

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

OmahaSteaks.com, Inc., Plaintiff, v. Access Now, Inc., Defendant	Case No. 17-cv-60 Complaint for Declaratory Judgment
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COMES NOW, OmahaSteaks.com, Inc., pursuant to 28 U.S.C. § 2201, and for its Complaint for Declaratory Judgment, states and alleges as follows:

PARTIES

1. Plaintiff, OmahaSteaks.com, Inc. (“Omaha Steaks”), is a Delaware corporation, with its principal place of business in Omaha, Douglas County, Nebraska.
2. Defendant, Access Now, Inc., is a Florida non-profit corporation, with its principal place of business in Miami Beach, Florida.
3. Defendant R. David New is a resident of the State of Florida.
4. Defendant Erica Walz is a resident of the State of Missouri.

JURISDICTION & VENUE

5. This Court has federal question jurisdiction over the subject matter of this action, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000a-3.
6. Venue is proper in this District under 28 U.S.C. § 1391(b)(2), as this lawsuit arises in relation to a website operated by Omaha Steaks out of its principal place of business in Omaha, Nebraska, as a result of which the events giving rise to the claim occurred in Omaha, Nebraska.

FACTUAL BACKGROUND

7. Omaha Steaks owns and operates the website www.omahasteaks.com, among others.

8. On or about January 4, 2017, Defendants, by and through their legal counsel, sent a demand letter to Omaha Steaks, claiming that www.omahasteaks.com “has substantial access barriers” making it “difficult or impossible for our clients and similarly situated stakeholders to access the site’s privacy-related information and legal terms and conditions, and to exercise privacy and legal choices available to person who enjoy full access to the website.”

9. These access barriers, Defendants claimed, violated the Americans with Disabilities Act (the “ADA”), and more specifically, Version 2.0 of the Web Content Accessibility Guidelines (“WCAG 2.0” or the “Guidelines”).

10. The Guidelines were published by the World Wide Web Consortium (“W3C”), the international website standards organization.

11. The demand letter purported to:

- a. Note the accessibility failures of www.omahasteaks.com;
- b. Note the “privacy and legal consequences of those failures;” and
- c. Propose a plan to “work constructively” with Omaha Steaks in lieu of “*immediately*” filing a lawsuit. (Emphasis added).

12. Counsel for Defendants next provided a list of 18 lawsuits they previously filed in which they sought “permanent injunctive relief for pervasive accessibility and privacy failures . . . involving digital access.”

13. According to the proposed “Confidential Settlement Agreement” attached to the demand letter, Defendants’ threat to file a lawsuit could be avoided, and Plaintiff’s claims released, in exchange for “payment of certain attorneys’ fees and expenses.”

14. Additionally, the proposed “Confidential Settlement Agreement” provided that Defendants’ law firm would represent Omaha Steaks for the next two (2) years to, *inter alia*, “assist and cooperate in the prevention of the Additional Potential Website Claims” against Omaha Steaks.

15. Only three short paragraphs of the proposed “Confidential Settlement Agreement” require Omaha Steaks to improve the accessibility of its website, *i.e.*, to cause its website to satisfy the Guidelines to the “greatest extent reasonably possible.”

16. Notably, the proposed “Confidential Settlement Agreement” did not mention entry of an injunction, which is the primary relief available under 42 U.S.C. § 2000a-3.

17. Finally, the proposed “Confidential Settlement Agreement” included the following provision:

DOJ. If the United States Department of Justice promulgates a final ADA Title III regulation setting out a website accessibility technical standard applicable to DEFENDANT’S WEBSITE during the term of this Agreement, DEFENDANT WILL take reasonable and necessary efforts to ensure legal compliance with such standards within the time frames set forth in the regulations.

OMAHA STEAKS’ PRIOR UNDERTAKING TO COMPLY WITH GUIDELINES

18. On or about June, 2016, and long before receiving the Defendants’ demand letter, Omaha Steaks became aware the Guidelines, and of the troll-like lawsuits being filed by Defendants’ law firm(s) and others relating to the alleged ADA violations.

19. Upon further investigation, Omaha Steaks began preparations to engage a specialized company to assist in making sure that its website is compliant under the Guidelines.

20. Omaha Steaks engaged that specialized company, and efforts to meet the Guidelines continue to be underway.

STATUS OF GUIDELINES

21. The Department of Justice released an advance notice of proposed rulemaking (ANPRM) in July 2010, indicating that it was considering amending its ADA regulations to address website accessibility. The agency expressly stated in its ANPRM that the ADA's broad nondiscrimination mandate reaches goods and services provided by covered entities on websites.

22. Despite no enactment of specific regulations, the Department of Justice (DOJ) has brought enforcement actions and investigations to cause various entities to make their websites accessible in accordance with the Guidelines.

23. Notwithstanding its enforcement efforts, the DOJ announced November 19, 2015 that it will put off until 2018 the release of proposed website accessibility regulations for businesses (20 ECLR, 12/9/15).

24. On January 9, 2017, the U.S. Architectural and Transportation Barriers Compliance Board (the "Access Board") announced a final rule requiring the websites and electronic content of federal agencies to conform to WCAG 2.0 AA within one year of the date the rule is published in the Federal Register.¹

25. Omaha Steaks acknowledges that even in the absence of federal regulations, the Guidelines are recognized as setting the baseline requirements for website accessibility.

26. However, Omaha Steaks asserts that its ongoing efforts at compliance are sufficient under the Guidelines, and that it should not held to a higher standard or earlier deadline than federal agencies must meet.

¹ The Rule was published in the Federal Register on January 18, 2017. <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule>. (last visited February 27, 2017).

27. Certainly, Omaha Steaks should not be subject to litigation purportedly aimed at a goal (compliance with Guidelines), that Omaha Steaks is already aiming to achieve.

28. Therefore, an actual and justiciable controversy now exists between Omaha Steaks and Defendants as to the applicability and requirements of the ADA, for which the declaration of this Court adjudicating the respective rights of the parties is sought.

**FIRST CLAIM FOR RELIEF – DECLARATORY JUDGMENT
(Legal Standard)**

29. The foregoing paragraphs are hereby restated and incorporated by reference, as though fully set forth herein.

30. Omaha Steaks seeks the declaration of this Court as to what legal standard governs its obligations to comply with the ADA.

31. Omaha Steaks further seeks the declaration of this Court as to whether it can be held liable for having failed to timely comply with that standard, in the absence of any federal regulation dictating an applicable deadline, particularly in light of the Federal Government's self-imposed future deadline of January 18, 2018.²

**SECOND CLAIM FOR RELIEF – DECLARATORY JUDGMENT
(Mootness)**

32. The foregoing paragraphs are hereby restated and incorporated by reference, as though fully set forth herein.

33. Omaha Steaks seeks the declaration of this Court as to whether Defendants' threatened lawsuit is rendered moot, either under the doctrine of Article III mootness or prudential mootness, in light of Omaha Steaks' prior and ongoing efforts to comply with the Guidelines.

THIRD CLAIM FOR RELIEF – DECLARATORY JUDGMENT

² See n.1.

(Ripeness)

34. The foregoing paragraphs are hereby restated and incorporated by reference, as though fully set forth herein.

35. Omaha Steaks seeks the declaration of this Court as to whether Defendants' threatened lawsuit is ripe, in the absence any federal regulation dictating an applicable deadline, particularly in light of the Federal Government's self-imposed future deadline of January 18, 2018.³

REQUEST FOR RELIEF

Based on the foregoing, Omaha Steaks respectfully request that this Court enter its Order:

- A. Declaring the legal standard that governs Omaha Steaks' obligations to comply with the ADA;
- B. Declaring whether the Defendants' threatened lawsuit is moot;
- C. Declaring whether the Defendants' threatened lawsuit is ripe;
- D. Awarding Omaha Steaks' attorneys' fees and costs incurred in bringing this action; and
- E. Directing such other, further, and different relief as this Court deems just and equitable.

Dated February 27, 2017

/s/ Nora M. Kane

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³ See n.1.

