DOMINOS LACKS ADMISSIBLE EVIDENCE TO PROVE EVEN MINIMALLY EFFECTIVE COMMUNICATION.

Although the District Court dismissed the action "without prejudice," the District Court's order addressed Defendant's affirmative defense via the existence of a purported telephone hotline for the visually impaired to call if they encountered problems with Defendant's website. (E.R. 009, Order of 3/20/17 at 9; ECF #42.)

The auxiliary aid provision of the ADA, 42 U.S.C. § 12182(a)(2)(A)(iii), which requires that a public accommodation provide an auxiliary aid to ensure disabled individuals are not excluded, denied services, segregated, or otherwise treated differently, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden, "allows a public accommodation to provide the information in any format, so long as it results in effective communication." *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 952, 956 (N.D. Cal. 2006). The ADA's auxiliary aid provision is an affirmative defense, which exempts public accommodations from

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1083 (W.D.Pa. Nov. 18, 2015) (denying motion to dismiss Title III website accessibility claims against a bank).

the obligation to provide auxiliary aids or services if doing so would fundamentally change the nature of the good or service, or result in an undue burden. In *Target*, the defendant, Target Corp., raised the telephone service issue via a motion to dismiss, which was denied. The district court in *Target* held:

> "The flexibility to provide reasonable accommodation is an affirmative defense and not an appropriate basis upon which to dismiss the action. After plaintiffs state a claim—by alleging that the website is not accessible to the blind—the burden then shifts to defendants to assert, as an affirmative defense, that they already provide the information on Target.com in another reasonable format (such as over the phone). . . . Defendant's challenge is premature and the court declines to dismiss the action on this basis."

Target, 452 F. Supp. 2d at 956.

In addition, a plaintiff's entitlement is to receive auxiliary aids and services that provide "effective communication" under 28 CFR §36.303(c)(1). That regulation expressly states that the auxiliary aids and services must be provided "in such a way as to protect the privacy and independence of the individual with a disability." 28 CFR § 36.303(c)(1)(ii).

As an initial matter, the District Court's Order failed to address whether or not Defendant had satisfied its burden of showing that requiring Defendant's website to be accessible would "fundamentally" alter the website service offered by Defendant. Similarly, the District Court's Order failed to address whether Defendant had satisfied its burden of showing that providing an accessible website would result in an "undue burden" for Defendant. Without such findings showing

that Defendant met ***its burden*** (Dominos offered no evidence for the court to even consider with respect to this burden), Defendant cannot prevail in invoking its affirmative defense under 42 U.S.C. § 12182(a)(2)(A)(iii).

Furthermore, surely both the "privacy" and the "independence" of the individual with a disability shall be compromised via the telephone service accommodation that Defendant relies upon. The District Court's Order made no findings as to either the "privacy" or the "independence" factors. Thus, the District Court's conclusion that "Plaintiff has failed to articulate why . . . Defendant's provision of a telephone hotline for the visually impaired" "does not fall within the range of permissible options afforded under the ADA," (E.R. 009, Order of 3/20/17 at 9; ECF #42.), fails to recognize the obvious deficiency in such alternative service in ensuring the independence of visually-impaired persons. In other words, while non-visually disabled persons are freely able to navigate through Defendant's website privately and independently, Defendant has relegated visually-impaired persons to be subjected to an alternative telephone service that forces such persons to be dependent on Defendant's representative for assistance.

The only evidence Dominos submitted in support of its motion (a single page declaration) is conclusory and does not provide any information to determine whether the telephone is even minimally effective to guarantee the "full and equal enjoyment" that an accessible website would deliver (E.R. 067-069). Nor did

Dominos offer any evidence to overcome its initial burden to show that remedying the Website would be undue burden that requires an alternative. The following excerpts of the Declaration of Mandi Galluch are instructive:

> "2. Defendant's website contains an accessibility banner that directs users who access the website with a screen reader with the statement 'If you are using a screen reader and are having problems using this website, please call 800-252-4031 for assistance.' Defendant provides customer support with a live customer service representative through that number twenty-four hours a day, seven days a week. If a blind or visually impaired individual calls that number, Defendant's representative can provide assistance with Defendant's website."

E.R. 068:12-18

> "6. Customers may also directly call their local Domino's Pizza restaurant to order food, purchase goods, and/or ask questions."

E.R. 069:1-2

Regardless, the fact that individuals with disabilities could somehow overcome barriers to access is not the relevant inquiry. *See Baughman v. Walt Disneyworld Company*, 685 F.3d 1131, 1134 (9th Cir. 2012)("Read as Disney suggests, the ADA would require very few accommodations indeed. After all, a paraplegic can enter a courthouse by dragging himself up the front steps . . . [a]nd no facility would be required to provide wheelchair-accessible doors or bathrooms, because disabled individuals could be carried in litters or on the backs of their friends…The ADA guarantees the disabled more than mere access to public facilities; it guarantees 'full and equal enjoyment.' 42 U.S.C. § 12182(a).")

(internal citation omitted). Dominos' provision of some manner to avoid the barriers to access on its website is not the relevant inquiry. The relevant question is whether those barriers can be removed in a manner that provides members of the disabled community with full access, equivalent to that enjoyed by persons without disabilities.

When faced with the same hastily added telephone number as part of Dave & Buster's motion for summary judgment (authored by the same counsel as Domino's motion here), District Judge Gutierrez refused to accept it as "effective communication" in the absence of a more fully developed record:

> "Gorecki, however, has raised a genuine dispute as to whether the mere existence of the phone line and a receptionist to answer it satisfies the ADA. For example, he notes that D&B 'does not allege this sentence is accessible to screen reader users.' Opp. 22:27–28. Given that the relevant DOJ notice requires an 'accessible alternative,' the Court agrees that the record as it stands is insufficient to address compliance, and so the Court disagrees with D&B that the mere appearance of the phone number on the Website renders Gorecki's claim moot."

See *D&B Order* at 7 [RJN 1].

Of critical importance here, and dispositive of the issue for Dominos, the Declaration of Mandi Galluch also fails to allege that the Domino's "accessibility banner" presented on the Website is accessible to screen reader users. This alone constitutes a triable issue of material fact and precludes summary judgment for Dominos.

In any event, a telephone line is an inadequate substitute for the website as a means of effective communication, particularly given the readily achievable alternative of accessible digital content. Regressing to the telephone line is tantamount to telling Mr. Robles to call and ask for sighted assistance, something that this court has condemned as perpetuating the damaging and undermining stereotype of the helpless disabled person, *Byron Chapman v. Pier 1 Imports* and *Baughman v. Walt Disneyworld* cases:

> '"DOJ commentaries — and the ADA itself — refer to an obligation that defendant bears,' the court observed, and the ADA was intended 'to eliminate the stereotype of the helpless disabled person completely reliant on the assistance of able-bodied persons to come to their rescue.' Therefore, the court ruled, accessible facilities 'must be maintained in a condition that allows a disabled person to actually use them.'"

Chapman v. Pier 1 Imports, No. 2:04-cv-01339 (9th Cir. 2015) at *8.

Dominos cannot escape liability by covertly slipping a statement and phone number into its website several months after Mr. Robles initiated his action about Dominos' inaccessible website and days before filing its motion (E.R. 157).

VIII. CONCLUSION

In sum, the District Court erred in granting Dominos' motion to dismiss and by dismissing all causes of action pursuant to the primary jurisdiction doctrine. Therefore, Mr. Robles respectfully requests that this Court reverse the District Court's ruling and hold that: (1) The invocation of the primary jurisdiction doctrine is not appropriate because Robles asks the Court only to require Dominos to make

Dominos.com and the Dominos Mobile App readily accessible to and usable by blind and visually impaired individuals and that the Website and Mobile App comply with the ADA -- issues requiring no specialized expertise and which arise *only* after liability is adjudicated; 2) That the District Court must respect and defer to statements made by the DOJ through documents filed in the course of litigation with regulated entities and otherwise; and 3) Causes of action 2 and 4 directed at the Domino's Mobile App must be allowed to proceed as they were not addressed anywhere in the Motion and as a consequence they were never properly at issue.

Dated: October 19, 2017

Respectfully Submitted

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ATTORNEYS FOR APPELLANT

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, undersigned counsel declares that there are no known related cases pending in this Court

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Opening Brief of Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 12,934 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: October 19, 2017

Respectfully Submitted

MANNING LAW, APC

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing OPENING BRIEF FOR PLAINTIFF-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 19, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 19, 2017

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