IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHERYL THURSTON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 3:17-cv-3391-N**
	§	
BCM FEDERAL CREDIT UNION,	§	
	§	
Defendant.	§	

DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM, AND BRIEF IN SUPPORT

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Defendant BCM Federal Credit Union ("BCM") files this Motion to Dismiss the Complaint filed by Plaintiff Cheryl Thurston ("Thurston") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for want of subject matter jurisdiction and failure to state a claim upon which relief may be granted, and respectfully shows as follows:

I. INTRODUCTION

Since December 13, 2017, Thurston has filed at least nine virtually identical lawsuits against Texas credit unions, seeking injunctive relief and attorneys' fees under Title III of the Americans with Disabilities Act ("ADA" or "Title III") for alleged deficiencies in the credit unions' websites.[1] In each case, Thurston contends that the website is not sufficiently accessible because the screen reader she uses due to a sight impairment cannot adequately navigate the website, and that this prevents her from having "full and equal access" to the website's benefits and services. BCM's counsel is aware that Thurston's California-based law firm has sent scores of demand letters threatening similar litigation to credit unions across Texas.[2]

BCM is a federally-chartered credit union located in Houston, Texas. Like other credit unions, it is a not-for-profit cooperative that is owned by its members – in BCM's case, individuals who work in the healthcare industry in Harris County, Texas. Thurston's Complaint against BCM

[1] *See Cheryl Thurston v. Trans Texas Southwest Credit Union*, No. (N.D. Tex., filed Dec. 13, 2017); *Cheryl Thurston v. Galveston Government Employees Credit Union*, No. 6:17-cv-00058 (N.D. Tex., filed Dec. 13, 2017); *Cheryl Thurston v. Tip of Texas Federal Credit Union*, No. 3:18-cv-00002 (W.D. Tex., filed Dec. 13, 2017); *Cheryl Thurston v. United Energy Credit Union*, No. 3:17-cv-03393 (N.D. Tex., filed Dec. 14, 2017); *Cheryl Thurston v. Grand Prairie Credit Union*, No. 3:18-cv-00127 (N.D. Tex., filed Jan. 18, 2018); *Cheryl Thurston v. Local 20 IBEW Federal Credit Union*, No. 3:18-cv-00133 (N.D. Tex., filed Jan. 18, 2018); *Cheryl Thurston v. Mt. Olive Baptist Church Credit Union*, No. 4:18-cv-00041 (N.D. Tex., filed Jan. 18, 2018); and *Cheryl Thurston v. Randolph-Brooks Federal Credit Union*, No. 3:2018cv00125 (N.D. Tex., filed Jan. 18, 2018). BCM asks the Court to take judicial notice of these cases, as it may properly do with respect to matters of public record.in deciding a motion to dismiss. *See Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) (citing *Cinel v. Connick*, 15 F.3d 1338, 1343 n. 6 (5th Cir. 1994)).

[2] Thurston's counsel has also instituted essentially the same litigation against countless credit unions in other jurisdictions. Too numerous to list, examples of such cases include *Carroll v. Northwest Federal Credit Union*, No. 1:2017-cv-01205 (E.D. Va., filed Oct. 24, 2017); *Carroll v. Roanoke Valley Credit Union*, No. 7:2017-cv-00469 (W.D. Va., filed Oct. 6, 2017); *Jones v. Family First Credit Union*, No. 1:17-CV-04592-SCJ (N.D. Ga., filed Nov. 15, 2017); *Jones v. Geovista Credit Union*, No. 4:17-CV-00249-JRH-GRS (S.D. Ga., filed Dec. 18, 2017); and *Davis v. Tampa Bay Federal Credit Union*, No. 8:18-cv-00144 (M.D. Fla., filed Jan. 16, 2018).

pleads a single count: an alleged violation of Title III, which prohibits places of public accommodation from discriminating against individuals with disabilities in providing goods and services to the public. BCM asks the Court to dismiss this case with prejudice for five reasons:

First, Thurston lacks standing to pursue her claim because she has suffered no injury in fact. Thurston does not allege that she is, or even desires to become, a member of BCM, qualifies for membership, or otherwise has any right to enjoy the benefits of membership. In addition, her claim has been rendered moot by BCM's implementation of website modifications that conform to the very accessibility standards Thurston contends should be followed.

Second, the Fifth Circuit has held unequivocally that only a physical "place" can qualify as a "place of public accommodation" subject to Title III's accessibility requirements. BCM's website exists in cyberspace; it has no physical presence and is not a place. Nor does the website in any way impair Thurston's access to BCM's physical, brick-and-mortar facilities.

Third, neither Congress nor the United States Department of Justice ("DOJ") – the agency with regulatory authority under Title III – has set forth standards defining what BCM must do to make its website accessible to Thurston. BCM has no affirmative duty to implement the changes Thurston desires. *Fourth*, to the extent Thurston claims that BCM violated Title III by failing to provide auxiliary aids and services, she failed to allege that she requested them. Absent a request, BCM has no duty to act. And *fifth*, it would be a violation of BCM's right to due process to require an accessible website when no law or regulation imposes such obligation.

As shown below, each of the foregoing reasons provides ample grounds for dismissal.

II. ARGUMENT

A. Plaintiff Lacks Standing to Pursue Her ADA Title III Claim.

1. Rule 12(b)(1) Standard.

A motion to dismiss for lack of standing implicates the district court's subject matter jurisdiction. *See United States v. Hays*, 515 U.S. 737, 742 (1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the [jurisdictional] doctrines."). Motions to dismiss based on the absence of standing are governed by Rule 12(b)(1) and should be granted if the court lacks the "statutory or constitutional power to adjudicate the case." *Harold H. Huggins Realty, Inc. v. FNC, Inc*., 634 F.3d 787, 795 n.2 (5th Cir. 2011); *see also Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Courts cannot award relief to litigants who do not meet constitutional Article III standing requirements. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975); U.S. Const. art. III, § 2.

The standing inquiry ascertains whether there exists a live case or controversy that renders judicial resolution appropriate. *See Summers v. Earth Island Inst*., 555 U.S. 488, 493 (2009). And "[e]nsuring that standing requirements are met by each plaintiff in each lawsuit brought under the ADA enables courts to ensure that the ADA is not being abused." *Access 4 All, Inc. v. Thirty E. 30th St., LLC*, No. 04 Civ. 3683, 2006 U.S. Dist. LEXIS 96742, at *35 (S.D.N.Y. Dec. 11, 2006). In deciding the motion, the Court is not limited to the allegations in the complaint, but can also take into account undisputed facts evidenced in the record and resolve relevant disputed facts. *See Freeman v. U.S.*, 556 F.3d 326, 334 (5th Cir. 2009), *cert. denied*, 558 U.S. 826 (2009); *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam).

2. Plaintiff Has Failed to Allege an Injury in Fact.

The burden of proof for a Rule 12(b)(1) motion to dismiss is on Thurston as the party asserting jurisdiction. *See Deutsch v. Travis County Shoe Hosp., Inc.*, No. 16-51431, 2018 U.S. App. LEXIS 2647, at *7 (5th Cir. Feb. 2, 2018) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). To establish standing, Thurston must demonstrate that "(1) [she] suffered an injury

in fact, (2) that is fairly traceable to [BCM's] challenged conduct …, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* 136 S. Ct. at 1547; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Allegations of injury that is merely conjectural or hypothetical do not suffice to confer standing. *See Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009).

a. Standing Requires a Showing of Not Only Past, But Also Future Injury.

Because ADA Title III affords only injunctive relief, *see* 42 U.S.C. § 12188(a), Thurston can satisfy the injury-in-fact requirement only if she shows that she "is immediately in danger of sustaining some direct injury." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983); *see also Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("a threatened injury must be certainly impending"). "[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Lyons*, 461 U.S. at 102 (quotations omitted); *see also Jolly v. Pappas Rests., Inc.*, 189 F.3d 467 (5th Cir. 1999) (restaurant's past denial of service to a disabled plaintiff did not support injunctive relief absent proof of real or immediate threat of future harm).

In *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308 (5th Cir. 1997), the Fifth Circuit had occasion to apply the standing requirement in the Title III context. The *Plumley* court dismissed on standing grounds an ADA claim for injunctive relief against a business that refused to contract with a disabled customer, as the customer had since died. In so ruling, it underscored that "a plaintiff must show that there is a reason to believe that he would directly benefit from the equitable relief sought," which means there must be "a real or immediate threat that he will be wronged again." *Id.* at 312; *see also Norkunas v. Park Rd. Shopping Ctr., Inc.*, 777 F. Supp. 2d 998, 1001 (W.D.N.C. 2011) (ADA plaintiff lacks standing for injunctive relief absent "likelihood

that he will suffer future discrimination at the hands of the defendant."), *aff'd*, 474 Fed.Appx. 369 (4th Cir. 2012).

At a minimum, this means that Thurston must plead sufficient facts to show both that she has encountered barriers in the past, and that she likely will be exposed to the same barriers in the imminent future. *See, e.g.*, *Cortez v. Nat'l Basketball Ass'n*, 960 F. Supp. 113, 117-18 (W.D. Tex. 1997) (plaintiff lacked standing because she failed to allege that she intended to return to the defendant's events in the future); *Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000) (absent likelihood that plaintiffs would visit an inaccessible building in the imminent future, they lacked standing to seek injunctive relief); *Norkunas*, 777 F. Supp. 2d at 1001 ("In order to demonstrate a likely future harm, Plaintiff must demonstrate an intention to return.").

b. As a Matter of Law, Thurston Lacks Standing Because She Is Not Within BCM's Field of Membership.

Thurston's Original Complaint (the "Complaint") is devoid of any such allegations. First, Thurston does not even plead facts sufficient to establish a past injury. While the Complaint identifies alleged access barriers, (Compl. ¶ 14), it nowhere describes the specific obstacles Thurston encountered personally, how they impacted her use of the website, or what goods, services or facilities of BCM they prevented her from enjoying. All Thurston alleges is that she made "several attempts" to use the website "in recent months" but was denied "full and equal access." (Compl. ¶ 16.) This is far too vague to demonstrate an actual past injury.

Second, Thurston fails to allege any facts that would indicate likely future harm. Nor can she: Thurston plainly does not meet the eligibility criteria for membership in BCM. Unlike other banking institutions, credit unions are unique in that they are not-for-profit cooperatives owned by their members, who hold "share accounts" rather than deposit accounts. While anyone can deposit money in a bank, only members can be account holders with a credit union. Under the

Federal Credit Union Act of 1934, membership in every federal credit union is limited to individuals who meet specific, predefined criteria that constitute a "membership field." *See* 12 U.S.C. § 1759(b). This means Thurston cannot simply choose to join a credit union in the same manner that she chooses to deposit money in a bank. To join BCM and take advantage of its products and services, Thurston must be within its field of membership. (Appendix at 1, Black Decl. ¶ 4.)

While Thurston acknowledges that BCM is a federally-chartered credit union headquartered in Houston, Texas,[3] (Compl. ¶ 5), she fails to allege any facts placing her within BCM's field of membership. Only persons sharing the following common bonds are eligible to join BCM:

1. employees, independent contractors or self-employed persons who work regularly in the Health Care Industry in Harris County, Texas …;
2. members of record of BCM Federal Credit Union #12892 as of August 26, 2008 …;
3. employees of [BCM];
4. persons retired as pensioners or annuitants from the above employment;
5. spouses of persons who died while within the field of membership of [BCM];
6. members of their immediate families or household;
7. organizations of such persons.

(Exhibit A, Appendix at 2-5, Declaration of Tony Black ¶ 5 and Exhibit 1 thereto.)

Thurston does not allege that she works in the healthcare industry in Harris County, Texas, or that she is an immediate family or household member of a Harris County healthcare worker.

[3] In fact, as BCM's website reflects, BCM's branch offices are, like its main office, located exclusively in Houston. *See* http://www.bcmfcu.com/contact.html; Appendix at 1, Black Decl. ¶ 3. The Court may take judicial notice of BCM's website and other matters of public record submitted to the Court in connection both with BCM's Rule 12(b)(1) and 12(b)(6) motions. *See Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (judicial notice of matters of public record in deciding motion to dismiss is proper and does not convert motion to dismiss into motion for summary judgment); *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (considering information on website of which district court took judicial notice); Fed. R. Evid. 201.

Indeed, Thurston's Complaint makes no disclosure whatsoever regarding her residence – an omission that likely was not accidental. Thurston is a frequent Title III litigant in California, and in such litigation, including as recently as November 16**,** 2017, has consistently identified herself as a resident of San Bernardino County, California.[4]

Just weeks ago, a Virginia district court faced with virtually identical claims (filed by the same attorneys representing Thurston here) held that a plaintiff who was not within the credit union's field of membership could not establish standing. *See Carroll v. Northwest Federal Credit Union*, No. 1:17-cv-01205, ECF #25 (E.D. Va. Jan. 26, 2018) (Exhibit B, Appendix at 6-10). Like Thurston, Carroll contended that the alleged inaccessibility of the credit union's website deterred him from visiting the credit union's physical branches. The district court held that Carroll could not demonstrate an injury in fact because he had not established that he "is entitled, or would ever be entitled, to utilize any services provided by Northwest FCU." *Id.* at p. 4. Moreover, any "plans to visit in the future are immaterial" absent eligibility for membership. *Id.* The same is true here. Thurston has not alleged that she is entitled to use BCM's services and thus can point to no redressable injury.

c. Thurston Has Failed to Allege an Intent to Return.

Even setting aside the dispositive field of membership issue, Thurston's Complaint fails to satisfy the "injury in fact" mandate. An ADA claimant may establish injury in fact in two ways. *See Hunter v. Branch Banking & Trust Co.*, No. 3:12-CV-2437-D, 2013 U.S. Dist. LEXIS 113102, at *6 (N.D. Tex. Aug. 12, 2013) (Fitzwater, C.J.). One is to "show that she intends to return to the allegedly noncompliant public accommodation and therefore faces a real and immediate threat that she will again be harmed by ADA non-compliance." *Id.* Facts relevant to

[4] *See* the sampling of California complaints filed by Thurston and their accompanying civil cover sheets attached as Exhibit C, which all identify San Bernardino County as Plaintiff's residence. (Appendix at 11, 13, 23, 39, 43, 50, 54.)

this determination include (1) the proximity of Thurston's residence to BCM; (2) her past patronage of BCM; (3) the definitiveness of her plan to return; and (4) the frequency of her nearby travel. *See, e.g., Van Winkle v. Pinecroft Ctr., L.P.*, No. H-16-2694, 2017 U.S. Dist. LEXIS 134817, at *19 (S.D. Tex. Aug. 23, 2017); *Davis v. First Nat'l Bank of Trenton*, No. 4:12-CV-396, 2012 U.S. Dist. LEXIS 187133, at *8 (E.D. Tex. Dec. 11, 2012), *rec. adopted*, 2013 U.S. Dist. LEXIS 39914 (E.D. Tex. Mar. 22, 2013). "'[S]omeday intentions'—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.'" *Access 4 All, Inc. v. Wintergreen Commercial P'ship, Ltd.,* No. 3:05-CV-1307-G, 2005 U.S. Dist. LEXIS 26935, at *10 (N.D. Tex. Nov. 7, 2005) (Fish, CJ) (*quoting Lujan,* 504 U.S. at 564); *see also Travis County Shoe Hosp.*, 2018 U.S. App. LEXIS 2647, at *7-8.

The second method of establishing injury in fact is to show continuing injury resulting from the deterrent effects of the alleged noncompliance. *See Hunter,* 2013 U.S. Dist. LEXIS 113102, at *7. Under this method, Thurston must show that the alleged accessibility barriers "affect[] [her] activities in some concrete way." *Frame v. City of Arlington*, 657 F.3d 215, 236 (5th Cir. 2011) (en banc), *cert. denied*, 565 U.S. 1200 (2012). "Because the plaintiff must still prove under the 'deterrent effect' method that she has an intent to return, the four-factor test applied to 'intent to return' cases also pertains to 'deterrent effect' cases to determine whether the plaintiff is in fact suffering an injury because she is being deterred from using the noncompliant accommodation." *Hunter,* 2013 U.S. Dist. LEXIS 113102, at *9 (citing *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1075 (7th Cir. 2013); *Steger*, 228 F.3d at 892).

Regarding the first method, Thurston alleges only that: (1) she has made "several attempts to use bcmfcu.com in recent months," (Compl. ¶ 16); (2) access barriers to the website have

"deterred Plaintiff on a regular basis from accessing BCM FCU's website … [and] from visiting BCM FCU's physical locations that Plaintiff may have located by using bcmfcu.com," (*id.*); and (3) absent the alleged barriers, Thurston could "investigate BCM FCU's services" and "find the locations to visit," (*id.* ¶ 15). Noticeably absent from the Complaint are any allegations that Thurston actually uses or plans to use BCM's services, that she has ever visited a BCM location or had any concrete plan to do so, or that she has any future intent to visit a BCM location or even to investigate its services and amenities. (*Id.* ¶¶ 11-16.)

The facts alleged do not support an injury in fact under the four-factor test. To the contrary, the first factor – proximity – demonstrates the opposite. "[A]s the distance between a plaintiffs residence and a public accommodation increases, the potential for the occurrence of future harms decreases." *Anderson v. Macy's, Inc.*, 943 F. Supp. 2d 531, 539 (W.D. Pa. 2013) (quoting *Molski v. Kahn Winery*, 405 F. Supp. 2d 1160, 1163-64 (C.D. Cal. 2005)). Courts generally find distances greater than 100 miles to fall well short of satisfying the proximity test. *See Davis*, 2012 U.S. Dist. LEXIS 187133, at *6 ("courts have found that a distance of more than 50 to 100 miles clearly fails to satisfy the proximity element").[5]

According to Google Maps, the distance from San Bernardino, California, to Houston, Texas, is 1,496 miles:[6]

[55] *See also Norkunas*, 777 F. Supp. 2d at 1002 (finding 120 miles between the plaintiff's residence and the defendant "too great for the Court to consider it likely that Plaintiff will have the occasion to return"); *Jones v. Sears Roebuck & Co.*, No. 2:05-cv-535, 2006 U.S. Dist. LEXIS 86613 (E.D. Cal. Nov. 29, 2006) (noting that a number of California courts "have consistently maintained that a distance over 100 miles weighs against finding a reasonable likelihood of future harm")

[66] "Fed. R. Evid. 201 permits courts to take judicial notice of generally known facts 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Part (c) of the Rule permits courts to take judicial notice of facts whether the parties request it or not, and courts have taken judicial notice of facts gleaned from internet mapping tools." *U.S. v. Stewart*, No. 3:07cr51, 2007 U.S. Dist. LEXIS 61715, at *3 n.2 (E.D. Va. Aug. 22, 2007) (mem. op.) (internal citations omitted).

There is no conceivable reason why Thurston would wish to join a credit union whose only offices are located three states and 1,500 miles away. Moreover, Thurston does not claim to be a member of or have ever done business with BCM, does not appear in its membership records, mentions no plan to use BCM's services or even to return to its website, and offers no information regarding the frequency of her travel to Harris County, Texas. (Appendix at 2, Black Decl. ¶ 6.) At best, Thurston's nebulous allegations amount to the sort of "some-day" intention that has been held insufficient for standing. *Lujan*, 504 U.S. at 564.

Thurston also fails to meet her burden on the second method of showing injury in fact. Just this month, the Fifth Circuit affirmed, in two separate cases, the dismissals for lack of standing of Title III claims involving allegedly inaccessible parking spaces because there was "no evidence that [plaintiff] has any intent to return – nor is there any reason to believe that [plaintiff] is affected by [defendant's] alleged ADA violation in any way, let alone 'some concrete way.'" *Deutsch v. Annis Enters.*, No. 17-50231, 2018 U.S. App. LEXIS 3028, at *7 (5th Cir. Feb. 8, 2018) (quoting *Frame*, 657 F.3d at 236) (per curiam); *accord Travis County Shoe Hosp.*, 2018 U.S. App. LEXIS 2647, at *10. The same is true here. Nothing in the Complaint lends credence to the supposition that the alleged inaccessibility of BCM's website would "negatively affect

[Thurston's] day-to-day li[fe]" in "some concrete way." *Annis Enters.*, 2018 U.S. App. LEXIS 3028, at *7. Any alleged injury from being deterred from "accessing BCM FCU's website" or "visiting BCM FCU's physical locations," (Compl. ¶ 16), is neither continuing nor imminent for standing purposes. *See, e.g., Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115, 1120 (S.D. Cal. 2006) (plaintiff who lived approximately 520 miles from the premises in question lacked standing); *Lamb v. Charlotte County*, 429 F. Supp. 2d 1302, 1310-11 (M.D. Fla. 2006) (dismissing ADA claim because plaintiff's alleged intent to return to defendant's site was not credible where plaintiff lived more than 75 miles from property).[7]

In sum, Thurston's deficient injury-in-fact allegations clearly fail to show that she has suffered the type of concrete, particularized, actual or imminent invasion of a legally protected interest that would support standing. *See Lujan*, 504 U.S. at 560; *Lyons*, 461 U.S. at 111.

3. Thurston's Claim Is Moot.

Not only does Thurston lack standing, but her claim is, simply and plainly, moot. "A case becomes moot ... when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Here,

[7] *See also Bowman v. G.F.C.H. Enters.*, No. 14-22651-CIV, 2014 U.S. Dist. LEXIS 148988, at *5-8 (S.D. Fla. Oct. 17, 2014) (dismissing Title III claims based on lack of standing where plaintiff's residence was located 25-30 miles from the location and plaintiff failed to provide any support for the bare assertion that she would return to the property); *Nat'l Alliance for Accessibility, Inc. v. Big Lots Stores, Inc.,* No. 11-cv-730, 2013 U.S. Dist. LEXIS 85993, at *14-17 (M.D.N.C. June 19, 2013) (dismissing Title III claim for lack of standing based on the 700-mile distance between plaintiff's residence and the store at issue and her vague reasons to return to the area and the store); *Reviello v. Phila. Fed. Credit Union*, No. 12-508, 2012 U.S. Dist. LEXIS 83449, at *14 (E.D. Pa. June 14, 2012) (dismissing ADA claim in case involving accessibility of ATM to visually-impaired plaintiff, where plaintiff lived more than fifty miles from defendant's ATM); *Disabled Patriots of Am., Inc. v. City of Trenton*, No. 07-CV-3165(FLW), 2008 U.S. Dist. LEXIS 73010, at *10 (D.N.J. Sep. 24, 2008) ("Courts have consistently maintained that a distance of over 100 miles weighs against finding a reasonable likelihood of future harm."); *Nat'l Alliance for Accessibility, Inc. v. Ridge*, No. 10-cv-286, 2011 U.S. Dist. LEXIS 36801, at *10 (W.D.N.C. Mar. 3, 2011) (dismissing a Title III claim for lack of standing where plaintiff would have to travel approximately 13 hours and 775 miles to get to the defendant's alleged place of public accommodation); *Judy v. Arcade L.P.*, No. 10-607, 2011 U.S. Dist. LEXIS 9855, at *7-14 (D. Md. Feb. 1, 2011) (plaintiff who lived more than 1,000 miles from the place of public accommodation lacked standing where plaintiff identified just one prior visit to the location and a general intent to return); *Judy v. Pingue*, No. 08-cv-859, 2009 U.S. Dist. LEXIS 109990, at *8-12 (S.D. Ohio Nov. 25, 2009) (dismissing a Title III claim for lack of standing and emphasizing that "plaintiff's distance from the defendant's place of business becomes especially significant when it is more than 100 miles").

BCM has already modified its website so that it conforms to the accessibility standards specified in the Web Content Accessibility Guidelines ("WCAG") version 2.0, which Thurston maintains are broadly accepted. (Compl. ¶ 9; Appendix at 2, Black Decl. ¶ 7.) Thus, further pursuit of an injunction would be futile, as nothing more can be accomplished. Here, as in *Ricks v. Wanser*, "[e]ven if this Court were to grant all of the prospective injunctive relief [plaintiff] seeks, no injury would be redressed. The [defendant] is already doing everything [plaintiff] asks this Court to order it to do." *Ricks v. Wanser*, No. A -10-CV-185-LY, 2012 U.S. Dist. LEXIS 52316, at **20-21 (W.D. Tex. Apr. 12, 2012) (granting summary judgment to defendant library in Title III case for failure to provide updated screen readers, since the claim had been rendered moot).

BCM has no reason whatsoever to undo the accessibility alterations it has made to its website at considerable expense, and thus there is no possibility that the alleged accessibility issues would recur. *See Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found,, Inc.*, 484 U.S. 49, 66 (1987) (the mootness doctrine "prevent[s] the maintenance of suit when there is no reasonable expectation that the wrong will be repeated"); *Kallen v. J.R. Eight, Inc*., 775 F. Supp. 2d 1374, 1378 (S.D. Fla. 2011) ("It is untenable for [p]laintiff to suggest that once the renovations are completed they could be undone."). No live controversy exists warranting continuation of this action. *See Haynes v. Hooters of Am., LLC*, No. 17-60663-Civ-Scola, 2017 U.S. Dist. LEXIS 91048 (S.D. Fla. June 14, 2017) (remediation of alleged website accessibility barriers moots the case, requiring dismissal).

In sum, this Court should thus dismiss Plaintiff's Complaint pursuant to Rule 12(b)(1).

B. <u>Alternatively, Dismissal Is Proper Because Plaintiff Has Failed to State a Claim</u>.

1. Standard of Review on Rule 12(B)(6) Motion to Dismiss.

"To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to

state a claim to relief that is plausible on its face.'" *Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Montoya v. FedEx Ground Package Sys., Inc*., 614 F.3d 145, 148 (5th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). This requires the plaintiff to allege sufficient facts to demonstrate there is "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Furthermore, "[d]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir. 2006), *cert. denied*, 549 U.S. 825 (2006).

2. Plaintiff's Claim Fails Because Title III Does Not Apply to Websites.

a. A Website Is Not a "Place of Public Accommodation."

Thurston brings her sole claim under Title III of the ADA. Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation." 42 U.S.C. § 12182(a); *see also* 28 C.F.R. § 36.201. In defining "public accommodation," the ADA sets forth a comprehensive list of 12 categories of private entities, provided that such entities have an effect on commerce:

(A) an inn, hotel, motel, or other place of lodging ...;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

> (F) a laundromat, dry-cleaner, bank, barber shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7). Nowhere in this definition is there any reference to "websites." Indeed, the statue does not list anything that is not a brick-and-mortar, physical place. And although Congress has extensively amended the ADA over the years, at no point did Congress choose to add websites to the list of places of public accommodation.

Upon careful examination of the statutory definition, the Fifth Circuit in 2016 joined the Third, Sixth and Ninth Circuits in holding that places of public accommodation are limited to physical places. *See Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 (5th Cir. 2016) (citing *Parker v. Metro. Life Ins. Co*., 121 F.3d 1006, 1014 (6th Cir. 1997); *Ford v. Schering-Plough Corp*., 145 F.3d 601, 613-14 (3d Cir. 1998) ("[W]e do not find the term 'public accommodation' or the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning.")), *cert. denied*, 138 S. Ct. 55 (2017). Places of public accommodation, therefore, must be "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services." *Id.* (quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)).

The Eleventh Circuit similarly limits Title III to situations where barriers prevent access to tangible places. *See Rendon v. Valleycrest Prods. Ltd.*, 294 F.3d 1279, 1281 (11th Cir. 2002) (Title III covers telephonic procedures, but only to the extent they preclude "participation in a competition held in a tangible public accommodation"). It further appears that the Fourth Circuit would take the same position, given its affirmance of a district court's dismissal for failure to state a claim "because AOL's chat rooms and other online services do not constitute a "place of public accommodation" under Title II [of the Civil Rights Act]." *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 540-41 (E.D. Va. 2003) (definition of places of public accommodation under the Civil Rights Act, like the definition under Title III, lists "without exception ... actual physical structures"), *aff'd*, 2004 U.S. App. LEXIS 5495 (4th Cir. Mar. 24, 2004).

The Fifth Circuit concluded in *Magee* that Coca-Cola vending machines are not akin to any of the categories listed in Title III and therefore are not places of public accommodation. *See Magee*, 833 F.3d at 534. Even more than vending machines, websites – which have no physical existence at all – cannot be considered the types of places that come within the statutory definition. Applying this principle to a credit union website, a court in the Eastern District of Virginia recently dismissed a Title III claim against a credit union, expressly concluding that the "website does not constitute a place of public accommodation" under the ADA. *Carroll v. Northwest Fed. Credit Union*, No. 1:17-cv-01205 (E.D. Va. Jan. 26, 2018) (Exhibit B, Appendix at 6-10).

Thus, to the extent Thurston alleges that "BCM FCU denies visually-impaired customers the services, privileges, advantages, and accommodations provided by bcmfcu.com," (Compl. ¶ 20), she fails to state a plausible claim because bcmfcu.com is not a place of public accommodation subject to Title III.

b. BCM's Website Does Not Impede Access to Its Physical Offices.

The only conceivable places of public accommodation associated with BCM are its brick-and-mortar offices. Thurston does not allege there are barriers to access at these physical facilities. Even those district courts that have applied Title III to websites generally do so because an inaccessible website impaired access to a physical place of public accommodation:

> [T]he ADA does not require places of public accommodation to create full-service websites for disabled persons. In fact, the ADA does not require a place of public accommodation to have a website at all. 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-mortar store. To survive a motion to dismiss, Plaintiff must claim an actual (not hypothetical) impediment to the use of Defendant's retail location.

Gomez v. Bang & Olufsen Am., Inc., No. 1:16-cv-23801, 2017 U.S. Dist. LEXIS 15457, at **12-13 (S.D. Fla. Feb. 2, 2017) (dismissing plaintiff's ADA claim); *see also Gomez v. La Carreta Enters.*, No. 17-61195-CIV, 2017 U.S. Dist. LEXIS 170777, at *9 (S.D. Fla. Oct. 13, 2017) (dismissing case because plaintiff failed to show the restaurant chain's website impeded his access to physical restaurants); *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 955-56 (N.D. Cal. 2006) ("To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA."); *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (dismissing complaint because plaintiffs failed to establish that the airline's virtual ticket counter impeded access to a physical, concrete space).

Importantly, the Fifth Circuit has never espoused this "nexus" approach. A search turned up no district court decision within the Fifth Circuit that applied Title III where a nexus was demonstrated. Regardless, Thurston's Complaint is devoid of any allegation that it is necessary to navigate BCM's website in order to enjoy the full range of goods, services, or privileges provided

at BCM's physical locations. Thurston does not allege that any of BCM's goods or services are obtainable only via the website; that anything requires her to do business with BCM only through its website; or that the website offers more advantageous loan terms or interest rates to members who use its website. And indeed, absent allegations that Thurston is in fact entitled to access BCM's goods, services and benefits, she cannot logically claim that the website impeded her access to them.

At most, Thurston has alleged that access barriers on BCM's website deterred her from looking up BCM's locations. (Compl. ¶ 13.) But this information can easily be gleaned elsewhere, for example by searching online, checking the phone book or simply calling BCM. Thurston's claimed inability to find it on the website does not establish that BCM's branches were inaccessible to her. Nothing on BCM's website affects Thurston's enjoyment of the services offered at those branches.

3. Title III Does Not Require BCM to Make Its Website Accessible to Thurston.

Even if BCM's website were covered by the ADA, BCM still has no affirmative obligation under Title III to make it accessible to Thurston. As an initial matter, Thurston has failed to allege any basis on which she could claim a right to partake in BCM's services. Beyond the membership eligibility hurdle, neither the statutory text of the ADA nor its implementing regulations contain any standards governing website access. There is, simply put, nothing that would provide notice to private entities as to what specific steps, if any, they must take to comply with the ADA insofar as their websites are concerned.

While the DOJ's Title III regulations specify in excruciating detail even the most minute standards for ensuring the disabled access to physical structures and locations (such as, for example, by setting forth the appropriate height of grab bars in toilet rooms, the maximum slope

of accessible ramps, the dimensions of required turn areas for wheelchairs, and the number and types of accessible seating in assembly areas), their silence on websites is deafening. And even though the DOJ revised its Title III regulations in 2010, it still elected not to include any standards or specifications regarding web content. The agency did issue an Advanced Notice of Proposed Rulemaking ("ANPRM") on Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, announcing DOJ's interest in developing more specific requirements or technical standards for website accessibility. 75 Fed. Reg. 43,460 (July 26, 2010). A Supplemental ANPRM pertaining to state and local governments followed in 2016. 81 Fed. Reg. 28658 (May 9, 2016). But the DOJ never released proposed regulations, and on December 26, 2017, it formally withdrew the ANPRMs, stating only that it "will continue to assess whether specific technical standards are necessary and appropriate to assist covered entities with complying with the ADA." 82 Fed. Reg. 60932 (Dec. 26, 2017).

The only arguable notice DOJ has given regarding the application of Title III's accessibility requirements to websites focused solely on the statutory and regulatory requirement to provide auxiliary aids and services. *See Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-cv-30023-MGM, 2016 U.S. Dist. LEXIS 120121 (D. Mass. Feb. 9, 2016) (referencing ECF No. 33, Statement of Interest of the United States of America ("Harvard Statement of Interest")); *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, No. 3:15-cv-30024-MGM, 2016 U.S. Dist. LEXIS 91080 (D. Mass. Feb. 9, 2016) (referencing ECF No. 34, Statement of Interest of the United States of America ("MIT Statement of Interest")); *see also* 42 U.S.C § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.[8] Thurston, however, does not allege that she requested and was denied the use of auxiliary aids or services in navigating BCM's website.

[8] 28 C.F.R. § 36.303(a) provides: "A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other

Instead, Thurston maintains that BCM is subject to an affirmative requirement to maintain a broadly accessible website, similar to Title III's affirmative requirements to ensure the readily achievable removal of existing architectural barriers, or to make architectural facilities accessible in the context of new construction or building alterations. See 42 U.S.C. § 12182(b)(2)(A)(iv) (affirmatively requiring the removal of structural barriers); 42 U.S.C. § 12183(a)(1) (affirmatively requiring new facilities to be designed and constructed in accordance with the accessible design standards promulgated by the DOJ); 42 U.S.C. § 12183(a)(2) (affirmatively requiring alterations of existing facilities to conform to accessible design standards). But websites are not buildings, and neither the statute nor the regulations purport to treat websites like buildings. Thurston's demand goes far beyond the DOJ's limited pronouncement on website accessibility expressed in the Harvard and MIT Statements of Interest. No regulation, guidance, notice or statement issued by the DOJ has ever taken the position that public accommodations must comply with the type of sweeping website accessibility design requirements Thurston asks the Court to impose on BCM.

Moreover, as noted, the DOJ has withdrawn its 2010 and 2016 ANPRMs. In the withdrawal notice, the DOJ specifically advised the public that it has not yet determined whether technical specifications are necessary, and that the ANPRMs "had no force or effect of law, and no party should rely on them as presenting the [DOJ's] position on these issues." 82 Fed. Reg. 60932 (Dec. 26, 2017). DOJ's future position regarding the applicability of Title III's accessibility requirements to websites is at best uncertain. This uncertainty affords Thurston no defensible ground for holding BCM liable. Lacking any specific legal standard or guidance for website accessibility, BCM has no duty to make its website broadly accessible to Thurston.

4. Thurston Fails to Allege That She Requested Auxiliary Aids or Services.

individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, *i.e.*, significant difficulty or expense."

Assuming that Thurston could, notwithstanding the Fifth Circuit's holding in *Magee*, assert a Title III claim based on failure to provide auxiliary aids and services, her Complaint must be dismissed because she does not allege that she requested such services. *See Betancourt v. Federated Dep't Stores,* 732 F. Supp. 2d 693, 711 (W.D. Tex. 2010) (dismissing Title III claim for failure to provide auxiliary aids and services because "Plaintiff has not alleged any auxiliary aid or service that she required but was not provided."). Where courts have considered the issue, they have consistently deemed the obligation to provide auxiliary aids and services to be triggered only by a specific request. *See, e.g.*, *Argenyi v. Creighton Univ*., 703 F.3d 441, 448 (8th Cir. 2013) (ADA only requires provision of auxiliary aids and services that are "necessary"); *Tauscher v. Phoenix Bd. of Realtors, Inc*., No. CV-15-00125-PHX-SPL, 2017 U.S. Dist. LEXIS 161940, at **7-8 (D. Ariz. Sep. 29, 2017) ("Defendant met [its] obligation under the ADA when it engaged in a dialogue with Plaintiff about his request for an ASL interpreter so that Plaintiff could attend Defendant's classes, but was precluded from further meeting its obligations under the ADA when Plaintiff refused to discuss alternative auxiliary aids."); *Godbey v. Iredell Mem'l Hosp., Inc*., No. 5:12-cv-00004-RLV-DSC, 2013 U.S. Dist. LEXIS 117129, at *23 (W.D.N.C. Aug. 19, 2013) ("defendants are not required as a matter of course to provide ASL interpreters" or "to guess a Plaintiff's need for reasonable accommodations"), *aff'd*, 578 Fed. Appx. 317 (4th Cir. 2014).[9]

The DOJ's Technical Assistance Manual ("TAM") similarly encourages consultation between public accommodations and disabled individuals to determine which auxiliary aids or

[9] *See also Burkhart v. Wash. Metrop. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. 1997) ("Nothing in the ADA itself or its implementing regulations dictates that a disabled individual must be provided with the type of auxiliary aid or service he requests unless it would alter the service provided or create an unreasonable burden or expense."); *U.S. v. Harcourt Brace Legal & Prof'l Publ'n, Inc*., No. 94CV3295, 1994 U.S. Dist. LEXIS 22007, **5-7 (N.D. Ill. June 23, 1994) (requiring the "Defendant [to] provide appropriate auxiliary aids and services to students with disabilities who request the provision thereof ...").

services will enable effective communication. *See* DOJ ADA Title III TAM, § III-4.3100, https://www.ada.gov/taman3.html (last visited Jan. 10, 2018) ("Public accommodations should consult with individuals with disabilities wherever possible to determine what type of auxiliary aid is needed to ensure effective communication."). In many of the DOJ's "examples of auxiliary aids and services," the obligation to provide an aid or service is triggered only upon request. *See id*. at § III-4.3300 ("[telecommunication devices for the deaf] must be made available on request to hospital patients or hotel guests where in-room phone service is provided" and hospitals, and most hotels and motels, that provide televisions "must provide closed caption decoder service upon request") (emphases added). Tellingly, a DOJ guidance under Title II of the ADA (which applies to public entities) unequivocally states, "Generally, the requirement to provide an auxiliary aid or service is triggered when a person with a disability requests it." ADA Best Practices Tool Kit for State and Local Governments: General Effective Communication Requirements Under Title II of the ADA, Ch. A(1), https://www.ada.gov/pcatoolkit/ chap3toolkit.htm (last visited Jan. 30, 2018).

Indeed, in the absence of a detailed regulatory accessibility standard, it would make little sense to require more, as BCM would have no way of knowing what specific changes would be effective for the particular screen reader employed by the requesting party. Screen readers differ, and modifications that would be effective for Thurston could conceivably cause the website to become inaccessible to another user with different screen reader technology. Nor would there necessarily be a reason to launch a full-scale website modification when only limited information is sought. Thurston's only specific allegation in this regard is that she has been deterred from visiting BCM's physical locations that she "may have located" using the website. (Compl. ¶ 16.) Even if Thurston was unable to access this information on the website, she could acquire it by calling BCM's main office – a number she could have obtained in a host of other ways, such as on

the internet or by using her phone provider's telephone directory service. There would be little point in spending weeks or months modifying BCM's entire website when the information Thurston requires can efficiently and effectively be provided through other BCM resources.

Accordingly, Thurston cannot state a claim for failure to provide auxiliary aids and services, and her Complaint should be dismissed.

5. Holding BCM Liable Under Title III Would Violate Due Process.

Finally, any injunctive relief Thurston seeks beyond the statutory obligation to provide auxiliary aids and services would necessarily require the Court to impose specific accessibility standards that are not found in Title III or its implementing regulations. The Court cannot merely direct BCM to make its website accessible. Rule 65(d) of the Federal Rules of Civil Procedure mandates that an injunction specify with particularity what the defendant must do or refrain from doing; a mere directive to obey the law must be stricken. *See* Fed. R. Civ. P. 65(d). But since the DOJ has never provided notice of any applicable standard, an order mandating compliance with any specific accessibility requirement would violate BCM's due process rights.

In the words of the Supreme Court, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). When it comes to website accessibility, however, private entities have yet to receive specific notice of what is prohibited and what is required. The DOJ's silence on the subject means businesses do not know "the rules by which the game will be played." *Ala. Prof'l Hunters Ass'n v. Fed. Aviation Ass'n,* 177 F.3d 1030, 1035 (D.C. Cir. 1999).

In all fairness, BCM should not be held liable under Title III for not complying with a website accessibility standard the DOJ has yet to embrace. As Judge Easterbrook aptly expressed the same concern in the context of the Fair Labor Standards Act:

> People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs. Unless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns.

Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).[10]

A California district court came to precisely this conclusion and found that the request for an injunction to comply with a particular website accessibility standard violated the defendant's due process rights. *See Robles v. Domino's Pizza LLC*, No. 16-06599, 2017 U.S. Dist. LEXIS 53133, at **16-17 (C.D. Cal. Mar. 20, 2017). In so holding, the court relied heavily on the Ninth Circuit's decision in *United States v. AMC Entertainment,, Inc*., 549 F.3d 760, 762 (9th Cir. 2008), which held that it would violate due process to apply the DOJ's interpretation of an ambiguous guideline regarding lines of sight for wheelchair occupants in movie theaters retroactively to theaters built before the interpretation was issued. *See AMC Entm't*, 549 F.3d. at 768. Thus, the district court abused its discretion by issuing an injunction that required AMC to retrofit theaters constructed before the DOJ's pronouncement. *See id.* The district court in *Robles* applied this rationale to reject Robles' request "to impose on all regulated persons and entities a requirement that they 'compl[y] with the WCAG 2.0 Guidelines' without specifying a particular level of

[10] Asking companies to become "compliant" with a non-existent standard is not something courts and even legislatures are empowered to do, because parties under our Constitution are entitled to know their obligations so they can comply with the law and avoid liability; this is why courts routinely hold vague statutes or regulations to be unconstitutional. Title III of the ADA should be no exception.

success criteria and without the DOJ offering meaningful guidance on this topic." 2017 U.S. Dist. LEXIS 53133, at *17. "This request," the court held, "flies in the face of due process." *Id*.

This case is no different. As in *AMC Entertainment*, the DOJ has yet to interpret the applicable accessibility standard. Indeed, unlike the situation in *AMC Entertainment*, in this case, the DOJ still has not pronounced what the standard should be. No operator of a commercial website has been advised of any affirmative website accessibility standard that must be met. *See Robles*, 2017 U.S. Dist. LEXIS 53133, at *17. Fundamental principles of due process mandate that BMC not be held liable for non-compliance with a standard that has never been adopted by the relevant regulatory authority.

To maintain operationally feasible and legally compliant websites, businesses need – and are entitled to – a uniform set of accessibility guidelines that both put them on notice of their obligations under the law and clearly define when compliance has been achieved. For these reasons, it would be a violation of BCM's due process rights to enjoin BCM to comply with a standard that has never been adopted, let alone promulgated as regulation, by the DOJ. Consequently, the Complaint should be dismissed.

III. CONCLUSION

WHEREFORE, BCM respectfully requests that the Court dismiss this action with prejudice for lack of standing. Alternatively, BCM asks that the Court dismiss the case with prejudice because Thurston has failed to state a claim under Title III of the ADA for which relief can be granted. BCM further asks that the Court award it such other and further relief to which it may show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 16, 2018, a true and correct copy of the foregoing document was electronically filed the clerk of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court, and the electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record, who have consented in writing to accept this Notice as a service of this document by electronic means.

/s/ Katrin U. Schatz
Katrin U. Schatz