UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-1138 PSG (AGRx)	Date	October 10, 2017
Title	Gorecki v. Dave & Buster's, Inc.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **Order DENYING Defendant's motion for summary judgment or, in the alternative, dismissal or stay**

Before the Court is Defendant Dave & Buster's, Inc.'s motion for summary judgment or, in the alternative, dismissal or stay. *See* Dkt. # 28 ("*Mot.*"). Plaintiff Sean Gorecki opposes the motion, *see* Dkt. # 34 ("*Opp.*"), and Defendant timely replied, *see* Dkt. # 35 ("*Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving papers, the Court DENIES Defendant's motion.

I. Background

This case stems from allegations made by Plaintiff Sean Gorecki ("Gorecki" or "Plaintiff") that Defendant Dave & Buster's, Inc. ("D&B" or "Defendant") has failed to operate its website in compliance with the Americans with Disabilities Act of 1990 ("ADA").

Gorecki is permanently blind and relies on the Job Access With Speech ("JAWS") screen-reading software program to access the internet and read website content on his computer. *Plaintiff's Statement of Genuine Issues of Material Fact*, Dkt. # 30, ¶¶ 4–5 ("*PSGI*"); *Declaration of Sean Gorecki*, Dkt. # 32, ¶¶ 2–3 ("*Gorecki Decl.*"). As a result, he cannot fully and independently access websites that are not designed to be compatible with screen-reading software. *PSGI* ¶ 6; *Gorecki Decl.* ¶ 3.

Since 2016, Gorecki has attempted to independently access and do business on D&B's website, www.DaveandBusters.com ("the Website"). *PSGI* ¶ 7; *Gorecki Decl.* ¶ 5. On one occasion in December 2016, Gorecki attempted to access the Website using his JAWS program to learn about booking an event, find a restaurant location, purchase a gift card, and otherwise explore D&B's offerings. *PSGI* ¶ 8; *Gorecki Decl.* ¶ 5. He discovered, however, that the Website's homepage, slide show, directions function, menu PDFs, and other features were inaccessible due to lack of alternative text, mislabeled or unlabeled graphics, inaccessible PDFs,

and other barriers. *PSGI* ¶¶ 9–14; *Gorecki Decl.* ¶¶ 6–11. Gorecki asserts that he wishes to independently access the Website "to preserve the privacy of [his] interactions with" D&B, and that his inability to do so caused "difficulty, discomfort, embarrassment, distress, discouragement, and frustration." *PSGI* ¶¶ 18, 21; *Gorecki Decl.* ¶¶ 14, 16.

D&B, for its part, claims that the Website contains an "accessibility banner" that directs screen-reader users with the following statement: "If You Are Using A Screen Reader And Are Having Problems Using This Website, Please Call (888) 300-1515 For Assistance." *Defendant's Statement of Uncontroverted Facts*, Dkt. # 21-2, ¶ 1 ("*DSUF*"); *Declaration of Kerri Walters*, Dkt. # 21-3, ¶¶ 2–3, Ex. 1 ("*Walters Decl.*"). That phone number is staffed by a receptionist who can provide assistance. *DSUF* ¶ 2; *Walters Decl.* ¶ 4. D&B further observes that blind or visually impaired customers may also call their local D&B restaurants for more information. *DSUF* ¶ 3; *Walter Decl.* ¶ 4.

Gorecki, although acknowledging that the accessibility banner appeared on the Website as of June 12, 2017, disputes its existence on or prior to June 3, 2017. *PSGI* ¶¶ 1, 16–17; *Declaration of Joseph Manning*, Dkt. # 33, ¶ 4, Ex. A ("*Manning Decl.*"); *Gorecki Decl.* ¶ 13.

Gorecki first filed his complaint against D&B in this Court on February 13, 2017, *see* Dkt. # 1, and subsequently filed a first amended complaint on July 10, *see* Dkt. # 26 ("*FAC*"). In his amended complaint, Gorecki asserts two causes of action: violations of Title III of the ADA, *see id.* ¶¶ 37–44, and violation of California's Unruh Civil Rights Act ("UCRA"), *see id.* ¶¶ 45–52. He seeks a declaratory judgment that, at the time the action commenced, D&B was in violation of Title III of the ADA due to its allegedly noncompliant website; injunctive relief to prevent further ADA violations and to require D&B to make the Website accessible to visually impaired individuals; statutory damages under California Civil Code § 52(a); and attorneys' fees, costs, and prejudgment interest. *See generally id.*

D&B in turn filed this motion on August 28. It argues that Gorecki's lawsuit violates its due process rights and should be dismissed under the primary jurisdiction doctrine; that the Website is, in fact, compliant with the ADA; and that Gorecki's UCRA claim fails because he did not adequately allege intentional discrimination. *See generally Mot.*

II. Legal Standard

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the nonmoving party will have the burden of proof at trial, the movant can prevail by pointing out that there is an absence of evidence to support the moving party's case. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See T.W. Electric Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

III. Discussion

D&B's motion contains four general arguments: that Gorecki's suit violates D&B's due process rights; that the suit should be dismissed under the primary jurisdiction doctrine; that the Website is in fact compliant with the ADA; and that Gorecki has failed to adequately plead his UCRA claim. Each argument will be considered in turn.

A. Due Process

D&B first argues that Gorecki's suit violates its due process rights. *See Mot.* 5:10–11:4. "Due process requires that the government provide citizens and other actors with sufficient notice as to what behavior complies with the law." *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) ("[A]gencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires.") (internal quotation marks omitted). With these guiding principles in mind, D&B argues that "[t]his lawsuit . . . is a classic example of overreach that is fundamentally unfair and violates important due process principles." *Mot.* 7:3–4. It explains that Gorecki's case is premised on D&B's alleged noncompliance with the ADA. However, it notes—correctly—that the Department of Justice ("DOJ"), which is responsible for promulgating regulations under the ADA, has "failed to issue standards or provide any guidance for what constitutes an 'accessible' website." *Id.* 7:6–7. Without such regulations to guide it,

D&B asserts that it would be "forced to guess at what [] accessibility features might be required"—a requirement that, D&B concludes, violates its due process rights because it would be left without sufficient advance notice as to how to comply with the ADA. *Id.* 7:7–9; *see also id.* 7:25–26 ("As there are no official standards for what constitutes an 'accessible' website, there are no specific and demonstrable standards Defendant can meet.").

In the words of another opinion from this District that dealt with a very similar ADA action, D&B "puts the cart before the horse." *Reed v. CVS Pharmacy, Inc.*, CV 17-3877 MWF (SKx), Dkt. # 27, at 7 ("*CVS Order*"). Nowhere in his amended complaint does Gorecki prescribe any set of specific requirements that he seeks to impose on D&B, or allege that D&B failed to satisfy any extra-governmental or nonofficial set of guidelines.[1] Instead, he only alleges that he attempted to access the Website but was unable to do so, which he claims is in violation of Title III. At one point, Gorecki does reference "readily available, well established guidelines, available to Defendant on the Internet," that can be used to make the Website accessible to the visually impaired. *FAC* ¶ 30. However, Gorecki merely uses these as a reference, and does not seek to implement any of these "established guidelines" as part of his prayer for relief. The Court agrees with the decision in *CVS Pharmacy* that "whether or not [D&B's] digital offerings must comply with [any set of noncompulsory guidelines] is a question of *remedy*, not liability." *CVS Order* at 7 (emphasis in original). As such, Gorecki's action should not be dismissed on this basis.

The cases relied upon by D&B for its due process argument are inapposite in this context. It expends much ink discussing the Ninth Circuit's *AMC Entertainment* decision, in which the court "was confronted with the question of whether the ADA required theater owners to retroactively incorporate a comparable viewing angle requirement in movie theaters." *Mot.* 6:3–5. The court decided the issue on due process grounds, noting that AMC was not put on notice of potential regulatory obligations until the filing of a particular amicus brief by the DOJ. *AMC Entm't*, 549 F.3d at 770. As Gorecki notes here, however, D&B "had notice of the ADA's basic mandate that commercial websites must be accessible to the disabled, since as early as 1996." *Opp.* 9:7–9. Indeed it did. "[T]he DOJ has made it abundantly clear that websites fall under [ADA] Title III's requirements." *CVS Order* at 7–8; *see also, e.g.*, *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131-JFW(SKx), 2017 WL 2957736, at *6 (C.D. Cal. June 15, 2017) (collecting examples and concluding that "the DOJ has consistently maintained that the

[1] D&B argues that Gorecki filed his amended complaint in an effort to "plead around" recent adverse decisions, since his original complaint did in fact reference a specific set of extra-governmental guidelines that D&B should follow. *Mot.* 2:11–16. Whether this is true or not, however, the Court will not consider any content that may have appeared in the original complaint. The Court granted Gorecki leave to file a first amended complaint, *see* Dkt. # 25, and that amended complaint is the only pleading that will be considered now.

ADA applies to private websites that meet the definition of a public accommodation"); Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460-01, 43464 (July 26, 2010); *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) ("[T]he accessibility requirements of the [ADA] already apply to private Internet Web sites and services."). In short, this is not a case where a defendant was blindsided by hitherto unascertainable regulations. Instead, D&B has had years' worth of sufficient notice that its website was required to conform to Title III of the ADA—which is all that Gorecki alleges in his amended complaint.

D&B also relies heavily on another recent decision from this district, *Robles v. Dominos Pizza LLC*, No. CV 16-06599 SJO (SPx), 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017). *See Mot.* 1:14–20, 3:5–5:8. There, on a motion very similar to D&B's, the court noted that the plaintiff sought "to impose on all regulated persons and entities a requirement that they compl[y] with [extra-governmental guidelines] without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic." *Dominos Pizza*, 2017 WL 1330216, at *5 (internal quotation marks omitted). The court was motivated by the plaintiff's attempt to impose a non-DOJ set of guidelines on the defendant, noting that "the Court, after conducting a diligent search, has been unable to locate a single case in which a court has suggested, much less held, that persons and entities subject to Title III that have chosen to offer online access to their goods or services must do so in a manner that satisfies" those particular guidelines. *Id.* at *8. The court ultimately dismissed the plaintiff's causes of action. *Id.*

Again, that case is distinguishable from this one. Gorecki has not attempted to impose any particular set of guidelines, but only challenges D&B's compliance with Title III of the ADA—which, as discussed above, D&B was under notice that it was obligated to do. For that reason, the due process concerns that motivated the court in *Dominos Pizza*—to wit, the imposition of extra-governmental standards as part of a plaintiff's requested relief—are not present here.[2]

[2] This case is also distinguishable from another relied upon by D&B for the same reason. In *Robles v. Pizza Hut*, the plaintiff, unlike Gorecki, directly invoked version 2.0 AA of the Web Content Accessibility Guidelines ("WCAG 2.0 AA") and sought "a permanent injunction requiring Defendant to retain a qualified consultant acceptable to Plaintiff . . . to assist Defendant['s compliance] with WCAG 2.0 AA." *Robles v. Pizza Hut, Inc.*, CV 16-8211 ODW (SSx), Dkt. # 1, ¶¶ 23, 41. Here, again, Gorecki does not seek to enforce WCAG 2.0 AA or any other extra-governmental guidelines.

Gorecki's amended complaint does no more than challenge D&B's compliance with governmental regulations for which it has long been responsible. Although the eventual *remedy* in this case might raise the specter of due process concerns, *liability* does not. Therefore, the Court concludes that D&B had sufficient notice of the requirements as articulated in Gorecki's amended complaint to satisfy the requirements of due process.

B. Primary Jurisdiction Doctrine

Primary jurisdiction is a prudential doctrine that permits courts to determine "that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015) (quoting *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008)). However, the Ninth Circuit has emphasized that "not every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction." *Astiana*, 783 F.3d at 760. Rather, the doctrine is reserved for a "limited set of circumstances" that "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Clark*, 523 F.3d at 1114. Moreover, "courts must also consider whether invoking primary jurisdiction would needlessly delay the resolution of claims." *Reid v. Johnson & Johnson*, 780 F.3d 952, 967–68 (9th Cir. 2015); *United States v. Philip Morris USA Inc.*, 686 F.3d 832, 838 (D.C. Cir. 2012) ("The primary jurisdiction doctrine is rooted in part in judicial efficiency."); *Astiana*, 783 F.3d at 760 ("Under our precedent, 'efficiency' is the 'deciding factor' in whether to invoke primary jurisdiction.") (citing *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007)).

The Court concludes that invocation of the doctrine is not appropriate in this case. It is true, as D&B notes, that the Ninth Circuit has applied the doctrine when there is a "need to resolve an issue" that "has been placed by Congress within the jurisdiction of an administrative body having regulatory authority." *Clark*, 523 F.3d at 1115. It is also true that "Congress expressly charged the Attorney General with the task of promulgating regulations clearly stating how public accommodations must meet their statutory obligations of providing access to the public." *Mot.* 12:14–18 (citing *AMC Entm't*, 549 F.3d at 763; 42 U.S.C. §§ 12101(b)(2), 12186(b)). However, as was the case in *Hobby Lobby Stores*, "Plaintiff does not ask the Court to fashion a remedy that adopts a specific technical rule. Instead, he requests an order requiring [Defendant] to comply with the DOJ's directive to ensure disabled individuals have as full and equal enjoyment of its website as non-disabled individuals." *Hobby Lobby Stores*, 2017 WL 2957736, at *7. At this stage of the litigation, this is not a case where "a federal administrative agency [must] hire personnel with the specific skills needed to devise and implement the regulatory scheme" because "courts do not have the institutional competence to put together a

coherent body of regulation." *Kirola v. City & Cty. of S.F.*, 860 F.3d 1164, 1181 (9th Cir. 2017). 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." *CVS Order* at 10. What is required of the Court at this time is a common exercise, 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." *Hobby Lobby Stores*, 2017 WL 2957736, at *7 (citing *National Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 205 n. 2 (D. Mass. 2012); *National Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 946 (N.D. Cal. 2006)).

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.

C. The Website's Compliance with the ADA

It is undisputed that the Website now contains an "accessibility banner" that directs screen-reader users with the following statement: "If You Are Using A Screen Reader And Are Having Problems Using This Website, Please Call (888) 300-1515 For Assistance." *DSUF* ¶ 1; *PSGI* ¶ 1. For this reason, D&B argues that it is now compliant with the ADA. *See Mot.* 17:11–27.

The DOJ has stated that "covered entities with inaccessible Web sites may comply with the ADA's requirement for access by providing an accessible alternative, such as a staffed telephone line, for individuals to access the information, goods, and services of their Web site." Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43466. This alone would suggest that the Website does indeed comply with the mandates of the ADA. 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.

In its reply, D&B asserts that Gorecki, "sensing the problems with his failure to design an accessible facility claim, says that this claim is really based on a failure to provide effective communication." *Reply* 10:26–12:14. It further asserts that "effective communications claims

require Plaintiff to try and communicate with Defendant and request an accommodation *before* bringing his lawsuit—which [Gorecki] chose not to do." *Id.* 11:6–9 (emphasis in original). There are various problems with this argument. First, as discussed above, the Court does not feel the record is sufficient to draw a conclusion one way or the other as to whether the Website is accessibly designed, and so whatever "problems" might exist with this claim, it is still viable. Second, D&B provides no statutory or case support for its assertion that a request to a defendant is required for an "effective communication" action. Indeed, at least one case cited by D&B implies the contrary. *See Collins v. Dartmouth-Hitchcock Med. Ctr.*, No. 13-cv-352-JD, 2015 WL 268842, at *5 (D.N.H. Jan. 21, 2015) ("Unless the need for accommodation is obvious, the requirement for reasonable accommodation *usually* does not arise unless an accommodation is requested.") (emphasis added). Finally, although an "effective communication" claim does not require either "the most advanced technology" or an absolute right to services, *Dobard v. San Francisco Bay Area Rapid Transit Dist.*, No. C-92-3563-DLJ, 1993 WL 372256, at *3 (N.D. Cal. Sept. 7, 1993), the factual record here is insufficient to assess whether the Website and its accessibility banner are even *minimally* effective, and so the Court must withhold judgment on its compliance.

Based on the scant evidence presented in the papers, the Court cannot conclude that D&B's website guarantees "full and equal enjoyment"—the standard required by the ADA. 42 U.S.C. § 12182(a); *see also Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) ("The ADA guarantees the disabled more than mere access to public facilities; it guarantees them 'full and equal enjoyment.'"). Therefore, at this time the Court finds a triable issue as to ADA compliance that precludes granting a motion for summary judgment in D&B's favor.

D. Gorecki's UCRA Claim

D&B argues that, because Gorecki's UCRA claim "cannot be premised upon violations of the ADA," it cannot be maintained in the absence of allegations of intentional discrimination. *Mot.* 18:1–19:11.

To state a viable UCRA claim, a plaintiff must plead and prove either "intentional discrimination in public accommodations" or a "denial of ADA mandated access," the latter of which does *not* require proof of intentional discrimination. *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 668, 678 (2009). Gorecki's UCRA claim "is specifically premised on the violation of rights under the ADA." *Opp.* 25:7–10 (citing *FAC* ¶ 48 ("Defendant is also violating the UCRA, Civil Code § 51 *et seq.* because the conduct alleged herein violates various provisions of the ADA, 42 U.S.C. § 12101 *et seq.*")). Accordingly, Gorecki needs neither to plead nor to prove

intentional discrimination. Because, as discussed above, there is a triable issue as to whether the Website violates the ADA, the Court cannot grant summary judgment on the UCRA claim.

IV. Conclusion

For the foregoing reasons, the Court DENIES D&B's motion for summary judgment or, in the alternative, dismissal or stay.

IT IS SO ORDERED.

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