No. _____

IN THE

Supreme Court of the United States

EXPENSIFY, INC.,

Petitioner,

v.

EDDIE WHITE

Respondent,

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Case No. 19–17320

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This action originated from a threatened lawsuit under the Americans with Disabilities Act. Because the threatened suit involved claims that were not legally cognizable, Expensify filed an action for declaratory judgment seeking a declaration of non-liability and nominal damages. However, the defendants executed waivers of their claims and moved to dismiss, arguing that the case was now moot. The district court agreed, despite Expensify's still-live claim for nominal damages and the threat of Respondent's counsel suing Expensify on behalf of other class representatives, and dismissed the action. The Ninth Circuit affirmed, relying on *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853 (9th Cir. 2017), holding that Expensify's claims did not implicate its "dignitary interests" or "important rights," and therefore nominal damages were unavailable. However, after the Ninth Circuit entered judgment, this Court decided *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), holding that every violation of a right entitles the injured party to nominal damages.

(No. 17,322) The question presented is whether *Uzuegbunam* merits summarily granting the petition, vacating the judgment, and remanding to determine whether the Ninth Circuit's holding, which took a narrow view of the availability of nominal damages, is inconsistent with this Court's intervening precedent, which took a substantially broader view of nominal damages.

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are identified in this petition's caption.

CORPORATE DISCLOSURE STATEMENT

Under Rule 29.6, Petitioner Expensify discloses that it has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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Expensify, Inc. respectfully petitions this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case concerns a party's ability to pursue nominal damages via a declaratory judgment action notwithstanding the would-be plaintiff's voluntary waiver of his claim. Faced with multiple threats of being sued for objectively meritless disability discrimination claims, Expensify sought declaratory relief in its local district court. Attempting to moot Expensify's action, the potential class action representatives voluntarily waived their claims and moved to dismiss the action. Expensify argued that its interest in a declaration of non-liability, and the peace that comes with it, was a sufficient basis for an award of nominal damages and thus for staving off mootness. The lower court disagreed, finding Expensify's interests insufficient for nominal damages, and therefore upheld dismissal of the action.

However, after the Ninth Circuit issued its decision affirming dismissal of Expensify's action, this Court issued its decision in *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021). *Uzuegbunam* provides a much broader view of nominal damages than the court below. While the court below held that nominal damages are categorically unavailable to a defendant in an ADA action seeking to vindicate its rights, and are instead reserved for violations of certain "dignitary interests," *Uzuegbunam* reasoned

that nominal damages are available for any legal injury.

The lower court's decision is at odds with *Uzuegbunam*. If nominal damages are available for any legal injury, then they should have been available to Expensify. Therefore, the Court should grant certiorari, vacate the lower court's judgment, and remand the case so the lower court can revisit Expensify's entitlement to nominal damages in light of *Uzuegbunam*.

OPINIONS BELOW

The December 11, 2020 opinion of the Ninth Circuit Court of Appeals is reported at 831 Fed. Appx. 268–270 (9th Cir. 2020).

The October 18, 2019 order of the United States District Court for the Northern District of California on Defendants'[1] motion to dismiss is unreported. 2019 WL 5295064.

[1] There were initially two defendants in this suit, Eddie White and Matt Kolesar. The parties entered a stipulation dismissing Matt Kolesar, however, before the district court's ruling on the motion to dismiss.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion and judgment in this case on December 11, 2020. App. 1a.

On March 19, 2020, the Court extended the 90-day deadline for filing petitions for certiorari by 60 days, to 150 days from the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This petition is timely under the extended deadline.

This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12182(a) provides:

(a) GENERAL RULE

No 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. § 12205 provides:

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

STATEMENT

I. Background Facts

Expensify offers services that automate expense reporting through its website[2] and through software applications available for Apple (iOS) and Google (Android) mobile devices. Expensify's services are not accessible through brick and mortar retail or commercial locations, but rather for public use exclusively through Expensify's website and mobile application.

Carlson Lynch LLP (the "CL Firm") is a leading filer of lawsuits under the ADA. App. 26a. For instance, press reports state that the CL Firm has filed dozens of ADA cases in front of a single judge in the Western District of Pennsylvania. App. 55a. ("All told, about 40 nearly identical cases have landed in front of the same federal judge, Arthur Schwab, all brought by one local law firm, Carlson Lynch Sweet Kilpea & Carpenter LLP.").

The CL Firm began this case by sending Expensify a threatening letter on behalf of two purportedly visually impaired individuals, Mr. Eddie White and Mr. Matt Kolesar, dated February 27, 2019. In the letter, the CL Firm threatened to sue Expensify for its alleged failure to comply with the ADA, California's Unruh Act, and Pennsylvania's Human Relations Act (PHRA), by not making its website sufficiently accessible to the visually impaired. App. 11a. The CL Firm further threatened to sue Expensify

[2] http://www.expensify.com

in Pennsylvania federal court, on behalf of a nationwide class, and seeking statutory damages under California law. App. 11a.

Expensify, on March 18, 2019, responded to the CL Firm's initial missive, explaining that, as an Internet-only business based in California and Oregon, it complied fully with the governing law of its home jurisdiction. App. 47a.

On March 23, 2019, the CL Firm responded, doubling-down on its initial threat, and highlighting its litigation success in bringing similar claims in jurisdictions outside the Ninth Circuit:

> In the last several years, our firm has overcome the "public accommodation" argument you raise. Attached is a 2018 decision from the W.D.Pa., where we will likely file the matter if necessary, confirming your client's website constitutes a "public accommodation" under the ADA. *See Suchenko v. Ecco USA, Inc.*, 2018 WL 3933514 (W.D. Pa. Aug. 16, 2018) [quotation omitted].
>
> Alternatively, we also file "website-only" cases in the D.Mass. and D.N.H. I have attached decisions from some of these cases as well. In each case, the forum court exercised jurisdiction (and its Circuit's law re what constitutes a public accommodation) over the out-of-forum website operator.

> In light of the above, we have been retained to contact Expensify about its inaccessible mobile applications and to resolve our clients' discrimination claims in a confidential settlement agreement, or litigation. . .
>
> Below is a link to one recent court-approved class settlement between NFB and Uber, in which Uber agreed to pay almost $300,000 for compliance monitoring of the ADA policies relating to its ride-share application. The Court also awarded NFB almost $2.5 million in fees.

App. 68a.

II. Procedural History

A. Expensify Files a Declaratory Judgment Action in its Local Federal Court

Reasonably believing that it was about to be sued in a federal court across the country, Expensify filed a declaratory judgment action in its local federal district court seeking to establish that it does not discriminate against the blind. On April 8, 2019, Expensify sued Messrs. White and Kolesar in the United States District Court for the Northern District of California. App. 22a.

In its complaint, Expensify invoked federal jurisdiction under the ADA, 42 U.S.C. § 12188, and sought a declaratory judgment that it did not violate

the ADA, Unruh Act or PHRA because its services were offered exclusively through the Internet, not through brick-and-mortar stores. App. 23-24a, 30-32a. Further, Expensify alleged that the CL Firm is a serial filer of ADA claims, and is part of what the Wall St. Journal referred to as a national wave of "website accommodation ADA litigation" seeking quick settlements going primarily to attorneys' fees. App. 26a. Expensify described the CL Firm's pre-complaint threats sent to Expensify, (App. 25a), and sought its attorneys' fees and costs. App. 32a.

Soon after Expensify filed its action, White and Kolesar unilaterally executed covenants not to sue, and sent releases related to their threatened claims to Expensify. App. 63-67a. The two individual defendants then moved to dismiss Expensify's suit, arguing that the voluntary covenants rendered the action moot.

Expensify argued that Messrs. White and Kolesar's voluntary waiver of their claims did not render the action moot because it provided no protection against the CL Firm simply filing a new action against Expensify on behalf of other individuals, in a jurisdiction across the country. App. 70a.

B. The District Court Dismisses the Action on Mootness Grounds, Finding No Basis for Nominal Damages

Citing the numerous pre-litigation threats Expensify had received, combined with the CL Firm's specialization in filing website accommodation ADA class actions, the district court agreed that Expensify had a "real and reasonable apprehension that

defendants would sue it," and therefore that a cognizable controversy existed when Expensify filed the action. App. 10a.

However, the district court reasoned that White and Kolesar's individual, voluntary covenants mooted Expensify's action. App. 14a. Recognizing that a "live claim for nominal damages will prevent dismissal for mootness," App. 19a (citing *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 869 (9th Cir. 2017)), the district court held that *Bayer*'s holding limited nominal damages to plaintiffs with a "special interest." App. 19a. *Bayer* involved an ADA plaintiff's claim. This, the Ninth Circuit had held, implicated a "dignitary interest" worthy of nominal damages, and therefore a live dispute staving off mootness. *Bayer*, 861 F.3d at 873-74. The district court found that Expensify's interest in not being subject to the CL Firm's continuing litigation threats was not, however, an interest that could support nominal damages under *Bayer*. App. 19-20a. Therefore, the district court granted the motion to dismiss and entered judgment against Expensify. App. 5a.

C. The Ninth Circuit Affirms Finding Expensify Lacked "Dignitary Interests" or "Important Rights" Sufficient to Award Nominal Damages

On December 11, 2020, the Ninth Circuit affirmed. Relying on *Bayer v. Neiman Marcus*, the Ninth Circuit agreed with the district court that nominal damages are available only for the vindication of "dignitary interests" or important rights." 831 Fed. Appx. at 270. The Ninth Circuit further agreed that Expensify's right to be free from accusations of

disability discrimination was not an affront to Expensify's dignitary interests for which nominal damages might be available. *Id.* Concluding that Expensify had failed to identify any "special interest" that might support nominal damages, the Ninth Circuit found that the district court had properly dismissed the action as moot.

REASONS TO GRANT THE WRIT

I. The Ninth Circuit's Decision Rests on a View of Nominal Damages at odds with *Uzuegbunam*

The Ninth Circuit affirmed dismissal of Expensify's complaint based on a narrow view of nominal damages. The lower court relied primarily on *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 869 (9th Cir. 2017). In *Bayer*, Neiman Marcus attempted to impose on its employees a mandatory arbitration agreement. Plaintiff Tayler Bayer refused to sign the agreement, and instead filed a charge with the EEOC alleging that Neiman Marcus was interfering with his rights under the ADA by imposing a mandatory arbitration agreement. *See id.* at 860-61. However, the EEOC delayed six years in issuing Bayer's right-to-sue letter on the arbitration agreement-related charge. *Id.* By that time, Bayer had long since been terminated. Bayer sued Neiman Marcus, seeking damages, injunctive relief, declaratory relief (regarding the illegality of the arbitration agreement), and attorney fees and costs. *Id.* at 861. The district court dismissed Bayer's second complaint as moot, reasoning that it could not grant effective relief to Bayer since he was no longer employed by Neiman Marcus. *Id.*

The Ninth Circuit reversed, ruling that the district court *could* have awarded Bayer nominal damages as a form of equitable relief under the ADA. The *Bayer* court characterized nominal damages as "trifling" and "symbolic." *Bayer*, 861 F.2d at 872. However, the *Bayer* court also found that nominal damages may be legal or equitable in nature, concluding that in Mr. Bayer's situation, an award of

nominal damages was properly equitable. *Bayer*, 861 F.3d at 874 (finding "that 'complete justice' may require the district court to award nominal damages as equitable relief.").

The Ninth Circuit in this case read *Bayer* as placing a categorical limitation on the award of nominal damages to a party asserting discrimination under the ADA, excluding a potential defendant seeking declaratory relief regarding ADA claims from entitlement to nominal damages. *See Expensify*, 831 Fed. Appx. at 270. Because Expensify was not an ADA plaintiff, the Ninth Circuit reasoned, it could not have the requisite "dignitary interests" to justify an award of nominal damages.

The Ninth Circuit's view of nominal damages is at odds with this Court's recent decision in *Uzuegbunam*. In its analysis of nominal damages, the Court in *Uzuegbunam* noted that courts at common law "reasoned that *every* legal injury necessarily causes damage" for which nominal damages are available. *Uzuegbunam*, 141 S.Ct. at 798 (emphasis in original). Likewise, the Court approvingly quoted Justice Story, who had explained that nominal damages are available "whenever there is a wrong," irrespective of whether the relief is prospective or retrospective. *Id.* at 799 (quoting *Webb v. Portland Mfg., Co.*, 29 F. Cas. 506, 508-509 (CC Me. 1838) (No. 17,322)). Moreover, the Court expressly rejected the notion, relied on by the Ninth Circuit in *Bayer*, that nominal damages "are purely symbolic," or "a mere judicial token." *Uzuegbunam*, 141 S.Ct. at 800-801 (referring to that view as a "flawed premise").

In the instant case, the district court and the Ninth Circuit relied on the categorical unavailability of nominal damages to a potential defendant under the ADA to conclude that Expensify's action was moot. However, this was based on the false premise that nominal damages are available only for certain exceptional rights, rather than being available for *all* legal violations as a default, as explained by the Court in *Uzuegbunam*. Expensify argued below that it was subjected to threats of baseless discrimination litigation, and that these threats are ongoing given that they are driven by the CL Firm, not by the individual potential plaintiffs who voluntarily waived their claims. Whether the ongoing threat of baseless litigation is a violation of Expensify's rights, therefore, should be determined on remand in light of *Uzuegbunam*.

II. An Order Granting Certiorari, Vacating, and Remanding is Appropriate in this Case

Because the Ninth Circuit issued its opinion without the benefit of *Uzuegbunam*, the Court should issue a GVR here. As this Court has recognized, "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is ... potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Uzuegbunam is plainly an "intervening development" within the meaning of *Lawrence*. The Ninth Circuit's decision in this case affirming dismissal of Expensify's action issued on December 11, 2020; the court then issued its mandate, terminating jurisdiction over the case, on January 4, 2021. Because this Court issued its decision in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021) on March 8, 2021, the Ninth Circuit had no opportunity to consider it while this case was pending before it.

CONCLUSION

This petition for writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Uzuegbunam v. Preczewski*.

Respectfully submitted,

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Counsel for Petitioner Expensify, Inc.

May 10, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the accompanying Petition for Writ of Certiorari complies with the word count limitations of Supreme Court Rule 33(g) in that it contains 2,507 words, utilizing Microsoft Word 2016, including footnotes and excluding material not required to be counted by Rule 33(d).

Respectfully submitted,

Glenn A. Danas
Counsel of Record

CERTIFICATE OF SERVICE

I, Glenn Danas, counsel for Petitioner Expensify, Inc., hereby certify that on this 10th day of May 2021, I caused a copy of the Petition for Writ of Certiorari to be served via US Mail on the following counsel:

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NOT FOR PUBLICATION

FILED

DEC 11 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EXPENSIFY, INC., Plaintiff-Appellant, v. EDDIE WHITE, Defendant-Appellee, and MATT KOLESAR, Defendant.	No. 19-17320 D.C. No. 4:19-cv-01892-PJH MEMORANDUM*

Appeal from the United States District Court
For the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted December 8, 2020**
San Francisco, California

Before: BOGGS,*** M. SMITH, and BENNETT, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Expensify, Inc. appeals a district-court ruling granting a motion to dismiss its suit for declaratory judgment against Eddie White and Matt Kolesar ("the Defendants"). Expensify, an internet-only company, sued the Defendants in response to communications from the Defendants' counsel alleging that Expensify's website and mobile applications discriminated against blind users. The Defendants had stated that a lack of accessibility violated three civil-rights statutes, including the Americans with Disabilities Act, 42 U.S.C. §§ 12181–12189 ("ADA"). Expensify sought a declaration that it did not violate the statutes.

In response to the complaint, the Defendants each executed a "Release and Waiver of Claims" that included irrevocable and unconditional covenants not to sue Expensify regarding the accessibility of its products. The Defendants then moved to dismiss the action for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The district court ruled that it had jurisdiction at the outset of the case but, finding that the waivers mooted the action, granted the motion.[1] *Expensify, Inc. v. White*, No. 19-CV-01892-PJH, 2019 WL 5295064, at *3–8 (N.D. Cal. Oct. 18, 2019).

*** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

[1] Before the ruling, the parties entered a stipulation voluntarily dismissing Kolesar.

On appeal, Expensify argues that the district court erred by holding that it had no right to nominal damages, and therefore its case was moot. Because there was no error, we **AFFIRM** the district court's dismissal.

The district court properly found—and the parties do not dispute on appeal—that subject-matter jurisdiction existed when Expensify filed the complaint. We review de novo the motion to dismiss for lack of subject-matter jurisdiction. *See US West, Inc. v. Nelson*, 146 F.3d 718, 721 (9th Cir. 1998).

1. A jurisdiction-providing controversy must exist at all stages of review, not merely when a party files its complaint. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013). "A case becomes moot," and a controversy ceases to exist, when "the parties lack a legally cognizable interest in the outcome." *Id.* at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). There is an exception if the wrongful behavior can reasonably be expected to recur, but an unconditional and irrevocable covenant not to sue can preclude that possibility. *See id.* at 92–93.

2. A case is not moot if effective relief remains available, such as nominal damages. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862, 868 (9th Cir. 2017). "A live claim for nominal damages will prevent dismissal for mootness." *Ibid.* (quoting *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002)).

3. The waivers signed by the Defendants mooted the action. The waivers were nearly identical to those evaluated in *Already, LLC v. Nike, Inc.*, 568 U.S. 85,

93 (2013), which were found to moot the case and preclude the possibility of future suits. Because the Defendants waived their right to bring a claim against Expensify in the future, there was no longer a live controversy and the court ceased to have subject-matter jurisdiction. *See id.* at 93–96, 101–02.

4. Expensify's argument that its claim for nominal damages kept its complaint alive is misplaced. Nominal damages were not proper because Expensify does not seek to vindicate dignitary interests nor important rights. *See Bayer*, 861 F.3d at 874. Private accusations that Expensify may have violated another person's civil rights is not an affront to Expensify's dignitary interests. While nominal damages may be available for some ADA claims seeking to redress dignitary harms, Expensify is not a *plaintiff* bringing a suit under the ADA, but a potential ADA *defendant* seeking declaratory relief.

Accordingly, we agree with the district court that there are no special interests or legal authorities supporting Expensify's claim for nominal damages. Expensify's complaint against White is moot and therefore it was properly dismissed.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EXPENSIFY, INC.,

Plaintiff,

v.

EDDIE WHITE,

Defendant.

Case No. 19-cv-01892-PJH

JUDGMENT

The issues having been duly heard and the court having dismissed the complaint with prejudice,

it is Ordered and Adjudged

that plaintiff takes nothing, and that the action is dismissed with prejudice.

IT IS SO ORDERED.

Dated: October 18, 2019

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EXPENSIFY, INC.,

Plaintiff,

v.

EDDIE WHITE,

Defendant.

Case No. 19-cv-01892-PJH

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

Re: Dkt. No. 22

Defendants Eddie White's ("defendant White") and Matt Koleslar's ("defendant Koleslar") (collectively, "defendants") motion to dismiss plaintiff Expensify, Inc's ("plaintiff") complaint for declaratory relief came on for hearing before this court on September 18, 2019. Plaintiff appeared through its counsel, Steven Carlson and Kevin Pasquinelli. Defendants appeared through their counsel, Kevin Tucker. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motion to dismiss with prejudice for the following reasons.

BACKGROUND

On April 8, 2019, plaintiff filed this action for declaratory relief under Title 28 U.S.C. § 2201 against defendants. Dkt. 1 ("Compl."). In it, plaintiff requests that the court make three legal determinations concerning the compliance of its website and mobile applications with certain requirements under the Americans with Disabilities Act ("ADA"), California Unruh Act (the "Unruh Act"), and Pennsylvania's Human Relations Act ("PHRA"). Those requests include the following:

- Plaintiff's website and mobile applications are not places of public

accommodation within the meaning of the ADA and therefore do not violate the ADA, Compl. ¶ 30;

- Plaintiff's website and mobile applications are not places of public accommodation within the meaning of the Unruh Act, plaintiff has not intentionally discriminated in its website, and therefore, plaintiff does not violate the Unruh Act, id. ¶ 36; and
- Defendants have not exhausted their administrative remedies against plaintiff before Pennsylvania's administrative Human Rights Commission (the "PHRC") and therefore any claim under the PHRA in this court is not ripe, id. ¶ 40.

Further detail of the complaint's relevant allegations, as well as post-filing events, is further detailed below.

A. The Complaint's Allegations

Plaintiff is a Delaware corporation "with principal places of business in San Francisco, California and Portland, Oregon." Compl. ¶ 7. Plaintiff alleged personal jurisdiction as to defendant White given his California residency, id. ¶ 4, and defendant Koleslar on grounds that he purposefully conducted activities in California, id. ¶ 5.

In its complaint, plaintiff alleges that defendants asserted that plaintiff violates the ADA, the Unruh Act, and the PHRA by failing to accommodate the needs of the visually impaired via its website and mobile applications. Compl. ¶ 2. Citing case law, plaintiff explains how such purported assertions by defendants would not constitute legally cognizable claims in California. Id. ¶¶ 2, 18-25. Plaintiff's basic positions are threefold:

(1) Plaintiff's website services do not qualify as a place of public accommodation (bringing it within the purview of the ADA's requirements) because controlling Ninth Circuit authority has ruled that a business operated website qualifies as a place of public accommodation only if the allegedly discriminatory conduct has a nexus to the goods and services offered at a physical location, id. ¶¶ 11, 18;

(2) In their prelitigation communications, defendants failed to assert any facts

showing the intentional discrimination necessary to state a claim under the Unruh Act, id. ¶ 23; and

(3) There has been no exhaustion of the administrative remedies necessary to initiate a claim under the PHRA, id. ¶ 24.

With respect to its compliance with the ADA, plaintiff expressly acknowledges that "[c]ircuit courts are split on whether websites, and associated mobile applications which access those websites, constitute a place of public accommodation as requirement by the ADA." Compl. ¶ 18. Later revealed in the parties' prelitigation communications, various courts in Pennsylvania, New Hampshire, and Massachusetts take a position on this issue contrary to that adopted by the Ninth Circuit.

At the heart of the initial jurisdictional inquiry in this matter are those same prelitigation communications. Prior to plaintiff's initiation of this action, the parties exchanged four relevant sets of written communications concerning the subject matter of plaintiff's requests. Those communications include the following:

(1) a ***February 27, 2019 letter*** from defense counsel to plaintiff, Compl., Ex. 2;

(2) a ***March 18, 2019 letter*** from plaintiff's counsel to defendants, Compl., Ex. 3; Dkt. 22-2, Ex. 3;

(3) a ***March 23, 2019 email*** from defense counsel to plaintiff, Compl. ¶ 17; Dkt. 22-2, Ex. 4; and

(4) an ***early April 2019 email*** string between counsel, Dkt. 22-2, Ex. 5.

A detailed description of key statements made in each of these communications appears in the analysis sections below.

B. Relevant Post-Complaint Events

On May 15, 2019, about a month after plaintiff filed its complaint, defendants sent plaintiff a letter purportedly confirming that they waived their respective rights to sue plaintiff regarding whether its website/mobile applications violate the ADA, Unruh Act, or PHRA. Dkt. 22-1 ¶ 7; Dkt. 22-2, Ex. 6. On June 19, 2019, defendants both executed a "Release and Waiver of Claims" (the "waiver") containing a Covenant Not to Sue (the

"covenant") detailing substantially the same guarantee as that detailed in their May 15, 2019 letter. Dkt. 22-1 ¶ 3; Dkt. 22-2, Ex. 2. The exact language of the waivers is further discussed in the analysis section below.

On July 25, 2019, White and Koleslar filed this motion to dismiss. Dkt. 22. Prior to its briefing, on August 21, 2019, the parties entered a stipulation of voluntary dismissal of defendant Koleslar without prejudice. Dkt. 28. Remaining defendant White premises his motion to dismiss on a lack of federal subject matter jurisdiction for want of a justiciable controversy.[1]

DISCUSSION

A. Legal Standard

A federal court may dismiss an action under Federal Rule of Civil Procedure 12(b)(1) for lack of federal subject matter jurisdiction. Fed. R. Pro. 12(b)(1). "Article III of the United States Constitution limits the jurisdiction of the federal courts to 'cases' and 'controversies,'" Bayer v. Neiman Marcus Group, Inc., 861 F. 3d 853, 861 (9th Cir. 2017) (citation omitted), and the Declaratory Judgment Act applies only in "a case of actual controversy," 28 U.S.C. § 2201. To determine the existence of a cognizable controversy within the meaning of the Declaratory Judgment Act, courts must determine "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 272 (1941). In the Ninth Circuit, "if the defendant's actions cause the plaintiff to have a 'real and reasonable apprehension that he will be subject to liability,' the plaintiff has presented a justiciable case or controversy." Spokane Indian Tribe v. United States, 972 F.2d 1090, 1092 (9th Cir. 1992) (citation omitted). Because "[a]

[1] Defendants' motion originally included a Rule 12(b)(2) challenge for want of personal jurisdiction over then-defendant Koleslar. That challenge was limited to defendant Koleslar. Given his dismissal from this action, the court need not rule on defendant Koleslar's unique challenge to this court's personal jurisdiction over him. As a result, the only remaining challenge by defendant White is based on Rule 12(b)(1).

federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears," the burden to prove its existence "rests on the party asserting federal subject matter jurisdiction." Pac. Bell Internet Servs. v. Recording Indus. Ass'n of Am., Inc., 2003 WL 22862662, at *3 (N.D. Cal. Nov. 26, 2003).

A federal court loses its authority to rule on the legal questions presented in a declaratory action if events following its commencement render it moot. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) ("An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000). To determine whether an action has been rendered moot, courts in the Ninth Circuit examine whether changes in the circumstances existing when the action was filed have forestalled any meaningful relief. West v. Secretary of Dept. of Transp., 206 F.3d 920, 925 n.4 (9th Cir. 2000).

B. Analysis

The court finds that a cognizable controversy existed at the time plaintiff initiated its complaint. However, the court further finds that defendants' waivers mooted that action and that neither the voluntary cessation nor capable of repetition yet evading review limitation on mootness applies here. The court also finds that plaintiff has not stated a claim for nominal damages that remains actionable and that any attempt by plaintiff to amend its complaint to salvage the justiciability of this action would be futile.

1. A Cognizable Controversy Existed When Plaintiff Initiated This Action

Plaintiff carried its burden to show that a cognizable controversy existed when it initiated this action. The circumstances surrounding the prelitigation events here support finding a real and reasonable apprehension that defendants would sue it. Those circumstances include defense counsel's prelitigation communications, reputation, and specialized practice.

In their initial February 27, 2019 letter to plaintiffs, defendants include the following

statements suggesting that they would sue plaintiff for its failure to comply with the ADA, Unruh Act, and PHRA:

- "***Our clients contend you have violated several*** statutes that prohibit disability discrimination, including *inter alia*, California's Unruh Civil Rights Act . . . the Pennsylvania Human Relations Act . . . and the Americans with Disabilities Act," Compl., Ex. 2; Dkt. 22-2, Ex. 1 (emphasis added);
- "Failure to remediate these deficiencies ***will subject you to suit*** in Pennsylvania federal court, ***and potentially, to California's statutory damages on a class basis,"*** id. (emphasis added);
- "Our clients also request, ***on behalf of all similarly situated individuals in the United States***, that you adopt a policy that protects against such disability discrimination," id. (emphasis added).

These statements, even though subtle, signal to plaintiff key aspects of what potential litigation against it would look like. Additionally, the fact that defendants' letter includes a 14-day window to respond, id., and carbon copies a Carlson Lynch lawyer "licensed to practice in CA," id., serves as additional indicia of the typical threats preceding litigation.

Additionally, numerous statements in defendants' March 23, 2019 email[2] to plaintiff further support a real and reasonable apprehension by plaintiff that defendants intended to sue it. Those statements include the following:

- "In the last several years, our firm has overcome the 'public accommodation' argument you raise," Compl., ¶ 17; Dkt. 22-2, Ex. 4;
- "Attached is a 2018 decision from W.D.Pa., ***where we will likely file the matter if necessary*** . . .," Dkt. 22-2, Ex. 4 (emphasis added);
- "Alternatively, ***we also file 'website-only' cases*** in the D.Mass and D.N.H.," id.

[2] Defense counsel labeled its email a Federal Rule of Evidence 408 communication but nonetheless attached it (in its entirety) to defendants' opening brief. As a result, defendants have waived any argument that such communication is privileged.

(emphasis added);

- "In light of the above, we have been retained to contact Expensify about its inaccessible mobile applications and to resolve our clients' discrimination claims in a confidential settlement agreement, ***or litigation***," id. (emphasis added);
- "In addition to the costs our clients have incurred to date, they seek compensation for compliance monitoring, to which our firm contends they would be entitled ***as a prevailing party upon filing suit***," id. (emphasis added);
- "By resolving this matter ***before litigation***, it is our designed goal to eliminate the litigation-related fee award entirely and reduce the monitoring costs significantly," id.

Again, while none of these communications overtly state that defendants would file suit against plaintiff, they either imply or assume the possibility of such suit. Moreover, the fact that defense counsel attached numerous judicial decisions as PDFs to this email, id., noted by plaintiff in its opposition brief as prior decisions successfully litigated by defense counsel, confers added credibility to defendants' suggestions that they would sue plaintiff.

Less significant, although still relevant, is defense counsel's legal practice. Plaintiff alleges that defense counsel's firm "is a leading filer of ADA claims," Compl. ¶ 13, and defense counsel's own prelitigation communications (noted above) support that characterization. The fact that defendants contacted plaintiff through counsel with such a reputation further supports finding that plaintiff acted out of a real and reasonable apprehension of facing suit by defendants.

Defendants, however, do identify numerous statements in their prelitigation communications reflecting an intent to cooperate with plaintiff. Such statements include the following:

- "Please let us know within fourteen (14) days of receipt of this letter if you agree to participate in the ***interactive process*** outlined above," Compl., ¶ Ex. 2; Dkt. 22-2, Ex. 1 (emphasis added);

- "In light of the above, we have been retained to contact Expensify about its inaccessible mobile applications and ***to resolve*** our clients' discrimination claims in a confidential settlement agreement, or litigation," Dkt. 22-2, Ex. 4 (emphasis added);
- "***By resolving*** this matter before litigation, it is our designed goal to eliminate the litigation-related fee award entirely and reduce the monitoring costs significantly," id. (emphasis added)**;**
- **"**Perhaps we can schedule a time to connect by phone?," id.;
- "Please let me know by April 11, 2019 whether you believe further pre-litigation discussions are appropriate. Otherwise, our office will conclude ***these resolution efforts*** to have been unsuccessful and go from there," Dkt. 22-2, Ex. 5 (emphasis added); and
- Upon learning that Expensify's counsel was out of the country, defense counsel wrote: "That is awesome. ***I look forward to catching up with [plaintiff's counsel] upon his return***. Steve, if you're reading this, I hope you have a great time during your last days in Morocco," id. (emphasis added).

While these statements reflect an apparent intent to resolve defendants' complaints about the accessibility of plaintiff's website without litigation, the court finds that any such intent is overshadowed by the suggestions of litigation specified above. Relatedly, while defendants might be correct that certain cases they cite as finding a cognizable controversy involve facts not present here, the formation of a "real and reasonable" apprehension is a fact-intensive inquiry and the specific circumstances surrounding the parties' prelitigation communications here may nonetheless form the basis for plaintiff's "real and reasonable apprehension" of suit.

Defendants' remaining argument—that finding a cognizable apprehension of litigation by plaintiff would "chill" pre-complaint communications aimed at informal resolution of a dispute—has merit. Regardless, by defendants' own recognition, that argument is grounded in the "policy" of the Ninth Circuit. While informal resolution may

be a desired outcome of the law, it does not dictate application of the controlling doctrinal test for determining the existence of a cognizable controversy.

2. Events Subsequent to the Complaint's Filing Mooted this Action

There is no contest that defendants' waivers facially mooted this action. As discussed immediately below, such waivers are materially identical to those that the United States Supreme Court in Already, LLC v. Nike, Inc., 568 U.S. 85 (2013) found in the first instance to "call[] into question the existence of any continuing case or controversy." Id. at 92. Instead, the key questions here are whether either (1) the voluntary cessation or (2) the capable of repetition yet repeating review doctrines limit such mootness finding. They do not.

i. Defendants' Waivers Satisfy the Voluntary Cessation Test

A defendant's voluntary cessation of the conduct challenged in an existing action moots a case only if such cessation is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 221 (2000) (emphasis in the original). The Court in Already, LLC v. Nike, Inc. recognized that a defendant's voluntary, unconditional, and irrevocable covenant not to sue in connection with certain subject matter challenged by plaintiff in a declaratory judgment action is sufficiently broad to ensure that defendant's challenged conduct could not reasonably be expected to recur. 568 U.S. 85, 92-95. The party challenging the ongoing justiciability of an existing action bears the "heavy burden" of proving that the challenged conduct cannot reasonably be expected to recur. Adarand Constructors, Inc., 528 U.S. at 222.

Here, defendants have met their burden of showing that their challenged conduct cannot reasonably be expected to recur. Defendants are correct that the Court in Already, LLC v. Nike, Inc. considered a materially similar covenant not to sue as provided in this case. 568 U.S. 85, 93. Compared side-by-side, each covenant provides as follows:

Covenant Not to Sue in Already LLC	Covenant Not to Sue in this Action
"***[Nike] unconditionally and irrevocably covenants to refrain from making any claim(s)*** or demand(s) ... ***against Already*** or any of its ... related business entities ... [including] distributors ... and employees of such entities and all customers ... ***on account of any possible cause of action based on or involving trademark infringement, unfair competition, or dilution, under state or federal law*** ... relating to the NIKE Mark based on the appearance of any of Already's current and/or previous footwear product designs, and any colorable imitations thereof, regardless of whether that footwear is produced ... or otherwise used in commerce ***before or after the Effective Date of this Covenant***." Already, LLC v. Nike, Inc., 568 U.S. 85, 93 (2013) (emphasis added).	"***White unconditionally and irrevocably covenants to refrain from making any claim(s)*** or demand(s) ***against Expensify***, or any of its related business entities, including distributors and employees of such entities ***on account of any possible cause of action based on or involving the accessibility of Expensify's past, present, or future websites and mobile applications***, including but not limited to all claims arising from or relating to Title III of the ADA, California, Unruh Civil Rights Act, the Pennsylvania Human Relations Act, and any other federal, state, or local law, statute or ordinance, rule or principle of common law or doctrine in law or equity, known or unknown, suspected or unsuspected, foreseen or unforeseen, real or imaginary, actual or potential, ***before or after the Effective Date of this Covenant***." Dkt. 22-2, Ex. 2 (emphasis added).

As defendants also point out, the Court held that such covenant overcame the voluntary cessation limitation on the mootness doctrine. Id. at 728. The Court reasoned that plaintiff's "only legally cognizable injury—the fact that Nike took steps to enforce its trademark—is now gone and, ***given the breadth of the covenant, cannot reasonably***

be expected to recur. There being no other basis on which to find a live controversy, the case is clearly moot." Id. at 732 (emphasis added).

Here, there is no cognizable distinction between the covenants provided by defendants to plaintiff and those considered in Already, LLC. The conduct challenged by the plaintiff in Already, LLC was Nike's attempt to "press[] an invalid trademark to halt [Already's] legitimate business activity." Id. at 91-92. The conduct challenged by plaintiff is the threat of a lawsuit for purported ADA-related violations in connection with its website. Because the breadth of the covenants provided in the waivers "suffices to meet the burden imposed by the voluntary cessation test," id. at 728, the justiciability of plaintiff's mooted action against defendants is not saved by this limitation.[3]

ii. Plaintiff Does Not Present a Cognizable Theory that Defendants' Conduct Is Capable of Repetition Yet Evading Review

Courts also recognize a limitation on the mootness doctrine when conduct underlying a declaratory judgment action is "capable of repetition while evading review." Alvarez v. Smith, 558 U.S. 87, 93 (2009). This limitation applies only in "exceptional situations, and generally only where the plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." Alvarez, 558 U.S. 87, 93. The Ninth Circuit has ruled that "the 'capable of repetition, yet evading review' exception to mootness applies only when (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." Bernhardt v. Cty. of Los Angeles, 279 F.3d 862, 871–72 (9th Cir. 2002).

Here, plaintiff does not argue that the conduct of defendants White or defendant Koleslar is capable of repetition yet evading review. Instead, plaintiff argues that the

[3] Plaintiff's remaining argument on the applicability of this limitation—that defendants' waivers do not prevent non-party ***defense counsel*** from initiating additional lawsuits against plaintiff on behalf of ***other future potential litigants***—is substantially similar to its theory that the challenged conduct is capable of repetition yet evading review. As a result, the court addresses the merits of that argument immediately below.

likelihood that defense counsel will represent other third-party plaintiffs in future website disability access related litigation triggers preserves the justiciability of its action.

Plaintiff failed to identify any authority expressly considering its theory that potential future representation of third-parties by counsel may trigger the capable of repetition yet evading review limitation. The closest authorities identified, proffered by defendants, simply presume that the challenged conduct capable of repetition would be repeated by the defendant to the existing action, see *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) ("In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) ***by the defendant*** that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, ***but from the defendant***. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion—***is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff***.") (emphasis added), or must implicate the interests of the parties, see Seven Words LLC v. Network Sols., 260 F.3d 1089, 1098–99 (9th Cir. 2001) ("A case or controversy exists justifying declaratory relief only when 'the challenged ... activity ... is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect ***on the interests of the . . . parties***.'") (emphasis added). Absent authority acknowledging that this limitation extends to potentially unreviewable conduct by unascertainable persons not a party to the litigation, the court refuses to adopt plaintiff's theory of the capable of repetition yet evading review doctrine.

In any event, plaintiff's theory, if accepted, would run the risk of running afoul of other jurisdictional requirements. Absent joinder of the future potential litigants that plaintiff purports will evade review, plaintiff cannot satisfy the Article III standing requirement that the challenged injury be both "imminent, not conjectural or hypothetical"

as well as "fairly traceable to the challenged action of the defendant." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000). Additionally, because defendant White is the only defendant remaining party to this action and plaintiff's claims as to him were mooted by his waiver, ruling on the action pursuant to plaintiff's theory would also qualify as an advisory opinion on some speculative future third-party conduct not yet giving rise to the real and reasonable apprehension necessary to find a cognizable case or controversy. These additional potential jurisdictional defects provide an independent basis to reject plaintiff's theory.

Lastly, as just described with respect to the conduct of potential future third-party litigants, defense counsel is not a party to this litigation. Whatever it may do with third-party litigants in the future is of no moment to what this court does with the litigants in this action now. As a result, the court refuses to extend the capable of repetition yet evading review limitation here on the ground that defense counsel may instigate future litigation elsewhere.

3. Prudential Factors Separately Cut Against Deciding Plaintiff's Claims

Distinct from the case and controversy requirement, a district court must also be satisfied that deciding an action for declaratory judgment is prudentially appropriate. Gov't Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1222-23 (9th Cir. 1998) ("The Declaratory Judgment Act embraces both constitutional and prudential concerns. . . . If the suit passes constitutional and statutory muster, the district court must also be satisfied that entertaining the action is appropriate."). Among others, such factors include whether exercising jurisdiction would result in needlessly determining state law issues, encouraging forum shopping, clarifying the legal relations at issue, or promoting procedural fencing. Id. at 1225.

Here, even if plaintiff's action were constitutionally justiciable, the court is still not satisfied that the various factors outlined in Dizol support exercising its authority to decide plaintiff's claims. As a result, on this independent ground, too, dismissal of plaintiff's claims is appropriate.

4. Plaintiff's Nominal Damages Claim Does Not Preserve This Action

While "a live claim for nominal damages will prevent dismissal for mootness," Bayer v. Neiman Marcus Grp., Inc., 861 F.3d 853, 869 (9th Cir. 2017), such a prayer arising out of a now-mooted claim requires "close inspection" as to its validity, Arizonans for Official English, 520 U.S. 43, 71. In Bayer, the Ninth Circuit considered a claim for a declaratory judgment premised upon an alleged requirement by an employer that its employees consent to an arbitration agreement as a condition of employment. Id. at 860. Plaintiff claimed that such requirement violated Title 28 U.S.C. § 12203(b) because it effectively required him to choose between his job and the exercise of his civil rights under the ADA. Id. at 867. Because plaintiff was no longer employed by the employer, the court concluded that such declaratory judgment claim was moot. Id. at 868.

The court then considered whether plaintiff's claim for nominal damages—which arose out of the same set of facts supporting plaintiff's mooted claim for declaratory judgment—remained actionable as an equitable remedy. Id. at 868-69. The court determined that it was. Id. at 875. To reach that determination, the court reasoned that "a violation of a statute intended to safeguard civil rights" gives rise to a certain "dignitary interest" that makes nominal damages "particularly well suited to securing complete justice" in that case. Id. at 874. The court in Bayer explained that "[i]n the context of a claim brought under a federal statute intended to combat discrimination, the phrase 'complete justice' has a clear meaning: the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" Id. at 873 (citations omitted) (footnote omitted).

Here, plaintiff has failed to identify any special interest justifying an award of nominal damages. Instead, plaintiff merely argues that defendants' suggestions that its website is in violation of applicable law qualifies as an affront to its "dignitary interest." A play on words, such an affront (even if true) does not qualify as a violation of plaintiff's civil rights. As a result, an award for nominal damages here would not advance the sort

of "complete justice" relied upon by the Bayer court to issue such relief. Because plaintiff also failed to identify any authority recognizing the propriety of a nominal damages award in a situation such as this outside the civil rights context, plaintiff's claim for nominal damages does not preserve the justiciability of its action.

5. Plaintiff's Requests to Amend Its Complaint Are Futile

Attempting to salvage the justiciability of its action, plaintiff requests leave to amend its complaint on three distinct grounds. Because none of these grounds would revive plaintiff's action, its requests to amend are denied as futile.

i. Allegations of a Reasonable Apprehension of a Class Action Suit

In its opposition briefing, plaintiff requests leave to amend its complaint to specifically allege reasonable apprehension of a class action suit. At oral argument, plaintiff failed to identify any ascertainable class or basis beyond a single reference to a class action in the parties' prelitigation communications to justify such an amendment. Given such failures, the court finds that plaintiff's request to amend its complaint on this ground is futile and therefore DENIED.

ii. Nominal Damages on the Theory of Defense Counsel's Purported Accusations of Unlawful Conduct

In its briefing, plaintiff also requests leave to amend its prayer for relief to specify a claim for nominal damages premised upon defense counsel's wrongfully accusing plaintiff of violating the statutory rights of blind individuals. Because plaintiff has failed to identify any legal basis that would support an award for nominal damages in a case such as this (where the alleged underlying injury is not a violation of its civil rights), plaintiff's request to amend its complaint on this ground is futile and therefore DENIED.

iii. Negligent Misrepresentation concerning Defendant White's Use of Plaintiff's Website

At oral argument, plaintiff raised the possibility of amending its complaint to allege a negligent misrepresentation or fraud claim against defendant White on the basis that he never actually used plaintiff's website. When asked by the court at oral argument,

plaintiff failed to identify any misrepresentation in a verified pleading by defendant White. Instead, plaintiff pointed only to statements by defense counsel in their prelitigation communications and reply brief. The court refuses to find that defendant White should be held liable for any misrepresentations by defense counsel (much less attorney argument) about his actual use of plaintiff's website.[4] As a result, plaintiff's request to amend its complaint on this ground is futile and therefore DENIED.

CONCLUSION

For the foregoing reasons, the court GRANTS defendants' motion to dismiss with prejudice.

IT IS SO ORDERED.

Dated: October 18, 2019

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

[4] The court cautions that a misrepresentation in a verified pleading could compel a different result.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EXPENSIFY, INC.,

Plaintiff,

vs.

EDDIE WHITE AND MATT KOLESAR,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY JUDGMENT

COMPLAINT

Expensify, Inc. ("Expensify"), a Delaware corporation, brings this claim, seeking a declaratory judgment by this Court pursuant to 28 U.S.C. § 2201 against Defendants Eddie White ("White") and Matt Kolesar ("Kolesar") (collectively, "Defendants"), and in support thereof does allege and state as follows:

NATURE OF CASE

1. This is an action for declaratory judgment arising under the Americans with Disabilities Act, 42 U.S. C. § 12101 *et seq*. ("ADA"), California's Unruh Civil Rights Act ("the Unruh Act"), and the Pennsylvania Human Relations Act ("PHRA").

2. Defendants have asserted that Expensify violates the ADA, the Unruh Act, and the PHRA by not accommodating the needs of the visually impaired via its website and mobile applications. Claims against Expensify based on these statutes are not legally cognizable. In the Ninth Circuit it

is well settled law that the ADA does not apply to websites unless there is a nexus between the site and a brick-and-mortar store which offers goods or services to customers. Expensify offers no goods and services through its office space and therefore no nexus exists between Expensify's offices and the services it offers the public through its website. Second, Defendants cannot establish an Unruh Act cause of action, independent of an ADA claim, unless there is intentional discrimination in public accommodations in violation of the terms of the Act. Defendants cannot aver facts that would support intentional discrimination and therefore, any Unruh Act cause of action fails. Lastly, Defendants have asserted that Expensify is in violation of the PHRA. Under Pennsylvania law any cause of action requesting this court's assistance must first have been brought before the Pennsylvania Human Rights Commission ("PHRC"). Defendants have failed to bring any such claim against Expensify. As such, Defendants have failed to exhaust their administrative remedies, and any PHRA matter is not ripe for hearing at this time.

JURISDICTION AND VENUE

3. This Court has federal question jurisdiction over the subject matter of this action, the ADA, pursuant to 28 U.S.C. § 1331 and 42 U.S.C § 12188, and supplemental jurisdiction over the related state claims under the Unruh Act and the PHRA.

4. This Court has personal jurisdiction over Defendant White because he is a resident of the State of California.[1]

5. This Court has personal jurisdiction over Defendant Kolesar because he has purposefully conducted activities jointly with other California residents into California relative to the subject matter of his action; directed his actions in concert with other California residents in California relative to the subject matters of this action, hired counsel in California jointly with other California residents for such purposes, made demands in concert with other California residents upon

[1] Exh. 1 Pg. 1 ¶ 1 states that Mr. White resides in California.

Expensify in California relating to Expensify's online automated expense reporting services (which are hosted from and provided from California), and purposefully availed himself of California law by threatening frivolous litigation in concert with other California residents against Expensify based on protections offered by California law (including at least the Unruh Act) to obtain "statutory damages on a class basis."[2]

6. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2) in that this lawsuit arises in relation to web services and mobile applications developed by Expensify out of its places of business in San Francisco, California and Portland, Oregon. In addition, Expensify hosts its webservers in San Jose, Los Angeles, and Reno. As a result, a substantial part of the decisions and events giving rise to the claim at issue herein occurred within this judicial district.

BACKGROUND OF EXPENSIFY SERVICES

7. Expensify is a Delaware corporation with principal places of business in San Francisco, California and Portland, Oregon.

8. Expensify offers services that automate expense reporting, through its software as a service ("SaaS") platform.

9. Expensify's services can be accessed through its website, http://www.expensify.com, and through native software applications that are available on Apple (iOS) and Google (Android) mobile devices.

10. Expensify does not sell or allow access to its services through brick and mortar retail or commercial locations. All of Expensify's expense automation services operate through its website and its mobile applications. Expensify's physical offices are not open to the public or to Expensify's customers (*i.e.*, Expensify has no customer-facing physical location). Defendants were informed of

[2] Exh. 2 Pg. 3 ¶ 2.

this readily-verifiable fact, yet persisted in pursuing these claims against Expensify.

11. More specifically, Expensify's expense reporting services do not facilitate access to or connect customers to goods or services in Expensify's physical offices. No goods or services are offered for sale from Expensify's physical offices. There is no nexus between Expensify's online services and its physical offices.

FACTS RELATING TO THE UNDERLYING DISPUTE

12. Bringing suits based on ADA Title III claims has become a cottage industry. According to a bi-annual report by the law firm Seyfarth Shaw LLP, "the number of ADA Title III lawsuits filed in federal court in 2018 hit a record high of 10,163-- up 34% from 2017 when the number was a mere 7,663."[3] This number represents almost a fourfold increase since Seyfarth Shaw started tracking the filings in 2013. Of the 10,163 filed nationwide in 2018, 4,249 of those were filed in California, representing almost 42 percent of all lawsuits.[4]

13. On February 27, 2019, Mr. R. Bruce Carlson and Kevin W. Tucker of Carlson Lynch Sweet, Kilpela & Carpenter, LLP ("Carlson Lynch") sent a letter to David Barrett, Founder and CEO of Expensify, accusing Expensify of violating the ADA, the Unruh Act, and the PHRA. *See* Exhibit 1 (the "Demand Letter"). The Demand Letter asserts in part that Mr. White, a California resident, was "born with Cataracts and Glaucoma . . . He is totally blind in his left eye, and has very little vision in right eye."[5] "Mr. Kolesar resides in Pennsylvania . . .[and] . . suffers from retinitis pigmentosa, a genetic disorder that rendered him totally blind when he was just nineteen years old."[6] As such, "both individuals use screen reader technology to access mobile applications on their smartphones."[7] The Demand Letter asserts that the Expensify software is not designed to utilize the

[3] Exh. 2 Pg. 1 ¶ 1.
[4] Id. at Pg. 2, lower graph.
[5] Exh. 1 at Pg. 1 ¶ 1.
[6] Id.
[7] Id.

screen reader technology and therefore denies equal access by lack of "provid[ing] text equivalents for non-text elements," and "fail[ure] to distinguish elements that trigger changes."[8]

14. Carlson Lynch is a leading filer of ADA claims. According to Lex Machina, Carlson Lynch has filed ninety-nine employment law claims, fifteen of those currently open.[9] According to the Wall Street Journal, as of November 1, 2016, "the suits often settle quickly, for between $10,000 and $75,000 . . . with the money typically going toward plaintiffs' attorneys' fees and expenses."[10] As of 2016, Carlson Lynch's own website was not compliant with the standards it asserts in its demand letters.[11]

15. On March 18, 2019, Mr. Steven Carlson, of Robins Kaplan LLP, counsel for Expensify, responded to the accusations stating very clearly that "Expensify offers its services exclusively through the Internet" and as such does not offer its services through *places of public accommodation* as required to state a claim under the ADA Title III.[12] Electronic services offered over the Internet are not a *place of public accommodation*, as determined by the Ninth Circuit and others. Below is a discussion of applicable law.

16. On or about this time, Expensify searched its databases for any record of Defendants White or Kolesar registering for an Expensify account. To date, Expensify has found no accounts that appear to be associated with Defendants White or Kolesar.[13]

17. On Saturday, March 23, 2019, Mr. Kevin Tucker, of Carlson Lynch, sent an email to Mr. Steven Carlson stating that he knew ways to "overcome the 'public accommodation' argument you raise." This law is also discussed below. All of these "solutions" were to file suit in foreign courts,

[8] Exh. 1 Pg. 2 ¶¶ 3-4.
[9] Exh. 4 Lex Machina screen shot.
[10] Exh. 5 Pg. 1. ¶ 3.
[11] Exh. 6. Letter from counsel in prior case demonstrating failure of Carlson Lynch website to pass accessibility tests.
[12] Exh. 3 Pg. 2 ¶ 4.
[13] This cannot be definitely known without further details of defendants. Expensify has found a customer named Matt Kolesar, however this account has not been active for three years.

such as the West District of Pennsylvania, the District of Massachusetts, and the District of New Hampshire, where Expensify has no physical presence.

GOVERNING LAW

AMERICANS WITH DISABILITIES ACT

18. Circuit courts are split on whether websites, and associated mobile applications which access those websites, constitute a *place of public accommodation* as required by the ADA. Courts of the Third, Sixth, Ninth, and Eleventh Circuits hold that the statute is unambiguous, holding that *places of public accommodation* are physical structures, and that the only goods and services that a disabled person has a full and equal right to enjoy are those offered at a physical location. Discrimination relating to a website only exists if the discriminatory conduct has a *nexus* to the goods and services offered at a physical location.

19. This approach means that an inaccessible website associated with a brick and mortar retail store could be in violation of the ADA if the website's inaccessibility interferes with the *full and equal enjoyment* of the goods and services offered at the physical store. However, a business that operates solely through the Internet and has no customer-facing physical location is not required to make its website accessible.

20. The most recent Ninth Circuit case affirming these positions is *Robles v. Domino's Pizza, LLC,* 913 F.3d 898, 902 (9th Cir. 2019). *Robles* affirmed *Weyer v. Twentieth Century Fox Film Corp,* 198 F.3d 1104, 1113-14 (9th Cir. 2000), which held that the ADA covers only: (1) physical places were goods or services are open to the public; and (2) to apply to a website, the site must have some connection between the good or service complained of and an actual physical place. *Robles* at 905. In applying *Weyer*, district courts have made clear that websites without a nexus to physical structures do not constitute *places of public accommodation*. Additional authority arising from California in the Ninth Circuit reaffirm this standard:

- *Young v. Facebook, Inc.*, 790 F.Supp.2d 1110, 1115 (N.D. Cal. 2011) ("Under controlling Ninth Circuit authority, 'places of public accommodation' under the ADA are limited to actual physical spaces ... Facebook operates only in cyberspace, and thus is not a 'place of public accommodation' as construed by the Ninth Circuit. While Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which [the plaintiff] claims she was denied access are offered to the public.");
- *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) (holding that the ADA can only apply to a website when "there is a 'nexus'" alleged between the challenged conduct and defendant's "physical space.");
- *Earll v. eBay, Inc.*, No. 5:11-CV-00262-JF HRL, 2011 U.S. Dist. LEXIS 100360, 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011) (holding [**12] that eBay's website is not a place of public accommodation under the ADA).

Courts in the Third and Eleventh Circuits also require a nexus. *See*

- *Tawam v. APCI Federal Credit Union*, 2018 WL 3723367 *6 (E.D. Pa. August 6, 2018) (claim under Title III of the ADA requires some "nexus" between the physical place of public accommodation and the services denied in a discriminatory manner) *citing Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 183 (3d Cir. 2010) and *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 120 (3d Cir. 1998).
- *Gomez v. Bang & Olufsen Am., Inc.*, 2017 U.S. Dist. LEXIS 15457, 2017 WL [*390] 1957182, at *4 (S.D. Fla. Feb 2, 2017) ("All the ADA requires is that, if a retailer chooses to have a website, the website cannot impede a disabled person's full use and enjoyment of the brick-and-mortor [sic] store. . . . [therefore] his ADA claim must be dismissed.").

21. Defendants, in their most recent letter, cite to single case from the W.D.Pa., *Suchenko v. Ecco USA, Inc.*, 2018 WL 3933514 (W.D.Pa. Aug. 16, 2018). In *Suchenko* the Court did not grant dismissal, holding that defendant "purportedly owns, operates, and/or controls the property upon which the alleged discrimination has taken place—i.e., its website. Therefore, Plaintiff in this case has a nexus to the place of public accommodation and thus may claim the protections of Title III."). The holding is in error, failing to correctly apply either *Peoples v. Discover Fin. Servs., Inc.*, or *Menkowitz v. Pottstown Mem'l Med. Ctr.*, both of which are controlling in the Third Circuit. Even if *Suchenko* were correctly decided, it is not controlling in the Ninth Circuit.

The Unruh Act

22. A violation of the Unruh Act may be maintained independent of an ADA claim only where "intentional discrimination in public accommodations in violation of the terms of the Act" are pled. *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 668, 94 Cal. Rptr. 3d 685, 208 P.3d 623 (2009) (quoting *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1175, 278 Cal. Rptr. 614, 805 P.2d 873 (1991). To prove intentional discrimination there must be allegations of "willful, affirmative misconduct," and there must be more than the disparate impact of a facially neutral policy on a particular group. *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 854, 31 Cal Rptr. 3d 565, 115 P.3d 1212 (2005).

23. To sufficiently state a cause of action under the Unruh Act, Defendants' claim cannot be based solely on the disparate impact of Expensify's policies on visually impaired individuals. Rather, it must be grounded on intentional discrimination. Defendants have not asserted any facts, plausible or otherwise, relating to intentional discrimination because no such discrimination exists.

Pennsylvania Human Relations Act

24. Expensify has been accused of violating the PHRA. "To bring suit under the PHRA, a plaintiff must first have filed an administrative complaint with the PHRC within 180 days of the alleged act of discrimination. If a plaintiff fails to file a timely complaint with the PHRC, then he or

she is precluded from pursuing judicial remedies. The Pennsylvania courts have strictly interpreted this requirement." *Waters v. Genesis Health Ventures, Inc*., 2004 U.S. Dist. LEXIS 25604, Civ.A.No. 03-CV-2909, 2004 WL 2958436, at *5 (E.D. Pa. Dec. 21, 2004) (quoting *Richards v. Foulke Assocs., Inc.*, 151 F. Supp. 2d 610, 613 (E.D. Pa. 2001)). In *Vincent v. Fuller Co*., 532 Pa. 547, 616 A.2d 969 (Pa. 1992), the Pennsylvania Supreme Court stated that: "persons with claims that are cognizable under the Human Relations Act must avail themselves of the administrative process of the Commission or be barred from the judicial remedies authorized in Section 12(c) of the Act. This rule of 'exhaustion of remedies' has long been applied by the courts of this Commonwealth to claims under the Act."

25. Expensify has not been named as a defendant in a Charge of Discrimination ("COD") before the Pennsylvania Human Relations Commission (the "Commission"). Therefore, Defendants have not exhausted their administrative remedies against Expensify in this action and therefore any PHRA judicial remedy requested in this tribunal cannot stand.

26. Therefore, an actual and justiciable controversy exists, within the meaning of the Declaratory Judgment Act, between Expensify and the Defendants as to the applicability and requirements of the ADA, the Unruh Act, and the PHRA regarding the website and mobile applications of Expensify. Therefore, a declaration by this Court is necessary to resolve this controversy.

COUNT 1 – CLAIM FOR DECLARATORY RELIEF

NON VIOLATION OF TITLE III OF THE ADA

27. Expensify re-alleges and incorporates each of the foregoing paragraphs by reference as through fully set forth herein.

28. Expensify's website and mobile applications are not places of public accommodation as required by Title III of the ADA.

29. Defendants' allegations regarding the ADA, the functionality of Expensify's website and

mobile applications, such as lack of "provid[ing] text equivalents for non-text elements," and "fail[ure] to distinguish elements that trigger changes," has created a case or controversy regarding the ADA.

30. Expensify requests a declaration that Expensify's website and mobile applications are not places of public accommodation and do not violate the ADA, and therefore Defendants allegations fail as a matter of law.

COUNT 2 – CLAIM FOR DECLARATORY RELIEF

NON-VIOLATION OF THE UNRUH ACT

31. Expensify re-alleges and incorporates each of the foregoing paragraphs by reference as though fully set forth herein.

32. Defendants have not asserted that Expensify has intentionally discriminated in public accommodations in violation of the terms of the Unruh Act and they cannot. Expensify has not intentionally, or otherwise, discriminated in public accommodations.

33. Despite not asserting intentional discrimination in public accommodations, Defendants have asserted that Expensify is violation the Unruh Act relative to its website and mobile applications being accessible to the visually impaired.

34. Therefore, an actual case or controversy exists whether Expensify is in violation of the Unruh Act.

35. Expensify's website and mobile applications are not places of public accommodation and Expensify has not intentionally discriminated relative to its websites.

36. As such, Expensify requests a declaration that its website and mobile applications are not places of public accommodation, that Expensify has not intentionally discriminated relative to its website and therefore does not violate the Unruh Act as a matter ow law.

COUNT 3 – CLAIM FOR DECLARATORY RELIEF

NON-VIOLATION OF THE PHRA

37. Expensify re-alleges and incorporates paragraphs 1-30 by reference as though fully set forth herein.

38. Under the PHRA Defendants must first have filed an administrative complaint, asserting a Charge of Discrimination ("COD") with the Pennsylvania Human Relations Commission ('PHRC") within 180 days of the alleged act of discrimination.

39. Expensify has not been named as a defendant in a COD before the PHRC.

40. Defendants have not exhausted their administrative remedies against Expensify in this action and therefore any PHRA judicial remedy requested in this tribunal is not ripe.

PRAYER FOR RELIEF

WHEREFORE, Expensify prays for relief as follows:

i. That the Court enter judgment for Expensify;

ii. For a Declaratory Judgment that Expensify is not in violation through its website, mobile applications, or otherwise, in violation of Title III of the ADA.

iii. For a Declaratory Judgment that Expensify is not in violation through its website, mobile applications, or otherwise, in violation of the Unruh Act.

iv. For a Declaratory Judgment that Expensify is not in violation through its website, mobile applications, or otherwise, in violation of PHRA.

v. That pursuant to 35 U.S.C. § 285, Federal Rule of Civil Procedure 11, and/or other applicable authority, Defendants be ordered to pay all of Expensify's reasonable attorneys' fees incurred in defending against Defendants' claims;

vi. For costs incurred in defense of this action;

vii. For such other and further relief as the Court may deem proper.

ROBINS KAPLAN LLP

Dated: April 8, 2019

/s/ *Kevin Pasquinelli*
Steven Carlson (CA Bar No. 206451)
Kevin Pasquinelli (CA Bar No. 246985)
ROBINS KAPLAN LLP
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scarlson@robinskaplan.com
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Attorneys for Plaintiff
EXPENSIFY, INC.

EXHIBIT 1

CARLSON LYNCH

1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
Phone: 412.322.9243
Fax: 412.231.0246
www.carlsonlynch.com

February 27, 2019

SENT VIA FEDERAL EXPRESS

David Barrett, Founder and CEO
Expensify, Inc.
88 Kearney Street
San Francisco, CA 94108

Re: Request for a Reasonable Accommodation to Access to your Mobile Applications

Dear Mr. Barrett:

This letter is sent on behalf of our clients, Matt Kolesar and Eddie White. Mr. Kolesar resides in Pennsylvania. He suffers from retinitis pigmentosa, a genetic disorder that rendered him totally blind when he was just nineteen years old. Mr. White, who resides in California, was born with Cataracts and Glaucoma, which was detected when he was thirteen years old. He is totally blind in his left eye, and has very little vision in his right eye. Today, both individuals use screen reader technology to access mobile applications on their smartphones. Screen reader "software translates the visual internet into an auditory equivalent. At a rapid pace, the software reads the content of a webpage to the user." *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 374 (E.D.N.Y. 2017). Unfortunately, your company's mobile applications are not compatible with screen reader technology. As a result, individuals with visual impairments, including our clients, cannot fully and equally access the services offered on your mobile applications, which I understand include:

iOS	Google Play
1. Expensify: Receipts & Expenses	2. Expensify - Expense Reports

To remedy this unequal access, our clients request the opportunity to participate with you in an interactive process designed to identify and implement a reasonable accommodation that protects against this disability discrimination, indefinitely.

All iOS and Android-based mobile devices[1] have built-in screen reader capabilities that can be turned on by the user. However, these screen readers only work if electronic information

[1] "Mobile" is a generic term for a broad range of wireless devices that are easy to carry and use in a wide variety of settings. This letter relates to those mobile devices commonly referred to

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[1] "Mobile" is a generic term for a broad range of wireless devices that are easy to carry and use in a wide variety of settings. This letter relates to those mobile devices commonly referred to

technology, such as your mobile applications, is designed to work with them, and most mobile applications presently are not. As a result, visually impaired users often have difficulty navigating applications, filling out forms, and identifying the function or significance of links, buttons, and images.

Unfortunately, your mobile applications contain significant failures that deny our clients, and all similarly situated individuals, full and equal access to your company's goods and services. As a result, our clients contend you have violated several statutes that prohibit disability discrimination, including, *inter alia,* California's Unruh Civil Rights Act (the "Unruh Act"), the Pennsylvania Human Relations Act ("PHRA"), and the Americans with Disabilities Act ("ADA"), implemented almost thirty years ago "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for" all. *See* 42 U.S.C. § 12101(a)(7).

Your mobile applications do not provide a text equivalent for non-text elements. Providing text alternatives allows the information to be rendered in a variety of ways by a variety of users. For example, a person who cannot see a picture, logo, or icon can have a text alternative read aloud using synthesized speech. A person who cannot hear an audio file can have a text alternative displayed so she can read it.

Your mobile applications fail to distinguish elements that trigger changes (e.g. links and buttons) from non-actionable elements (e.g. content and status information). Providing a clear indication that elements are actionable is relevant especially where actionable elements are detected visually, for example, by touch or mouse use. Interactive elements must also be detectable by users, like our clients, who rely on a programmatically determined accessible name (e.g. screen reader users).

Visual features that can set an actionable element apart include shape, color, style, positioning, text label for an action, and conventional iconography. Examples of distinguished features include button shape (rounded corners, drop shadows), color offset, and underlined text or alternate color use for links.

Your mobile applications fail to provide an alternative for time-based media that presents equivalent information for prerecorded content. Alternatives to time-based media, like video, help people who have difficulty perceiving visual content. For example, screen readers can read text alternatives aloud or present them to braille.

Your mobile applications include content subject to time limits that prevent users with disabilities from reading and understanding the content, reacting or responding to certain prompts, or understanding screen layouts and controls.

Your mobile applications prevent screen reader users who navigate sequentially through content from accessing primary content directly.

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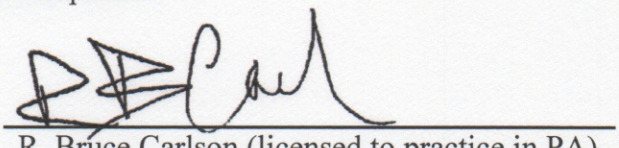
as smartphones and tablets, only. This letter does not concern desktop/laptop applications, wearable technology, such as smart-watches, or household appliances.

Your mobile applications fail to identify and describe input errors in text. By failing to identify input errors in text, screen reader users are less likely than others to understand an error has occurred. In the case of an unsuccessful form submission, re-displaying the form and indicating the fields in error is insufficient for some users to perceive that an error has occurred. As a result, these users are more likely to abandon the form before encountering a non-text error indicator.

Based on the foregoing, our clients request that you reasonably accommodate their disabilities and immediately remediate your mobile applications so they comply with the PHRA, Unruh Act, and ADA. Failure to remediate these deficiencies will subject you to suit in Pennsylvania federal court, and potentially, to California's statutory damages on a class basis. Our clients also request, on behalf of all similarly situated individuals in the United States, that you adopt a policy that protects against such disability discrimination, indefinitely. Please let us know within **fourteen (14) days** of receipt of this letter if you agree to participate in the interactive process outlined above.

To discuss this matter further, please contact Kevin Tucker by phone at (412) 322-9243 or by email at ktucker@carlsonlynch.com, with a copy to bcarlson@carlsonlynch.com and dhart@carlsonlynch.com. We look forward to your response.



R. Bruce Carlson (licensed to practice in PA)
Kevin W. Tucker (licensed to practice in PA)
CARLSON LYNCH SWEET KILPELA & CARPENTER, LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
T. (412) 322.9243

cc: Todd D. Carpenter, Esq. (licensed to practice in CA)

EXHIBIT 2

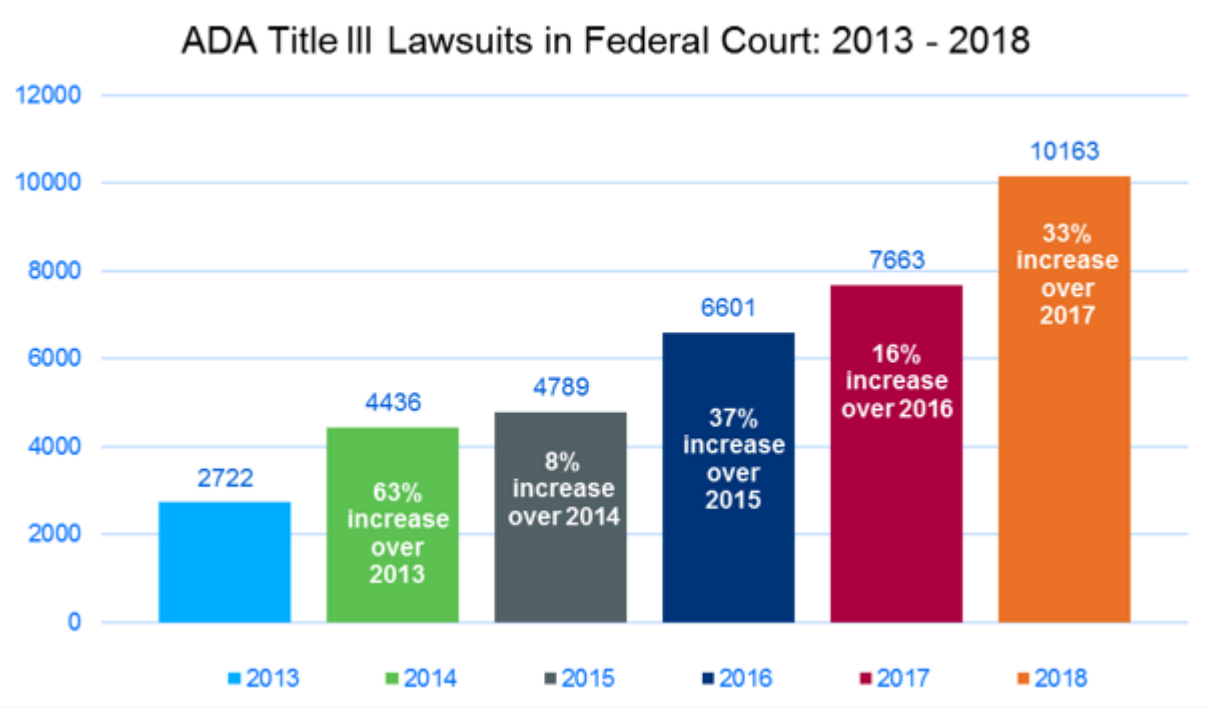
ADA Title III

News & Insights

Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000

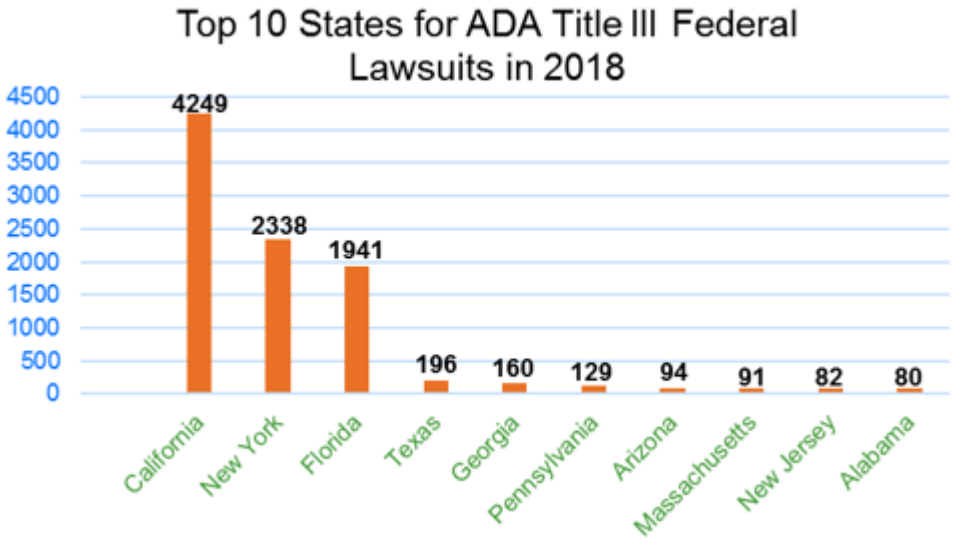
By **Minh N. Vu**, **Kristina M. Launey** & **Susan Ryan** on January 22, 2019

The number of ADA Title III lawsuits filed in federal court in 2018 hit a record high of 10,163 – up 34% from 2017 when the number was a mere 7,663. This is by far the highest number of annual filings since we started tracking these numbers in 2013, when the number of federal filings was only 2,722. In other words, the number of cases has more than tripled. The chart below shows the explosion in these types of suits:



[Graph: ADA Title III Lawsuits in Federal Court: 2013-2018: 2013: 2722; 2014: 4436, 63% increase over 2013; 2015: 4789, 8% increase over 2014; 2016: 6601, 37% increase over 2015; 2017: 7663, 16% increase over 2016; 2018: 10163, 33% increase over 2017]

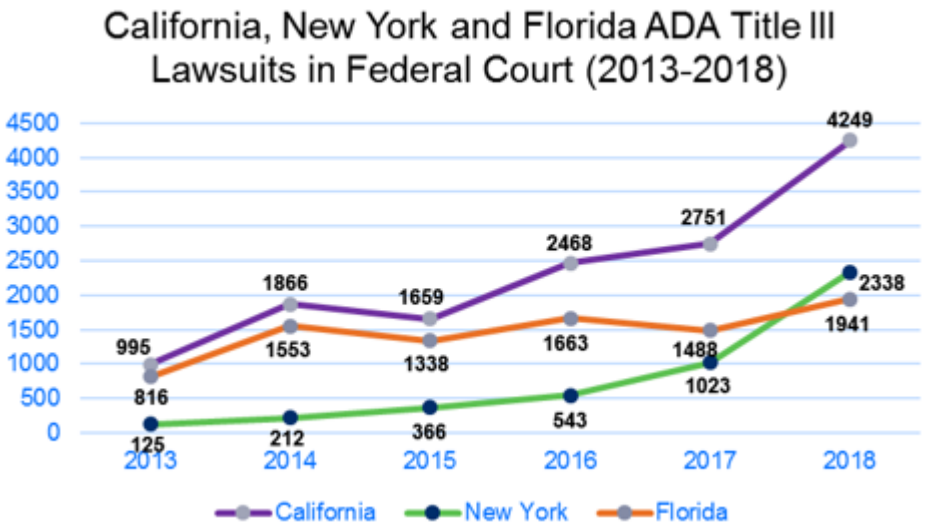
California, New York, and Florida led the pack by a wide margin as the states with the most ADA Title III lawsuits, with Texas, Georgia, Pennsylvania, Arizona, Massachusetts, New Jersey, and Alabama making the top ten but trailing far behind. Nevada, Colorado, and Utah fell out of the top ten in 2018, displaced by newcomers Alabama, Arizona, and Massachusetts. No ADA Title III lawsuits were filed in Montana, New Mexico, North Dakota, South Dakota, Vermont, Wyoming.



[Graph: Top 10 States for ADA Title III Federal Lawsuits in 2018: CA 4249, NY 2338, FL 1941, TX 196, GA 160, PA 129, AZ 94, MA 91, NJ 82, AL 80.

[Graph: Top 10 States for ADA Title III Federal Lawsuits in 2017: CA 2751, FL 1488, NY 1023, UT 360, NV 276, CO 215, GA 187, PA 182, TX 129, NJ 108.]

The big news among the top three states is that New York displaced Florida as the second busiest jurisdiction. Filings in New York more than doubled from 2017 to 2018 (1023 vs. 2338) while the number of cases filed in Florida only increased from 1488 to 1941. The number of lawsuits filed in California increased by 54% from 2751 in 2017 to 4249 in 2018. This record-breaking California number does not even include the many state court filings which we do not track.



[Graph: California, New York and Florida ADA Title III Lawsuits in Federal Court: 2013-2018: 2017: CA 2751, 2018: CA 4249, 2017: NY 1023, 2018: NY 2338, 2017: FL 1488, 2018: FL 1941.]

What is driving the ADA Title III lawsuit explosion? We are still crunching the numbers but we believe there were nearly 2000 federal lawsuits about allegedly inaccessible websites filed in 2018. There were very few of these cases before 2015. In addition, plaintiffs and their attorneys branched out into suits about hotel reservations websites in 2018, further driving the numbers. We also continue to see many lawsuits about physical access barriers.

A note on our methodology: Our research involved a painstaking manual process of going through all federal cases that were coded as “ADA-Other” and manually culling out the ADA Title II cases in which the defendants are state and local governments. The manual process means there is the small possibility of human error, but we are confident in our process.

SEYFARTH SHAW

EXHIBIT 3

2440 W. EL CAMINO REAL
SUITE 100
MOUNTAIN VIEW, CA 94040

650-784-4002 TEL
650-784-4041 FAX
ROBINSKAPLAN.COM

March 18, 2019 *Via Email and U.S. Mail*

Kevin Tucker
Carlson Lynch Sweet Kilpela & Carpenter, LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222

Dear Mr. Tucker,

We are representing Expensify in regards to your February 27, 2019 correspondence. Please direct all future correspondence to me.

Expensify takes seriously the concerns that you have raised. Expensify will continue to comply with all applicable laws and regulations that govern its operations.

We have reviewed the applicable law, including the following cases which establish that Expensify is already compliant with governing requirements. As you know, the Americans with Disabilities Act ("ADA") applies to "places of public accommodation." *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cit. 2019) (citing 42 U.S.C. § 12182(a)). As a company based in Oregon and California, the governing law of the U.S. Court of Appeal for the Ninth Circuit is clear that "places of public accommodation" are limited to physical places. Under Ninth Circuit law, the ADA only covers "actual, physical places were goods or services are open to the public, and places where the public gets those goods or services." *Robles*, 913 F.3d at 905 (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113-14 (9th Cir. 2000)). That is, "some connection between the

good or service complained of and an actual physical place is required." *Robles*, 913 F.3d at 905 (citing *Weyer*, 198 F.3d at 1114).

Likewise, the law of the Third Circuit, where one of your clients resides, requires a physical place for there to be a "place of public accommodation." *See, e.g.*, *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place…"); *Peoples v. Discovery Fin. Servs.*, 2010 U.S. App. LEXIS 14702, at *8 (3d Cir. 2010) ("Our court is among those that have taken the position that the term is limited to physical accommodations.").

The above analysis is confirmed by the case cited in your letter, *Andrews v. Blick Art Materials*, 286 F. Supp. 3d 365 (E.D.N.Y. 2017). That case confirms that the "Courts of Appeals for the Third, Sixth, Ninth, and Eleventh Circuits hold that the statute is unambiguous: 'places of public accommodation' are physical structures." *Id.* at 388.

Expensify offers its services exclusively through the Internet. Expensify does not offer its services through physical stores. As such, Expensify does not offer its services through "places of public accommodation," as is required to state a claim under the Americans with Disabilities Act.

Your letter offers no authority that the provisions of Pennsylvania and/or California state law somehow override this governing federal law.

Expensify takes serious its legal obligations and believes it is compliant with applicable law.

Sincerely,

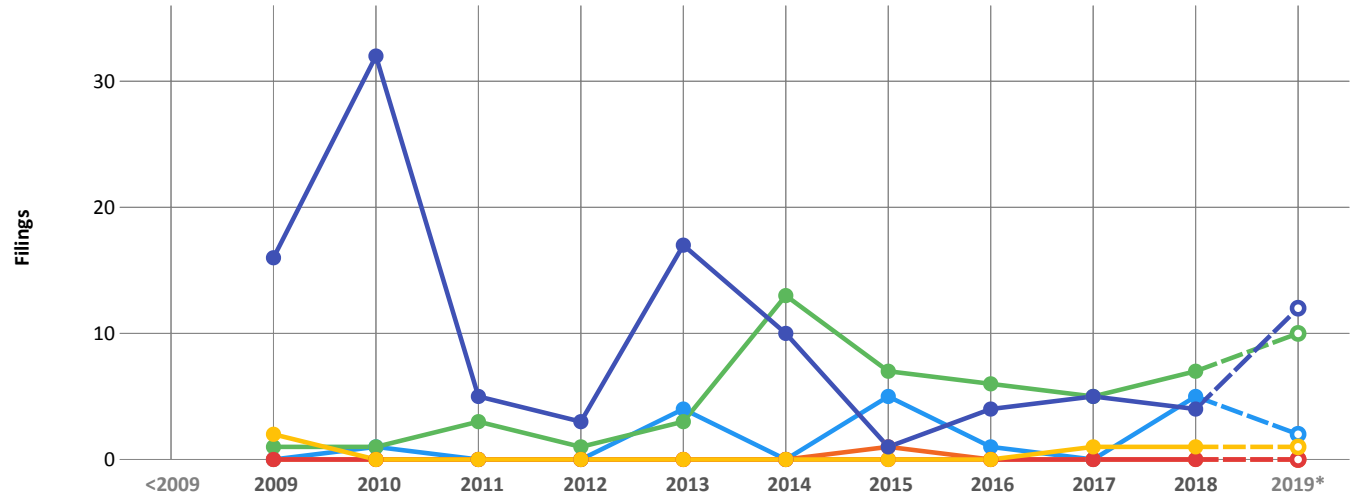
Steven C. Carlson

EXHIBIT 4

Carlson Lynch

Summary | District Court Cases | PTAB Trials | Client List | District Court Judge Appearances | PTAB Judge Appearances | Delaware Court of Chancery Cases

Cases Filed by Year (Top 6 by Focus Order)



	<2009	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019*
Antitrust	0	0	1	0	0	4	0	5	1	0	5	0
Bankruptcy	0	0	0	0	0	0	0	1	0	0	0	0
Contracts	0	1	1	3	1	3	13	7	6	5	7	5
Copyright	0	0	0	0	0	0	0	0	0	0	0	0
ERISA	1	2	0	0	0	0	0	0	0	1	1	0
Employment	17	16	32	5	3	17	10	1	4	5	4	9

* 2019 numbers are year-to-date. Open dots are full-year estimates.

Cases by Type

Case Types	Cases
Antitrust	16
Bankruptcy	1
Contracts	52
ERISA	5
Employment	123
Insurance	2
Patent	2
Product Liability	27
Securities	6
Trade Secret	1
Trademark	3

All other Case Types have 0 results in this case list.

Top Clients by number of open cases

Party	Law Firm's Cases	Client Total	%
Iron Gate Technology, Inc.	3	7	43%
Kathryn Scheller	3	7	43%
Nancy Thomas	3	11	27%
SAHARA LOGAN	3	3	100%
Amedius LLC	2	7	29%
American Electric Motor Services, Inc.	2	8	25%
Brett Watts	2	7	29%
CB Roofing LLC	2	7	29%
Credit Union National Association	2	2	100%
Danny J Curlin	2	7	29%

→ See all clients

Top Courts

Court	Cases
Western District of Pennsylvania (W.D.Pa.)	78
Eastern District of Pennsylvania (E.D.Pa.)	16
Northern District of Georgia (N.D.Ga.)	13
Northern District of California (N.D.Cal.)	13
Central District of California (C.D.Cal.)	13
Southern District of California (S.D.Cal.)	12
Northern District of Ohio (N.D.Ohio)	11
Middle District of Pennsylvania (M.D.Pa.)	9
Northern District of Alabama (N.D.Ala.)	7
Northern District of Illinois (N.D.Ill.)	6

Cases by Role and Type

	Plaintiff		Defendant	
Case Type	Open	Total	Open	Total
Antitrust	12	15	0	0
Bankruptcy	0	1	0	0
Contracts	18	50	0	1
Copyright	0	0	0	0
ERISA	1	5	0	0
Employment	15	99	1	23
Insurance	0	2	0	0
Patent	1	2	0	0
Product Liability	5	22	0	4
Securities	3	4	0	0
Trade Secret	0	1	0	0

	Plaintiff		Defendant	
Case Type	Open	Total	Open	Total
Trademark	2	2	0	0

Referred to in Litigation

Below are some of the different ways Carlson Lynch appears in PACER. Lex Machina normalizes law firm names so that all of a law firm's cases are grouped under a single name.

- CARLSON & LYNCH
- CARLSON LYNCH
- Carlson Lynch
- Carlson Lynch Kilpela & Carpenter
- CARLSON LYNCH KILPELA & CARPENTER
- Carlson Lynch Law Firm
- CARLSON LYNCH PNC
- CARLSON LYNCH SWEET & KILELA
- Carlson Lynch Sweet & Kilpela
- CARLSON LYNCH SWEET & KILPELA
- Carlson Lynch Sweet & Kilpela & Carpenter
- CARLSON LYNCH SWEET & KIPELA
- Carlson Lynch Sweet & Kipela
- Carlson Lynch Sweet & Kipela & Carpenter
- CARLSON LYNCH SWEET KILEPLA & CARPENTER
- CARLSON LYNCH SWEET KILPELA
- Carlson Lynch Sweet Kilpela
- Carlson Lynch Sweet Kilpela & Carpenter
- Carlson Lynch sweet Kilpela & Carpenter
- CARLSON LYNCH SWEET KILPELA & CARPENTER
- CARLSON LYNCH SWEET KILPELA & CARPTENTER
- Carlson Lynch Sweet Kilpela Carpenter
- CARLSON LYNCH SWEET KIPELA & CARPENTER
- Carlson Lynch Sweet Kipela & Carpenter
- CARLSON LYNCH SWEET KIPELA CARPENTER
- Carlson Lynch Sweet Lilpela & Carpenter
- CARLSON LYNCH SWEET, KILPELA & CARPENTER
- Carlson Lynch Sweet, Kilpela & Carpenter
- Carlson Lynch Swet Kilpela & Carpenter
- CARLSON, LYNCH LAW FIRM
- Carlson, Lynch, Sweet & Kilpela
- CARLSON, LYNCH, SWEET, KILPELA & CARPENTER
- CarlsonLynch
- CARSON LYNCH
- Carson Lynch

EXHIBIT 5

https://www.wsj.com/articles/companies-face-lawsuits-over-website-accessibility-for-blind-users-1478005201

LAW

Companies Face Lawsuits Over Website Accessibility For Blind Users

More than 240 businesses nationwide have been sued in federal court since the start of 2015

Legally blind para-athlete Juan Carlos Gil, seen here at a rowing training session in Miami in 2014, has sued more than 30 businesses this year claiming their websites aren't accessible to the blind. **PHOTO:** LYNNE SLADKY/ASSOCIATED PRESS

By Sara Randazzo

Updated Nov. 1, 2016 10:54 a.m. ET

The disability lawsuits started hitting the Pittsburgh federal courthouse last July, all claiming corporations' websites violated the law by not being accessible to the blind. The first round came against household names such as Foot Locker Inc., FL **+0.55%** ▲ Toys "R" Us, Brooks Brothers Group Inc., and the National Basketball Association. Later suits targeted lesser-known retailers including Family Video Movie Club Inc. and Rue21 Inc.

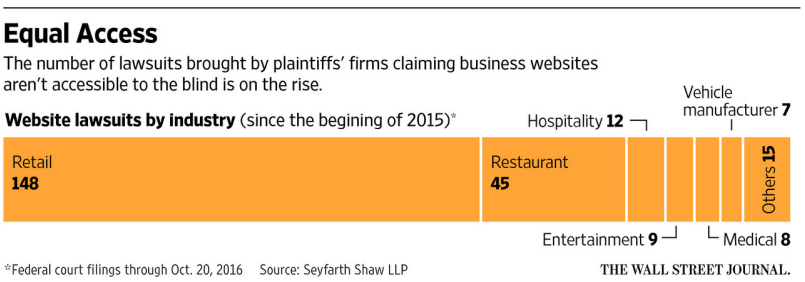
All told, about 40 nearly identical cases have landed in front of the same federal judge, Arthur Schwab, all brought by one local law firm, Carlson Lynch Sweet Kilpela & Carpenter LLP.

Nationwide, more than 240 businesses have been sued in federal court since the start of 2015, concerning allegedly inaccessible websites, according to law firm Seyfarth Shaw LLP. Most settle quickly, for between $10,000 and $75,000, lawyers involved say, with the money typically going toward plaintiffs' attorneys' fees and expenses.

The suits named above have been dismissed, according to court dockets, which don't reflect if a private settlement was reached. Toys "R" Us said it is looking for ways to make its website more accessible. The other companies had no comment or didn't respond to a request for comment.

The Justice Department, which enforces the Americans with Disabilities Act, has delayed since 2010 releasing technical guidelines as to how websites should comply, most recently putting it off until 2018. The delay has led to "complete mayhem," said Minh Vu, a Seyfarth Shaw partner who represents companies in disability-access cases.

A Justice Department spokesman declined to comment on the guidelines, but noted public settlements the agency has reached with companies, including tax-preparation service H&R Block and online grocer Peapod, requiring them to make websites accessible.



Disability-rights advocates and plaintiffs' lawyers say the litigation points to a real issue: making sure those with disabilities have the same freedom to enjoy the internet as everyone else.

"Blind people are not going to be able to thrive and live the lives they want to live if they don't have equal access to websites," said Christopher Danielsen, spokesman for the National Federation of the Blind. He said most websites have barriers for the blind, who rely on software to read the content of webpages aloud. Such services can be free or cost upward of $1,000, depending on the sophistication.

Defense lawyers and industry groups counter that while the underlying issues are important, the suits are a legal-fee shakedown and don't help improve accessibility. "You find entrepreneurial lawyers who are always looking for the next great cause of action," said Steven Solomon, a defense lawyer at GrayRobinson PA in Miami.

Public businesses have long been required to be accessible to the disabled under the ADA, signed into law in 1990. Websites, however, weren't expressly included in the law as a place of "public accommodation."

Federal appellate courts have been divided on the issue, with some finding that all websites must comply with disability standards, and others contending that websites only fall under the ADA if they have a "nexus" to a brick-and-mortar business. Mr. Danielsen said there is no data as to how many websites don't accommodate blind users.

Miami-area resident Juan Carlos Gil, who is legally blind and wheelchair-bound because of cerebral palsy, isn't content to wait for the legal landscape to clear. Mr. Gil has sued more than 30 businesses this year alleging their websites violate the law, including women's retailer Anthropologie Inc., grocery chain Winn Dixie Stores Inc., and Burger King Corp. "These are big corporations...that honestly they don't care," the 34-year-old said.

Winn-Dixie said it doesn't comment on open litigation. Anthropologie and Burger King didn't respond to a request for comment.

Mr. Gil said he faces obstacles online 90% of the time. When websites aren't coded correctly, screen readers get stuck, simply saying "image" or "blank" aloud, without continuing across the page. Proper headers and text embedded behind images help blind users navigate sites.

Retrofitting websites that aren't built correctly can run into the tens of thousands of dollars or more for companies, experts say.

A para athlete, Mr. Gil said he recently spent $200 on wheels for his racing wheelchair while competing in London, only to later realize he had ordered the wrong item because the website was difficult to use.

Mr. Gil is represented by Miami attorney Scott Dinin, who has sued at least 108 mall retailers, restaurants, banks and others during the past year in the Southern District of Florida. "All we're looking for is, are you going to be inclusive, or exclude people?" Mr. Dinin said.

He and other plaintiffs' lawyers, including Bruce Carlson of Carlson Lynch and C.K. Lee in New York, are quick to note that the website suits aren't big moneymakers, but decline to discuss the economics.

For every company sued, several more receive letters seeking an out-of-court settlement.

A restaurant trade group recently alerted its members to a typical Carlson Lynch demand letter that invites companies to call the law firm before hiring experts "to explore a far more cost-effective and pragmatic approach to resolving these issues." The letters include a report of red flags on a company's website derived from a disability-access scanning program.

Mr. Carlson said his firm has sent "many hundreds of letters" and only targets larger companies, because he believes that is more likely to make industries aware of the issues than suing mom-and-pop businesses.

Judges often push the lawsuits into mediation, which then are resolved in private settlements, according to a review of nationwide court dockets. The settlements frequently include a timeline in which a company agrees to improve its website and undergo future monitoring, lawyers involved say, but some entail little more than paying attorneys fees. So far, the suits primarily target websites, but lawyers expect claims against mobile applications could be on the horizon.

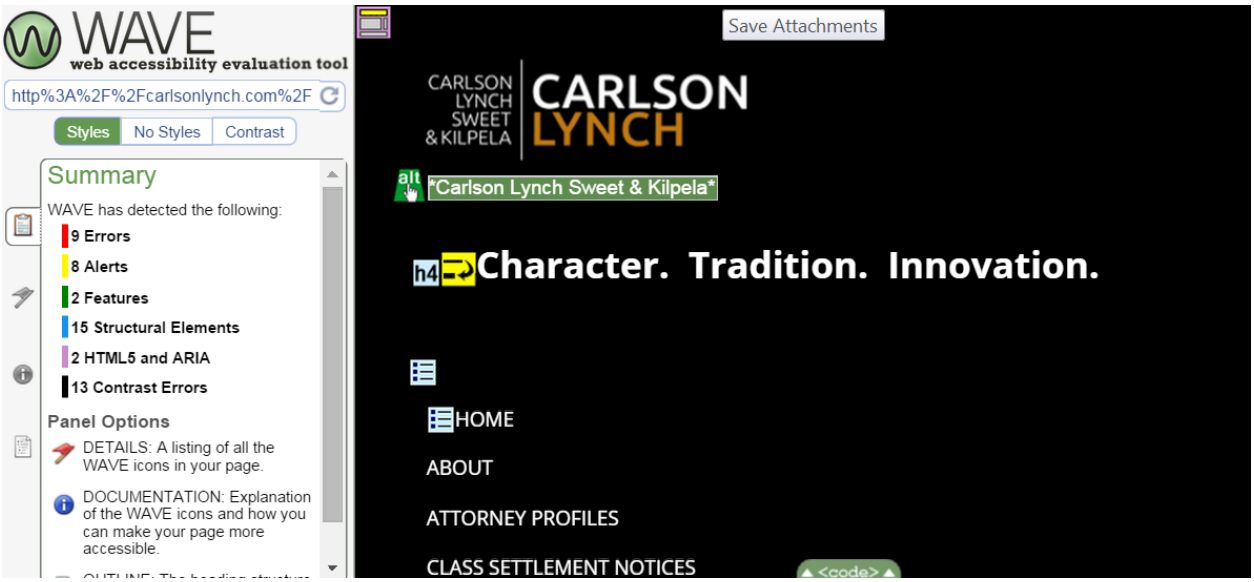
Mr. Danielsen with the National Federation of the Blind said the organization has filed some lawsuits but prefers to work collaboratively with companies. “There are millions of websites, literally,” he said. “Nobody is going to sue everybody.”

Write to Sara Randazzo at sara.randazzo@wsj.com

EXHIBIT 6

Exhibit 2

From: Greg Hurley [mailto:GHurley@sheppardmullin.com]
Sent: Monday, December 21, 2015 3:35 PM
To: BCarlson@CarlsonLynch.com
Subject: website claim by Carlson - response to Carlson



Bruce Carlson (BCarlson@CarlsonLynch.com)

Dear Bruce,

I was surprised when Harbor Freight sent me your demand letter regarding the accessibility to their website. Your letter is identical to the ones you have sent to many of my other clients. I note that you did not disclose the "claimant", nor did you disclose what transactions they were unable to complete. It is impossible for us to preserve records without this information. Also as you know your client's standing and the scope of their claim is dependent on their disability. Does this hypothetical plaintiff need spoken text ? large font ? low contrast ? high contrast ? etc.

You appear to base your allegations on the an audit for compliance with Section 508 of the Rehab Act. You won't be surprised that Harbor Freight is not a governmental contractor and therefore not subject to the Rehab Act. You also assert that the WC3 / WCAG guidelines are mandated by the ADA. I think you also

know that is not true. If you are correct that such guidelines are mandatory, then your firm's website suffers the same alleged deficiencies that you claim to have identified with Harbor Freight. I ran an audit Carlson Lynch website on WAVE (checking for WCAG compliance) that shows that your website has "errors". See the screen shot above. I shouldn't have to remind you that law firms are specifically identified in the ADA as " public accommodations" subject to the same rules you assert apply to retailers. Does the record of the prior "errors" on your website indicate that Carlson Lynch has a policy or practice of not maintaining an accessible website?

Please disclose the specific transactions that your client could not complete and provide screen shots of the code that created "barriers" for them so we can respond to your demand for your fees for this hypothetical plaintiff. You are also welcome to explain the WCAG errors and the even more extensive Section 508 errors on your website.

Thanks

Greg Hurley
714.424.8205 | direct
714.428.5981 | direct fax
949.282.9530 | cell
GHurley@sheppardmullin.com

SheppardMullin
Sheppard Mullin Richter & Hampton LLP
650 Town Center Drive, 4th Floor
Costa Mesa, CA 92626-1993
714.513.5100 | main
www.sheppardmullin.com

RELEASE AND WAIVER OF CLAIMS

BACKGROUND

1. Expensify, Inc. ("Expensify") and/or its affiliates and related entities owns and operates websites and mobile applications which are made available to members of the public to access with smartphones, tablets, and other electronic devices. On and through the websites and mobile applications, Expensify and/or its affiliates and related entities offers expense management systems for personal and business use.

2. Eddie White ("White") suffers from cataracts and glaucoma. He is totally blind in his left eye and has very little vision in his right eye. White uses screen reader technology to access online content with his smartphone.

3. Following a review by his counsel, White, through his counsel, sent Expensify a written request for a reasonable accommodation to access Expensify's mobile applications dated February 27, 2019 (the "Request"). The Request alleges that two of Expensify's mobile applications, including "Expensify: Receipts & Expenses" and "Expensify - Receipts & Expenses," which are available on iOS and Android-based mobile devices respectively, are not fully accessible to individuals with disabilities in violation of Title III of the ADA ("ADA"), California's Unruh Civil Rights Act (the "Unruh Act"), and the Pennsylvania Human Relations Act ("PHRA").

RELEASE

4. Release of White's Claims. White, on behalf of himself and any of his agents, employees, representatives, assigns, heirs, executors, trustees, partners and attorneys, and each of them (collectively, the "Releasing Persons"), jointly and severally forever release and discharge Expensify, and each of its affiliates and related entities, together with their respective past, present, and future officers, directors, employees, agents, stockholders, attorneys, servants,

representatives, parent entities, subsidiary entities, partners, insurers, contractors, and the predecessors, successors, heirs, executors, administrators and assigns of each of the foregoing (collectively, the "Released Parties"), from any and all claims, causes of action, suits, demands, rights, liabilities, damages, lawsuits, legal proceedings, losses, fees, costs and expenses of any kind whatsoever, whether known or unknown, including, but not limited to, any monetary, injunctive or declaratory relief relating thereto, and for reimbursement of attorneys' fees, costs and expenses, relating to the accessibility of Expensify's past, present, or future websites and mobile applications, including but not limited to the Request, but not including claims related to the enforcement of this Release and Waiver (collectively, the "Released Claims"). This release expressly applies to, but is not limited to, all claims regarding the accessibility of Expensify's past, present, or future websites and mobile applications, including but not limited to all claims arising from or relating to the ADA, Unruh Act, PHRA, and any other federal, state, or local law, statute or ordinance, rule or principle of common law or doctrine in law or equity, known or unknown, suspected or unsuspected, foreseen or unforeseen, real or imaginary, actual or potential, through the date of this Release and Waiver. White, on his own behalf and on behalf of the other Releasing Persons, acknowledges that Released Claims may include claims that are presently unknown, and that the release contained in this Release and Waiver is intended to and does fully, finally and forever discharge all Released Claims, whether now asserted or unasserted, known or unknown, which arise out of or in connection with the Released Claims.

5. Other Actions. White represents and agrees that he has not filed any charges, complaints, lawsuits, or other proceedings regarding the Released Claims with any court or with any municipal, state or federal board, agency or commission charged with the enforcement of any law or regulation.

WAIVER

6. Section 1542 Waiver. White hereby expressly and knowingly waives and relinquishes any and all rights that he has or might have relating to the Released Claims under California Civil Code § 1542 (and under any and all other statutes or common law principles of similar effect) which reads as follows:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.**

7. Subsequent Discovery of New Facts. White acknowledges that he may hereafter discover facts different from, or in addition to, those which he now believes to be true with respect to the Released Claims above. On his own behalf and on behalf of all of the Releasing Persons, White agrees that the foregoing Release and Waiver shall be and remain effective in all respects notwithstanding such different or additional facts or discovery thereof, and that this Agreement contemplates the extinguishment of all such Released Claims. By executing this Release and Waiver, White acknowledges the following: (a) his is represented by counsel of his own choosing; (b) he has read and fully understands the provisions of California Civil Code § 1542; and (c) he has been specifically advised by his counsel of the consequences of the above waiver and this Release and Waiver generally.

8. Covenant Not To Sue. White unconditionally and irrevocably covenants to refrain from making any claim(s) or demand(s) against Expensify. or any of its related business entities,

including distributors and employees of such entities on account of any possible cause of action based on or involving the accessibility of Expensify's past, present, or future websites and mobile applications, including but not limited to all claims arising from or relating to Title III of the ADA, California's Unruh Civil Rights Act, the Pennsylvania Human Relations Act, and any other federal, state, or local law, statute or ordinance, rule or principle of common law or doctrine in law or equity, known or unknown, suspected or unsuspected, foreseen or unforeseen, real or imaginary, actual or potential, before or after the Effective Date of this Covenant.

9. Actions Brought By Third-Parties. To the extent any charge, complaint, grievance, demand for arbitration, or other proceeding against Released Parties in connection with the Released Claims may be brought by a third party, White expressly waives any claim to any form of monetary or other damages, or any other form of recovery or relief in connection with any such action except for statutorily required witness fees.

MISCELLANEOUS PROVISIONS

10. Effective Date. This Release and Waiver shall become effective as of the date of White's signature below ("Effective Date").

11. Binding Authority. The signatories represent that they have the authority to bind the respective parties identified below to the terms of this Agreement.

12. Entire Release and Waiver. This Release and Waiver and Exhibit A constitute the entire Release and Waiver with respect to its subject matter and supersede any and all prior agreements, understandings, promises, warranties, and representations made by each Party to the other concerning their subject matter. This Release and Waiver may be modified only by a written document signed by all Parties. No waiver of this Release and Waiver or of any of its

promises, obligations, terms, or conditions shall be valid unless it is written and signed by the Party against whom the waiver is to be enforced.

13. Severability. If any part or any provision of this Release and Waiver is finally determined to be invalid or unenforceable under applicable law by a court of competent jurisdiction, that part or provision shall be ineffective to the extent of such invalidity or unenforceability only, without in any way affecting the remaining parts or provisions of this Release and Waiver.

14. No Assignment. White hereby warrants and represents that he has not assigned nor in any way transferred or conveyed, all or any portion of the claims covered by this Release and Waiver.

15. Representation/Warranty Regarding Other Potential Claimants or Legal Claims. White represents and warrants that he has not disclosed or revealed the existence of the Request, its contents, or the threat or possibility of any legal action against the Expensify or the Released Persons to any potential plaintiff or potential putative class member or to any attorney for a potential plaintiff or potential putative class member other than Carlson Lynch, LLP.

AGREED AND CONSENTED TO:

Eddie White

EDDIE WHITE

6/19/2019

Date

Kevin Tucker

From: Kevin Tucker
Sent: Saturday, March 23, 2019 8:03 AM
To: 'Carlson, Steven C.'
Cc: Bruce Carlson; Daniel Hart; Pasquinelli, Kevin M.
Subject: RE: Response of Expensify
Attachments: Suchenko v ECCO USA Inc, 2018 WL 3933514 (W.D. Pa. 08.16.2018).pdf; Gathers v 1-800-Flowerscom Inc, 2018 WL 839381 (D. Mass. 02.12.2018).pdf; Access Now Inc v Otter Products LLC, 280 F.Supp.3d 287 (D. Mass. 2017).pdf; Access Now Inc v Blue Apron LLC (1).pdf

FRE 408 Communication: Confidential And Not To Be Shared With Any Third Party Without Prior Written Consent of Kevin W. Tucker, Esquire

Hi Steve,

Thank you for your March 18 letter. I appreciate you reaching out.

In the last several years, our firm has overcome the "public accommodation" argument you raise.

Attached is a 2018 decision from the W.D.Pa., where we will likely file the matter if necessary, confirming your client's website constitutes a "public accommodation" under the ADA. *See Suchenko v. Ecco USA, Inc.*, 2018 WL 3933514 (W.D.Pa. Aug. 16, 2018) ("Simply put, Defendant in the instant case, like other corporate defendants in Gniewkowski and Suchenko, purportedly owns, operates, and/or controls the property upon which the alleged discrimination has taken place—i.e., its website. Therefore, Plaintiff in this case has a nexus to the place of public accommodation and thus may claim the protections of Title III. As a result, Defendant's Motion to Dismiss is denied.").

Alternatively, we also file "website-only" cases in the D.Mass. and D.N.H. I have attached decisions from some of these cases as well. In each case, the forum court exercised jurisdiction (and its Circuit's law re what constitutes a public accommodation) over the out-of-forum website operator).

In light of the above, we have been retained to contact Expensify about its inaccessible mobile applications and to resolve our clients' discrimination claims in a confidential settlement agreement, or litigation. A settlement agreement provides our clients with an opportunity to enforce future ADA compliance by contract. This is necessary in the absence of regulations governing online accessibility.

In addition to the costs our clients have incurred to date, they seek compensation for compliance monitoring, to which our firm contends they would be entitled as a prevailing party upon filing suit.[1] This mirrors the court-approved process by which several advocacy organizations litigate their Title III cases. Below is a link to one recent court-approved class settlement between NFB and Uber, in which Uber agreed to pay almost $300,000 for compliance monitoring of the ADA policies relating to its ride-share application. The Court also awarded NFB almost $2.5 million in fees.

https://nfb.org/images/nfb/documents/pdf/uber-and-lyft/uber-settlement.pdf

By resolving this matter before litigation, it is our designed goal to eliminate the litigation-related fee award entirely and reduce the monitoring costs significantly.

Perhaps we can schedule a time to connect by phone? If you agree, please use the link below to schedule a call time that fits your schedule. Once you do, we both will receive a calendar invite with dial-in information. This takes the back-and-forth out of scheduling calls because the link gives you access to the next two weeks of my calendar.

https://calendly.com/kevintucker

Have a nice weekend,

Kevin

[1] *See Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, Case No. 2:16-cv-01898-AJS (W.D. Pa. Jan. 11, 2018) (ECF 191); *see also Access Now, Inc. v. Lax World, LLC*, No. 1:17-cv-10976-DJC (D. Mass. Apr. 17, 2018) (ECF 11).

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CARLSON
LYNCH

From: Carlson, Steven C. [mailto:SCarlson@RobinsKaplan.com]
Sent: Monday, March 18, 2019 9:50 PM
To: Kevin Tucker <ktucker@carlsonlynch.com>
Cc: Bruce Carlson <bcarlson@carlsonlynch.com>; Daniel Hart <dhart@carlsonlynch.com>; Pasquinelli, Kevin M. <KPasquinelli@RobinsKaplan.com>
Subject: Response of Expensify

Mr. Tucker, please see the attached correspondence in response to your firm's letter to Expensify.

Regards,
Steve Carlson

YOU IN ANOTHER JURISDICTION. THIS ACTION IS BETWEEN MR. WHITE AND YOUR CLIENT, NOT BETWEEN MR. WHITE'S COUNSEL AND YOUR CLIENT.

MR. CARLSON: WE AGREE, YOUR HONOR. AND HAVING THIS COURT IN THE NINTH CIRCUIT ESTABLISH JUDGMENT THAT MR. -- THAT EXPENSIFY DID NOT DISCRIMINATE AGAINST MR. WHITE, THAT DOES NOT INSULATE US IN NEW HAMPSHIRE, FOR EXAMPLE, FROM A SIMILAR CLAIM BY SOME OTHER PLAINTIFF FROM THE CL FIRM.

NONETHELESS, THAT SITUATION WOULD BE AN EXPRESS TICKET TO THE SUPREME COURT. IF WE'VE GOT OUR JUDGMENT HERE SAYING WE DID NOT DISCRIMINATE AND THERE'S A CONTRARY JUDGMENT IN NEW HAMPSHIRE PERHAPS, WE BELIEVE ABSOLUTELY THAT WOULD BE A DIRECT TICKET TO THE SUPREME COURT. WE DO BELIEVE THE CIRCUIT SPLIT NEEDS TO BE SOLVED, AND WE BELIEVE THIS IS THE CASE TO DO IT.

THE COURT: IS THAT YOUR ARGUMENT?

MR. CARLSON: FURTHERMORE, YOUR HONOR, WE SHOULD BE GRANTED LEAVE TO AMEND. THERE'S BEEN ASSERTIONS MADE --

THE COURT: WHAT WOULD YOU AMEND TO ADD?

MR. CARLSON: WELL, FOR EXAMPLE, YOUR HONOR, IN THE PAPERS IN THE REPLY BRIEF, THERE'S BEEN ASSERTIONS BY COUNSEL THAT MR. WHITE ATTEMPTED TO USE THE EXPENSIFY SYSTEM, WAS UNABLE TO DO SO BECAUSE OF HIS DISABILITY.

WE HAVE SEEN ZERO EVIDENCE THAT THAT ASSERTION BY COUNSEL IS TRUE. IT WAS A DECLARATION SUBMITTED BY MR. WHITE.