

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Yovanny Dominguez, and on behalf of all  
other persons similarly situated,

Plaintiffs,

-against-

Foot Locker, Inc.,

Defendant.

**USDC SDNY**  
**DOCUMENT**  
**ELECTRONICALLY FILED**  
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1:19-cv-10628 (PGG) (SDA)

REPORT AND RECOMMENDATION

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.

TO THE HONORABLE PAUL G. GARDEPHE, UNITED STATES DISTRICT JUDGE:

Pending before the Court is a motion by Defendant Foot Locker, Inc.,<sup>1</sup> pursuant to Fed. R. Civ. P. 12(b)(1), to dismiss the First Amended Complaint (“FAC”) of Plaintiff Yovanny Dominguez (“Plaintiff” or “Dominguez”) for lack of subject matter jurisdiction, or, in the alternative, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the FAC for failure to state a claim. For the reasons set forth below, I respectfully recommend that Defendant’s motion to dismiss for lack of subject matter jurisdiction be GRANTED, and that Defendant’s alternative motion to dismiss for failure to state a claim be GRANTED, and that the FAC be dismissed without prejudice, and with leave to replead.

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<sup>1</sup> The Notice of Motion states that the correct defendant is named Foot Locker Card Services LLC, but is improperly pled as Foot Locker, Inc. (Not. of Mot., ECF No. 25.) In this Report and Recommendation, the defendant shall be referred to as “Defendant” or “Foot Locker.”

**RELEVANT FACTS**<sup>2</sup>

Dominguez is a Bronx resident who is a visually-impaired and legally blind person who requires Braille, which is a tactile writing system, to read written material. (FAC, ECF No. 21, ¶¶ 2, 24.) Foot Locker owns, operates and/or controls multiple retail stores in the City and State of New York. (*Id.* ¶ 26.) Several of these stores are located in close proximity to Plaintiffs residence. (*Id.* ¶¶ 25-27.)

On October 26, 2019, Dominguez telephoned Foot Locker’s customer service office in an attempt to purchase a store gift card and inquired if Foot Locker sold store gift cards containing Braille. (FAC ¶ 16.) He was informed that Foot Locker does not sell store gift cards containing Braille. (*Id.*) During the call, Foot Locker’s employee did not offer any alternative auxiliary aids or services to Dominguez with respect to its gift cards. (*Id.* ¶ 17.)

Dominguez alleges that Foot Locker’s failure to sell Braille gift cards violates Title III of the Americans with Disabilities Act (“ADA”), the New York State Human Rights Law (“NYSHRL”) and the New York City Human Rights Law (“NYCHRL”). (FAC ¶¶ 68-103.) Without an effective auxiliary aid for the physical Foot Locker gift cards,<sup>3</sup> Dominguez alleges that he cannot independently access the information contained thereon in order use the card like a sighted person. (*Id.* ¶ 5.) If

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<sup>2</sup> For purposes of this motion to dismiss, the Court assumes that the well-pleaded allegations of the FAC are true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (when “well-pleaded factual allegations” are present, “a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

<sup>3</sup> Dominguez did not include a copy of a Foot Locker gift card as an exhibit to the FAC, but did include one as an exhibit to his Opposition Memorandum. (*See* Opp. Mem. Ex. A, ECF No. 29-1.) The gift card on the reverse side states that it “may be applied towards any purchase at any Foot Locker, Kids Foot Locker or Lady Foot Locker store in the U.S. or online at [footlocker.com](http://footlocker.com), [kidsfootlocker.com](http://kidsfootlocker.com) or [ladyfootlocker.com](http://ladyfootlocker.com).” (*See* Opp. Mem. Ex. A at 2.) The reverse side also states that it “may not be exchanged for cash except where legally required.” (*See id.*)

Foot Locker's gift cards were equally accessible to blind and visually-impaired customers like Dominguez, they could independently purchase the store gift cards, distinguish them from other cards, ascertain the terms and conditions, the unique identification number, and remaining balance on the gift card as sighted individuals do. (*See id.* ¶ 46.)

Dominguez alleges that, because the gifts cards are not accessible to him, he cannot fully and equally use or enjoy the facilities, goods and services that Foot Locker offers to the public at its retail stores. (FAC ¶ 42.) He further alleges that he has been a customer at Foot Locker stores on prior occasions and intends to immediately purchase at least one store gift card from Foot Locker as soon as it sells cards that are accessible to the blind and to utilize it at a Foot Locker retail store. (*See id.* ¶¶ 21, 45.)

Dominguez, on behalf of himself and others similarly situated, "seeks a permanent injunction requiring Defendant to design, implement, distribute and sell store gift cards integrated with the Defendant's retail stores that are accessible to blind and vision-impaired individuals that may include Braille writing that identifies the name of the merchant and the denomination of the gift card (if the gift card has a specified denomination) and additionally convey other pertinent and statutorily required information contained on all of Defendant's store gift cards such as terms of use, expiration dates, fees, a toll-free telephone number, ability to ascertain gift card balance, etc." (FAC ¶ 55.)

#### **PROCEDURAL HISTORY**

Dominguez commenced this action on November 15, 2019 by filing a Complaint against Foot Locker alleging violations of the ADA, NYSHRL and NYCHRL based upon its failure to sell store gift cards to consumers that contain writing in Braille. (*See Compl.*, ECF No. 1, ¶¶ 4, 49-84.) On

March 2, 2020, Foot Locker filed a Letter Motion requesting a pre-motion conference to seek leave to file a motion to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6). (3/2/20 Letter Mot., ECF No. 16.) On March 3, 2020, Judge Gardephe entered an Order setting a schedule for Foot Locker's motion to dismiss. (3/3/20 Order, ECF No. 19.) On April 13, 2020, prior to the time that the motion to dismiss was filed, Dominguez filed his First Amended Complaint. (See FAC.)

On May 4, 2020, pursuant to Judge Gardephe's "Bundling Rule," the parties filed their legal memoranda in support of and in opposition to Foot Locker's motion to dismiss Plaintiff's FAC that is now pending before the Court.<sup>4</sup> (5/4/20 Notice of Mot., ECF No. 25.) On May 8, 2020, the motion to dismiss was referred to me for a report and recommendation. (Am. Order of Ref., ECF No. 32.)

## DISCUSSION

### **I. Legal Standards**

#### **A. Rule 12(b)(1) Standard**

A claim may be "properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). To decide a Rule 12(b)(1) motion to dismiss, "the district court must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014). However, "jurisdiction must be

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<sup>4</sup> Foot Locker filed a memorandum of law (Def. Mem., ECF No. 26) and a reply memorandum of law. (Reply, No. 27.) Dominguez filed an opposition memorandum. (Opp. Mem., ECF No. 29.)

shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.” *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (quoting *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003)). “In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) a district court may consider evidence outside the pleadings.” *Id.*

“To satisfy constitutional standing requirements, a plaintiff must prove: (1) injury in fact, which must be (a) concrete and particularized, and (b) actual or imminent; (2) a causal connection between the injury and the defendant’s conduct; and (3) that the injury is likely to be redressed by a favorable decision.” *Kreiser v. Second Ave. Diner Corp.*, 731 F.3d 184, 187 (2d Cir. 2013). “Plaintiffs seeking injunctive relief must also prove that the identified injury in fact presents a ‘real and immediate threat of repeated injury.’” *Id.* A plaintiff has standing in an ADA suit seeking injunctive relief “where (1) the plaintiff alleged past injury under the ADA; (2) it was reasonable to infer that the discriminatory treatment would continue; and (3) it was reasonable to infer, based on the past frequency of plaintiff’s visits and the proximity of defendants’ [services] to plaintiff’s home, that plaintiff intended to return to the subject location.” *Id.* at 187-88.

**B. Rule 12(b)(6) Standard**

To survive a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability

requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* The Court “must accept as true all of the [factual] allegations contained in a complaint[,]” but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citation omitted).

Further, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Id.*; see also *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013) (“we are not required to credit conclusory allegations or legal conclusions couched as factual allegations.”) (citing *Twombly*, 550 U.S. at 555, 557).

“To state a claim under Title III, [a plaintiff] must allege (1) that she is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against her by denying her a full and equal opportunity to enjoy the services defendants provide.” *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).

## **II. The FAC Should Be Dismissed For Lack Of Subject Matter Jurisdiction**

The Court carefully has reviewed the Memorandum Opinion and Order issued by District Judge Woods in a similar gift card case that Dominguez and his same legal counsel (Bradly Marks) filed in this Court against Banana Republic, LLC (“Banana Republic”), *Dominguez v. Banana Republic, LLC*, No. 19-CV-10171 (GHW), 2020 WL 1950496 (S.D.N.Y. Apr. 23, 2020), in which Judge Woods granted Banana Republic’s motion to dismiss on the grounds of the lack of subject matter jurisdiction (and failure to state a claim). The allegations contained in the First Amended Complaint in *Banana Republic* are nearly identical to the allegations contained in the FAC in this case. (*Compare* 19-CV-10171 ECF No. 22 *with* FAC.) Indeed, the Court ran a redline comparison

of the First Amended Complaint in the *Banana Republic* case and this case, and it appears that Plaintiff's counsel merely replaced Banana Republic's name with Foot Locker's name and the remaining allegations are identical.

The Court finds Judge Woods' Opinion as to the lack of subject matter jurisdiction to be thorough and persuasive. As Judge Wood held in *Banana Republic*, after considering the three elements of standing set forth by the Second Circuit in *Kreisler*, 731 F.3d at 187-88:

Plaintiff has simply not alleged enough facts to plausibly plead that he intends to "return" to the place where he encountered the professed discrimination. Put differently, there are not enough facts in Plaintiff's complaint to plausibly suggest that he will be injured by [Foot Locker]'s failure to sell Braille gift cards in future. Plaintiff does not profess an interest in procuring [footwear], nor does he assert that he owns several [Foot Locker] pieces already and wishes to continue compiling a collection with the help of a [Foot Locker] gift card. Instead, Plaintiff only vaguely notes that he had "been a customer at Defendant's stores on prior occasions" and that several [Foot Locker] "stores are located in the Southern District of New York, and in close proximity to Plaintiffs residence." FAC ¶¶ 21, 27. These generic, conclusory statements are plainly insufficient—Dominguez must provide the Court with some specific facts demonstrating that it is likely he will be injured by [Foot Locker] in [the] future.

*Banana Republic, LLC*, 2020 WL 1950496, at \*4. Thus, based upon Judge Woods' Opinion in *Banana Republic*, the Court recommends that Plaintiff's ADA claims be dismissed for lack of standing.

Similarly, the Court adopts Judge Woods' Opinion and recommends that the NYSHRL and NYCHRL claims also be dismissed for lack of standing since those claims are governed by the same standing requirements as the ADA. *See Banana Republic, LLC*, 2020 WL 1950496, at \*5. Alternatively, if Plaintiff's ADA claims are dismissed, the Court recommends that supplemental jurisdiction not be exercised over the NYSHRL and NYCHRL claims. *See id.*

**III. Defendant's Rule 12(b)(6) Motion Should Be Granted**

The Court also finds Judge Woods' Opinion with respect to Defendant's Rule 12(b)(6) motion to be thorough and persuasive. As Judge Woods held in *Banana Republic*:

There is simply no legal support for Plaintiff's assertion that Title III requires [Foot Locker] to create Brailled gift cards for the visually impaired. In fact, the plain text of the ADA and the Department of Justice's implementing regulations make clear the exact opposite: a retailer need not alter the mix of goods that it sells to include accessible goods for the disabled.

*Banana Republic, LLC*, 2020 WL 1950496, at \*7. The Court further agrees with Judge Woods that gift cards are not places of public accommodation and that the ADA does not apply. *See id.* In addition, Plaintiff has not adequately alleged that he was "denied access to an auxiliary aid or service, much less one that effectively communicated information about [Foot Locker]'s gift cards." *See id.* at \*11.

As stated above, the Court recommends that, if Plaintiff's ADA claims are dismissed, supplemental jurisdiction not be exercised over the NYSHRL and NYCHRL claims. Accordingly, the Court recommends that Defendant's alternative motion to dismiss the FAC be granted, even if subject matter jurisdiction were found to exist.

**CONCLUSION**

For the foregoing reasons, the Court recommends that Defendant's motion to dismiss for lack of subject matter jurisdiction be GRANTED. The Court also recommends that Defendant's alternative motion to dismiss the FAC be GRANTED. Finally, the Court recommends that Plaintiff be given leave to file a second amended complaint to cure the deficiencies articulated in this Report and Recommendation, and the Opinion of Judge Woods in *Banana Republic*, by alleging additional facts about the interactions he has had with Foot Locker.

DATED: New York, New York  
May 12, 2020



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**STEWART D. AARON**  
**United States Magistrate Judge**

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**NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION**

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Gardephe.

**THE FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.** *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).