20-1550(L)

20-1552(M), 20-1559(M)
20-1588(M), 20-1594(M), 20-1608(M)

In the

United States Court of Appeals
For the Second Circuit

HIMELDA MENDEZ, and on behalf of all other persons similarly situated,
MARCOS CALCANO, On behalf of himself and all other persons similarly situated,
YOVANNY DOMINGUEZ, on behalf of all other persons similarly situated,
BRAULIO THORNE, on behalf of himself and all other persons similarly situated
and JAMES MURPHY, on behalf of himself and all other persons similarly situated,

Plaintiffs-Appellants,

v.

ANNTAYLOR, INC., SWAROVSKI NORTH AMERICA LIMITED,
BANANA REPUBLIC, LLC, JERSEY MIKE'S FRANCHISE SYSTEMS, INC.,
THE ART OF SHAVING-FL, LLC and KOHL'S DEPARTMENT STORES, INC.,

Defendants-Appellees.

- and -

KOHL'S CORPORATION,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS HIMELDA MENDEZ, MARCOS CALCANO, YOVANNY DOMINGUEZ, BRAULIO THORNE AND JAMES MURPHY

LAW OFFICES OF
G. OLIVER KOPPELL & ASSOCIATES
Attorneys for Plaintiffs-Appellants Himelda Mendez, Marcos Calcano, Yovanny Dominguez, Braulio Thorne and James Murphy
99 Park Avenue, Suite 1100
New York, New York 10016
(212) 867-3838

THE MARKS LAW FIRM, PC
Attorneys for Plaintiffs-Appellants Himelda Mendez, Marcos Calcano, Yovanny Dominguez, Braulio Thorne and James Murphy
175 Varick Street, 3rd Floor
New York, New York 10014
(646) 770-3775

APPELLATE INNOVATIONS
(914) 948-2240

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over these consolidated appeals pursuant to 28 U.S.C. §1331, federal question jurisdiction, insofar as Appellants' complaints alleged violations of the Americans with Disabilities Act by Appellees. This Court has jurisdiction over the appeals of these matter pursuant to 28 U.S.C. §1291, following the District Court's final dismissal of all of the actions.

Appellants' appeals are timely brought insofar as the District Court issued judgments dismissing all of the claims in Appellants' actions on May 11, 2020 and May 13, 2020. Appellants' subsequently timely filed Notices of Appeals with respect to these final judgments on May 12, 2020 and May 18, 2020.

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in holding that Appellants lacked standing to bring their lawsuits for Appellees' violations of the Americans with Disabilities Act even though Appellants had explicitly pled an intent to return to Appellees' stores?

   The answer to this question is YES.

2. Did the District Court err in holding that Appellees store gift cards are goods in and of themselves, and not services or places of public accommodation that facilitate the purchase of actual goods and services by consumers?

   The answer to this question is YES.

PRELIMINARY STATEMENT

The year 2020 represents the 30th anniversary of the landmark Americans with Disabilities Act, 42 U.S.C. §12101 et seq ("ADA"). While the statute has made remarkable strides in eradicating barriers for persons with disabilities, there still remains work to be done. As the world changes and emerging technologies develop, people with disabilities must take steps to ensure that their rights are recognized, and their needs are met.

Ensuring that the rights of the visually impaired are met is genesis of the lawsuits brought by Appellants Himelda Mendez, Marcos Calcano, Yovanny Dominguez, Braulio Thorne and James Murphy (collectively "Appellants"). Each of these individuals are visually impaired, if not blind. Each of these individuals wishes to operate independently in the world, which includes shopping for goods and services in the same manner as sighted individuals. However, the retail merchants sued herein, AnnTaylor, Inc., Swarovski North America Ltd., Banana Republic, LLC, Jersey Mike's Franchise Systems, Inc., The Art of Shaving-FL, LLC and Kohl's Department Stores, Inc. (collectively "Appellees"), frustrate this goal. Each of the Appellees makes store gift cards available so that consumers can use them online and in their stores to purchase goods. Store gift cards are also often given as gifts. These store gift cards are helpful to consumers in that they allow the recipient to make their purchase privately, within their budget, and by using an alternative to cash. From the retailers' perspective, gift cards increase communication with consumers, promote brand loyalty and help increase sales.

Despite the utility of these store gift cards to consumers, these store gift cards are not available in Braille, preventing the visually impaired from utilizing them. Appellants have sued to compel Appellees, as well as similar merchants, to make the store gift cards accessible to them and others in positions similar to them.

The District Court erred when it dismissed Appellants' claims. Appellants' have standing to bring their actions as they were all deprived of access to Appellees' stores through the lack of availability of store gift cards in Braille. Appellants all alleged in their Amended Complaints that they intended to return to Appellees' stores and purchase Brailed store gift cards should Brailled gift cards be made available. Indeed, Appellees' stores are located in proximity to Appellants' residences, and were stores that Appellants had previously frequented. Under longstanding precedent, these factors establish standing to allege ADA violations.

The District Court further erred in finding that store gift cards were goods, and not services or places of public accommodation under the ADA. Store gift cards are services insofar as they are a method through which individuals purchase goods from retailers. Store gift cards are cash alternatives for the benefit of the consumer. As such, Appellees, who operate retail stores, are required to provide auxiliary aids in order to allow the disabled, including Appellants, to utilize their stores' services, including store gift cards. Appellants appropriately alleged that Appellants failed to do so, as Appellants inquired from Appellees and confirmed that Appellees do not offer Brailled store gift cards. At best, whether other alternative auxiliary aids are available, and whether those auxiliary aids are adequate under the requirements of the ADA, are questions of fact that were inappropriately considered by the District Court in connection with the motions to dismiss. In fact, Braille is the only way in which store gift cards can be made accessible to people who are visually impaired. This is particularly true insofar as federal regulation requires certain mandatory disclosures to be made to all consumers on the store gift cards themselves, something the visually impaired are deprived of absent a Brailled store gift card.

Alternatively, store gift cards must be considered places of public accommodation under the ADA. The ADA was always intended to be flexible, to account for developments in technology. Courts have recognized that places of public accommodation need not be physical places, but encompass any form of space that an individual can access that facilitates the obtaining of goods or services. The failure to make such spaces accessible to the disabled is an ADA violation and requires the issuance of Brailled store gift cards.

Contrary to the claim of the District Court, store gift cards are not goods that Appellants' are seeking to make accessible. Store gift cards are used as an alternative method of payment, a cash alternative like a credit or debit card.

Customers do not barter a store gift card in exchange for goods from a store. Both the definition of store gift cards adopted under federal law, as well as the definition of goods utilized by the District Court, do not support the District Court's conclusion that store gift cards must be deemed goods. Accordingly, the District Court's conclusion that store gift cards are goods and therefore need not be made accessible under the ADA was erroneous.

For all of the foregoing reasons, the decisions of the District Court dismissing Appellants' actions must be reversed.

STATEMENT OF THE CASE

I. Store Gift Cards Generally

The term Store Gift Card is defined as:

> an electronic promise, plastic card, or other device that is (i) redeemable at a single merchant or an affiliated group of merchants that share the same name, mark or logo; (ii) issued in a specified amount, whether or not that amount may be increased in value or reloaded at the request of the holder; (iii) purchased on a prepaid basis in exchange for payment; and (iv) honored upon presentation by such single merchant or affiliated group of merchants for goods or services.

15 U.S.C. §1693l-1(a)(2)(C).

The first plastic store gift cards were introduced in 1994 by Blockbuster Video and Neiman Marcus as a response to a rise in counterfeit gift certificates. JA 449[1]. Store gift cards are intended to be used as an alternative method to payment in cash. See e.g. JA 37. Store gift cards are issued by selective stores including retail stores and banks.[2]

From 1995 to 2012, the store gift card industry grew faster than the U.S. GDP and it is expected to grow from a $318 billion industry in 2017 to $506 billion by 2025. JA 450. This is true because retailers like Appellees tend to use store gift cards to increase communication with consumers, build brand loyalty, increase sales,

[1] References to "JA" refer to the Joint Appendix filed in this matter.

[2] https://web.archive.org/web/20130619150012/https://www.thefreelibrary.com/CES%2fNaBANCO+introduces+stored+value+card+technology%3b+Blockbuster...-a017787941 (last visited July 19, 2020).

allow the recipient to choose their own purchase within their budget, JA 450, and as an alternative to carrying around cash.

For the protection of consumers, there is both Federal and State law which governs mandatory disclosures that must be made to all purchasers of store gift cards. See 15 U.S.C. §1693l-1; 12 CFR §205.20; GBL §396-i. These disclosures, which include the store gift card expiration date, the fees associated with using the store gift card (or any dormancy fees), and a toll-free number or website to obtain information about the store gift card, must be made on the store gift card itself. 12 CFR §205.20(c)(4). Despite the fact that retailers must include these required disclosures on store gift cards, Appellees do not make store gift cards available in Braille so that the visually impaired can use them. According to a 2010 U.S. Census Bureau report, approximately eight million, one hundred thousand people in the United States are visually impaired, including two million who are blind. JA 32[3]. These individuals would be the direct beneficiaries of Brailled store gift cards.

II. Facts Specific to Each Action

A. Mendez v AnnTaylor Inc.

Himelda Mendez ("Mendez") is legally blind and requires aids like Braille to read written material. JA 32. Mendez is proficient in reading Braille. JA 36.

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[3] See also https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html (last visited July 19, 2020).

AnnTaylor Inc. provides store gift cards to be used at their retail stores. JA 35. The store gift cards lack auxiliary aids needed by the visually impaired. JA 35. Mendez lives within close proximity to at least one AnnTaylor retail store and has been a customer of AnnTaylor on prior occasions. JA 36, 37.

On October 21, 2019, Mendez called AnnTaylor to purchase a store gift card that had Braille and was told that none existed. JA 35. AnnTaylor did not offer Mendez a comparable auxiliary aid for its store gift cards. JA 35. Mendez has been denied meaningful use of AnnTaylor's store gift cards because she cannot readily ascertain necessary information about the gift card. JA 36. Such information includes: being able to distinguish AnnTaylor's store gift cards from others, determining the store gift card's balance, and ascertaining the store gift card's terms of use. JA 36. Consumers use store gift cards for security and budgetary reasons. JA 38. Without Braille or some other auxiliary aids, Mendez cannot independently obtain the necessary information about the store gift card to use it for its intended purpose. JA 33-34, 36. If AnnTaylor were to sell store gift cards with Braille or an alternative sufficient auxiliary aid, Mendez would be able to utilize AnnTaylor's store gift cards like a non-blind person. JA 41. Mendez intends to immediately purchase at least one store gift card from AnnTaylor as soon as AnnTaylor sells store gift cards that are accessible to the visually impaired. JA 36.

B. Marcos Calcano v. Swarovski North America Limited

Marcos Calcano ("Calcano") is legally blind and requires aids like Braille to read written material. JA 98. Calcano is proficient in reading Braille. JA 102. Swarovski North America Limited sells store gift cards to be used only at Swarovski North America's retail stores. JA 101. These store gift cards lack auxiliary aids needed by those who are visually challenged. JA 101. Calcano lives within close proximity to at least one of the Swarovski retail stores and has previously been a customer of Swarovski. JA 102, 103.

Calcano has been denied meaningful use of Swarovski North America's store gift cards due to a lack of auxiliary aids. JA 102. Calcano cannot readily ascertain necessary information about the store gift cards. JA 102. Such information includes: being able to distinguish Swarovski North America's store gift cards from others, the store gift card's balance, and the store gift card's terms of use. JA 102. Customers can utilize Swarovski North America's store gift cards for security and budgetary reasons; however, without Braille or some other auxiliary aids, Calcano is unable to do so. JA 99, 100, 104.

On November 9, 2019, Calcano called Swarovski North America's retail store to purchase a store gift card that had Braille and was told that none existed. JA 101. Swarovski North America did not offer a comparable auxiliary aid for its store gift cards. JA 101. If Swarovski North America were to sell store gift cards with Braille or an alternative sufficient auxiliary aid, Calcano would be able to utilize Swarovski North America's store gift cards like a non-blind person. JA 99. Calcano looks forward to the day that Swarovski North America provides store gift cards with appropriate aids so he can equally enjoy Swarovski North America's store gift cards as non-blind persons do. JA 102. Calcano immediately intends to purchase at least one store gift card as soon as it becomes accessible for the visually impaired. JA 102.

C. Dominguez v. Banana Republic, LLC

Yovanny Dominguez ("Dominguez") is legally blind and requires aids like Braille to read written material. JA 163. Dominguez is proficient in reading Braille. JA 167. Banana Republic, LLC sells store gift cards to be used only at Banana Republic's retail stores. JA 166. These store gift cards lack auxiliary aids needed by those who are visually challenged. JA 166.

Dominguez lives within close proximity to at least one Banana Republic retail store and has previously been a customer of Banana Republic. JA 167, 168. Dominguez has been denied meaningful use of Banana Republic's store gift cards due to a lack of auxiliary aids. JA 166. Dominguez cannot readily ascertain necessary information about the store gift card. JA 167. Such information includes: being able to distinguish Banana Republic's store gift cards from others, determining the store gift card balance, and ascertaining the store gift card's terms of use. JA

167. Customers can utilize Banana Republic's store gift cards for security and budgetary reasons; however, without Braille or some other auxiliary aids, Dominguez is unable to do so. JA 164-165, 167, 169.

On October 26, 2019, Dominguez called Banana Republic to purchase a gift card that had Braille and was told that none existed. JA 166. Banana Republic did not offer a comparable auxiliary aid for its store gift cards. JA 166. If Banana Republic were to sell store gift cards with Braille, Dominguez would be able to utilize Banana Republic's store gift cards like a non-blind person. JA 171. Dominguez looks forward to the day that Banana Republic provides store gift cards with appropriate aids so he can equally enjoy Banana Republic's gift cards as non-blind persons do. JA 167. Dominguez intends to immediately purchase at least one store gift card from Banana Republic as soon as Banana Republic provides store gift cards that are accessible to the blind. JA 167, 172.

D. Thorne v. Jersey Mike's Franchise Systems, Inc.

Braulio Thorne ("Thorne") is legally blind and requires aids like Braille to read written material. JA 283. Thorne is proficient in reading Braille. JA 287. Jersey Mike's Franchise Systems, Inc. sells store gift cards to be used only at Jersey Mike's restaurants. JA 286. These store gift cards lack auxiliary aids needed by those who are visually challenged. JA 286.

Thorne lives in close proximity to Jersey Mike's restaurant, and had previously been a customer of Jersey Mike's on prior occasions. JA 287. Thorne has been denied meaningful use of Jersey Mike's store gift cards due to a lack of auxiliary aids for Jersey Mike's store gift cards. JA 287. Thorne cannot readily ascertain necessary information about the gift card. JA 287. This information includes: being able to distinguish Jersey Mike's store gift cards from others, the store gift card balance, and the store gift card's terms of use. JA 287. Customers use Jersey Mike's store gift cards for security and budgetary reasons. JA 289. However, without Braille or some other auxiliary aids, Thorne cannot independently obtain the necessary information about the store gift card to use it for its intended purpose. JA 284.

On October 23, 2019, Thorne called Jersey Mike's to purchase a store gift card that had Braille and was told that none existed. JA 286. Jersey Mike's did not offer a comparable auxiliary aid for its store gift cards. JA 286. If Jersey Mike's were to sell store gift cards with Braille or an alternative sufficient auxiliary aid, Thorne would be able to utilize Jersey Mike's store gift cards like a non-blind person. JA 287. Thorne looks forward to the day that Jersey Mike's provides store gift cards with appropriate auxiliary aids so that he can equally enjoy Jersey Mike's gift cards as non-blind persons do. JA 287. Thorne intends to immediately purchase at least one store gift card from Jersey Mike as soon as Jersey Mike provides store gift cards that are accessible to the blind. JA 287.

E. Calcano v. The Art of Shaving-FL, LLC

Marcos Calcano ("Calcano") is legally blind and requires aids like Braille to read written material. JA 347. Calcano is proficient in reading Braille. JA 351. The Art of Shaving - FL, LLC sells store gift cards to be used only at The Art of Shaving's retail stores. JA 350. These store gift cards lack auxiliary aids needed by those who are visually challenged. JA 350. Calcano lives within close proximity to at least one The Art of Shaving retail stores, and has previously been a customer of The Art of Shaving. JA 351, 352.

Calcano has been denied meaningful use of The Art of Shaving's store gift cards because of a lack of auxiliary aids. JA 351. Calcano cannot readily ascertain necessary information about the store gift card JA 351. This information includes: being able to distinguish The Art of Shaving's store gift cards from others, the store gift card balance, and the store gift card's terms of use. JA 351. Customers use The Art of Shaving's store gift cards for security and budgetary reasons; however, without Braille or some other auxiliary aids, Calcano cannot independently obtain the necessary information about the store gift card to use it for its intended purpose. JA 348 353

On November 1, 2019, Calcano called The Art of Shaving to purchase a store gift card that had Braille and was told that none existed. JA 350. The Art of Shaving offer a comparable auxiliary aid for its store gift cards. JA 350. If The Art of Shaving were to sell store gift cards with Braille or an alternative sufficient auxiliary aid, Calcano would be able to utilize The Art of Shaving's store gift cards like a non-blind person. JA 351. Calcano looks forward to the day that The Art of Shaving provides store gift cards with appropriate auxiliary aids so he can equally enjoy The Art of Shaving's store gift cards as non-blind persons do. JA 351. Calcano intends to immediately purchase at least one store gift card from The Art of Shaving as soon as The Art of Shaving provides store gift cards that are accessible to the blind. JA 351.

F. <u>Murphy v. Kohl's Department Stores, Inc.</u>

James Murphy ("Murphy") is legally blind and requires aids like Braille to read written material. JA 413. Murphy is proficient in reading Braille. JA 417. Kohl's Department Stores, Inc. sells store gift cards to be used only at Kohl's Department stores. JA 414. These store gift cards lack the auxiliary aids needed by those who are visually challenged. JA 417. Murphy lives near a Kohl's store. JA 417.

Kohl's Department Stores does not have store gift cards that are accessible to the visually impaired. JA 416. Murphy cannot readily ascertain necessary information about the gift card like being able to distinguish Kohl's Department Store's gift cards from those issued by others. JA 414-415, 417. This information includes the store gift card's balance, and the store gift card's terms of use. JA 414-415, 417. Customers use Kohl's Department Store's store gift cards for security and budgetary reasons; however, without Braille or some other auxiliary aids, Murphy cannot independently obtain the necessary information about the store gift card to use it for its intended purpose. JA 414-415, 419.

On October 22, 2019, Murphy called Kohl's Department Store to purchase a store gift card with Braille and was told that none existed. JA 416. Kohl's Department Store did not offer Murphy a comparable auxiliary aid for its store gift cards. JA 416. Murphy looks forward to the day when Kohl's Department Store provides store gift cards with appropriate aids so he can equally enjoy Kohl's Department Store's store gift cards as sighted persons do. JA 417. Murphy intends to immediately purchase at least one store gift card from Kohl's Department Store as soon as Kohl's Department Store provides store gift cards that are accessible to the blind. JA 417.

III. Procedural History

All of the cases appealed herein were brought before the Hon. Gregory H. Woods and have a virtually identical procedural history. After Appellants filed their Complaints, JA 6-28, 72-94, 139-162, 220-242, 324-346, 390-412, Appellees sought to dismiss those Complaints. JA 29-31, 95-97. In lieu of responding to those efforts at dismissal, Appellants filed Amended Complaints. JA 32-57, 98-123, 163-188, 283-308, 347-372, 413-437. Appellees subsequently moved to dismiss those Amended Complaints. JA 58-59, 124-125, 189-191, 309-311, 373-375, 438-440.[4]

The District Court thereafter granted the motions to dismiss, writing its principle opinion on this issue in *Dominguez v. Banana Republic, LLC*, --- F.Supp.3d ----2020 WL 1950496 (S.D.N.Y. April 23, 2020).[5] The District Court in each case held that Appellants lacked standing to bring their action, as Appellants had not alleged a plausible intent to return to Appellees' stores. *Id*. at *4. The District Court went on to say that were it to consider the merits of the alleged ADA violation, it would still find that store gift cards were goods, and goods did not have to be made accessible under the ADA. *Id*. at *5-7. The District Court further held that store gift cards are not places of public accommodation that require accessibility under the ADA. *Id*. at *7-9. Last, the District Court found that Appellants needed to address

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[4] Though no oral arguments were held on the motions to dismiss, a pre-motion conference was held before the District Court in one action – *Thorne v Jersey Mike's Franchise Systems, Inc*. In that conference, the parties set forth their viewpoints on these issues. JA 243-282.

[5] Opinions that quote virtually verbatim from *Dominguez* were written in each of the other cases. *Mendez v. AnnTaylor, Inc*, 2020 WL 1974211 (S.D.N.Y. April 24, 2020); *Calcano v. Swarovski North America Limited*, 2020 WL 1974143 (S.D.N.Y. April 24, 2020); *Thorne v. Jersey Mike's Franchise Systems, Inc*., 2020 WL 1989411 (S.D.N.Y. April 27, 2020); *Calcano v. Art of Shaving - FL, LLC*, 2020 WL 1989413 (S.D.N.Y. April 27, 2020); and *Murphy v. Kohl's Department Stores, Inc*., 2020 WL 1974261 (S.D.N.Y. April 24, 2020). To avoid repetition, Appellants will only cite to the principle opinion in *Dominguez*.

other auxiliary aides potentially offered by Appellees, and why those were inadequate, in order to successfully make a claim that Appellees fail to make their store gift card services accessible to the visually impaired. *Id*. at *10-11.

After judgments were entered by the District Court dismissing the actions, JA 65, 131, 213, 317, 381, 543, the instant appeals were brought. JA 66, 132, 214, 318, 382, 544. By order of this Court dated June 24, all of the appeals were consolidated.

ARGUMENT

I. Standard of Review

This Court reviews "*de novo* a judgment of dismissal pursuant to Fed.R.Civ.P. 12(b)(6), assuming all facts alleged within the four corners of the complaint to be true, and drawing all reasonable inferences in plaintiff's favor." *Interpharm, Inc. v. Wells Fargo Bank, Nat. Ass'n,* 655 F.3d 136, 141 (2d Cir. 2011). Applying this standard to the dispute herein, the judgments of the District Court must be reversed.

Furthermore, in applying this standard, this Court must also note the District Court's decisions reflect its antipathy to lawsuits of this nature. The opinion in *Dominguez* refers to Appellants' lawsuits as "copy-and-paste litigation" on more than one occasion. 2020 WL 1950496 at *4, 12. The District Court also cynically notes that "of course" Appellants are seeking attorney's fees as part of their prayers for relief. *Id*. at*1. The District Court also discusses a variety of other similar litigation brought by Appellants counsel. *Id*. at *1 n.1, 5 n.3. However, this prejudicial assessment by the District Court represents a fundamental misunderstanding of the importance of the instant litigation.

Lawsuits under Title III are intended to effectuate compliance with protections for the disabled. Attorneys are incentivized to bring these actions by Congress making available the award of attorneys' fees to successful attorneys representing disabled plaintiffs. In fact, the inclusion of a fee-shifting provision in

Article III cases was intended by Congress to create "private attorneys general." As pointed out in *Fred Nekouee v. H.V. Real Estate Corporation, et al.*, 2017 WL 5010380, at *3 (E.D. Mo. Nov. 2, 2017), courts have recognized that "private litigation serves as an important means to enforce the public policies behind civil rights statutes, such as the ADA, and serial litigants serve a valuable purpose as private attorneys general ensuring that the ADA yields its promise of equal access to disabled persons." That Congress intended to empower private attorneys as private attorneys general was recognized by Justice Ginsberg in her opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). She states that when fee shifting was included in Title III of the ADA Congress created an incentive "for the enforcement of federal law by private attorneys general." *Id.* at 623. A number of district courts have similarly recognized the benefits of hiring private attorneys to incentivize the enforcement of the ADA. *See Brady v. Wal-Mart Stores, Inc.*, 455 F.Supp.2d 157, 205 n.19 (E.D.N.Y. 2006). *See also Adams v. Capo, Capko & Griffith, LLC*, 2015 WL 7738374 (W.D. Mo. Nov. 30 2015). Even if Appellants were merely ADA testers who solely sought to confirm that Appellees made store gift cards accessible, without any intent to purchase them, their actions in bringing these lawsuits would still be appropriate. *Harty v. Simon Property Group, L.P.*, 428 Fed.Appx. 69, 71 (2d Cir. 2011). When considering the propriety of the decisions of the District Court, this Court should take into account the District Court's unwarranted disdain for litigation of this nature that apparently colored its findings.

II. Appellants Have Standing to Bring Their Claims

In order to be able to use store gift cards in a similar manner to sighted individuals, the visually impaired Appellants require the store gift cards contain Braille lettering. Appellants each inquired of Appellees, local merchants that are in proximity to their home, merchants that Appellants had patronized before, about the availability of Brailled store gift cards. Appellants were uniformly informed that such store gift cards were unavailable. These facts establish sufficient standing for Appellants to bring their claims against Appellees.

To satisfy constitutional standing requirements, a plaintiff must prove: (1) injury in fact, which must be (a) concrete and particularized, and (b) actual or imminent; (2) a causal connection between the injury and the defendant's conduct; and (3) that the injury is likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). Plaintiffs seeking injunctive relief must also prove that the identified injury in fact presents a "real and immediate threat of future injury," often termed "a likelihood of future harm." *Shain v. Ellison,* 356 F.3d 211, 215–16 (2d Cir. 2004).

Standing in the ADA context differs from the typical standing analysis because the Supreme Court has instructed courts to "take a broad view of constitutional standing in civil rights cases, especially where, as under the ADA, private enforcement suits are the primary method of obtaining compliance with the act." *Doran v. 7-Eleven, Inc*., 524 F.3d 1034, 1039 (9th Cir. 2008) quoting *Trafficante v. Metro Life Ins. Co*., 409 U.S. 205, 209 (1972). In applying these general standing requirements to actions under the ADA, this Court has found standing in ADA suits seeking injunctive relief, "where (1) the plaintiff alleged past injury under the ADA; (2) it was reasonable to infer that the discriminatory treatment would continue; and (3) it was reasonable to infer, based on the past frequency of plaintiff's visits and the proximity of defendants' [services] to plaintiff's home, that plaintiff intended to return to the subject location." *Kreisler v. Second Ave. Diner Corp.,* 731 F.3d 184, 187–88 (2d Cir. 2013) (per curiam), *cert. denied,* 572 U.S. 1115 (2014); *see also Camarillo v. Carrols Corp.,* 518 F.3d 153, 158 (2d Cir. 2008) (per curiam). Applying this standard in *Camarillo,* this Court found standing where (1) defendants had failed to effectively communicate menu items to the legally blind plaintiff—an alleged ADA violation, (2) this discriminatory treatment was likely to continue, and (3) the plaintiff's past visits and proximity to the restaurant made it reasonable to infer her intent to return. *See Camarillo,* 518 F.3d at 158.

A. <u>The District Court Correctly Found that Appellants Satisfied the First Two Prongs of the Requirements for Standing</u>

Under the facts of this case, the District Court correctly found that Appellants' Amended Complaints had alleged both a past injury and the likelihood that such injuries would continue. These allegations satisfy the first two prongs of the standing inquiry.

For standing purposes, the injury-in-fact must take one of two forms: "direct injury from personally encountering disability based discrimination" or "deterrence from using defendant's property because it is not ADA compliant." *Feltzin v. Triangle Properties #1, LLC*, 2016 WL 11599264, at *4 (E.D.N.Y. Dec. 15, 2016). Deterrence from using defendant's property "can be shown by establishing that the plaintiff is reasonably deterred from the accommodation because of the discrimination." *Access Living Metropolitan Chicago v. Uber Technologies, Inc.*, 351 F.Supp.3d 1141, 1149 (N.D. Ill. 2018) quoting *Chapman v. Pier 1 Imports (U.S.) Inc*., 631 F.3d 939, 949 (9th Cir. 2011) (en banc).

In these cases, the District Court correctly found that Appellants satisfied the first two prongs of the inquiry. Appellants alleged that they encountered disability based discrimination when they called the Appellees in order to determine if Appellees provided a Braille store gift card, and were told that such cards were unavailable. *Dominguez*, 2020 WL 1950496, at *3. The District Court also correctly found that Appellants had sufficiently alleged that Appellees did not intend to sell Brailled store gift cards in the future. *Id*. As such, the initial elements of the standing inquiry were appropriately deemed satisfied by the District Court.

B. Appellants Pled a Plausible Intent to Return to Appellees' Stores

In claiming that Appellants could not demonstrate a plausible intent to return to Appellees' stores absent the availability of the Brailled store gift cards, *Dominguez*, 2020 WL 1950496, at *4, the District Court wholly ignored the following language in the Amended Complaints: "Plaintiff has been a customer at Defendant's stores on prior occasions and intends to immediately purchase at least one store gift card from the Defendant as soon as the Defendant sells store gift cards that are accessible to the blind and utilize it at Defendant's retail store." JA 36, 102, 167, 287, 351, 417. While quoting other provisions of the FAC in its decisions, the District Court never once refers to this allegation. The District Court never explains why this clear and unambiguous statement of an intent to return to Appellees' stores by Appellants, which must be taken as true for purposes of a motion to dismiss, does not satisfy the requirement that Appellants intended to return to Appellees' stores.

In *Kreisle*r, 731 F.3 at 188, this Court held that a reasonable intent to return to the store was established where the ADA violation deterred the plaintiff from using the store, the plaintiff frequents similar stores, the plaintiff resides in proximity to the store, and the plaintiff would like to frequent the store if he was able to access it. The "plausible intention" to return does not require a specific date for plaintiff's return to the location or website, as a plaintiff only has to show a future undefined intention to return while a discriminatory barrier remains in place. See *Gonzalez v.*

Bahar Corp., 2019 U.S. Dist. LEXIS 58567, at *6-8 (E.D.N.Y. April 3, 2019) quoting *Harty,* 428 Fed.Appx. at 71; see also *Hirsch v. Hui Zhen Huang*, 2011 WL 6129939, at *3 (S.D.N.Y. Dec. 9, 2011); *Access Now, Inc., v. South Florida Stadium Corp*., 161 F. Supp.2d 1357, 1364 (S.D. Fla. 2001). Potentially returning just as an ADA tester for the location confers standing. *Harty*, 428 Fed.Appx. at 71.

Similarly here, the District Court conceded that Appellants had alleged that Appellees' stores are near their homes and that they had frequented those stores. *Dominguez*, 2020 WL 1950496, at *4. As set forth above, Appellants articulated an express intent to return to the store to purchase store gift cards if such store gift cards were made available in Braille. These allegations satisfy ADA standing requirements.

Indeed, contrary to the findings of the District Court herein, other District Court's in this Circuit have found standing to allege ADA violations in similar circumstances. See *Dominguez v. Taco Bell, Corp*., —F. Supp. 3d— 2020 WL 3263258 (S.D.N.Y. June 17, 2020); *Lopez v. Build-A-Bear Workshop, Inc.*, 2020 WL 3318247 (S.D.N.Y. June 18, 2020); *Mendez v. BG Retail, LLC*, 2020 WL 3318293 (S.D.N.Y. June 18, 2020); *Murphy v. Little Caesar Enterprises, Inc.*, 2020 WL 3318279 (S.D.N.Y. June 18, 2020); *Thorne v. Boston Market Corporation*, 2020 WL 3504178 (S.D.N.Y. June 29, 2020).

For example, in *Taco Bell, Corp*., 2020 WL 3263258, at *2, the court wrote:

> The FAC [First Amended Complaint] sufficiently pleads Article III standing. The FAC satisfies the past injury requirement by alleging that Plaintiff encountered a barrier when he requested and was denied a braille gift card and was not offered any auxiliary aid….The FAC satisfies the second standing requirement that the discriminatory treatment would continue, based on the employee's alleged statement that [Defendant] Taco Bell does not sell braille gift cards….Finally, the FAC sufficiently pleads Plaintiff's intent to return to Taco Bell, stating that Plaintiff has been a Taco Bell customer "on prior occasions and intends to immediately purchase at least one store gift card from Defendant as soon as the Defendant sells store gift cards that are accessible to the blind."

These facts are identical to those here, and, for the same reasons articulated by those courts, this Court should find that Appellants have standing to pursue their ADA claims.

C. Appellants Need Not Allege What They Would Purchase from Appellees in Order to Have Standing

The District Court's finding that Appellants need to specify what they intended to purchase at Appellees' establishments with a Brailled store gift card, *Dominguez*, 2020 WL 1950496, at *4, has no basis in law. It would be akin to requiring a plaintiff alleging denial of physical access to a store to specify what items that individual intended to purchase should they be permitted entry to the store. As discussed above, in *Kreisl*er, this Court did not require the plaintiff to allege what menu items he intended to purchase if allowed access to the defendant restaurant – be it a sandwich or a soda or a stew. The plaintiff simply had to allege a plausible intent to return based on proximity of the store to his home, and history of eating out. *Kreisler*, 731 F.3d at 188. Indeed, this Court held that plaintiff's deterrence from using the store because of defendant's ADA violations constituted a sufficient ADA injury for standing purposes. *Id*.

Appellees herein are retail establishments that sell clothing and accessories (Ann Taylor, Banana Republic, Kohl's, Swarovski), food items (Jersey Mike's), personal care items (Kohl's, Art of Shaving) and home goods (Kohl's, Swarovski). These are stores Appellants have stated that they patronized in the past and have specifically stated that they intend to patronize in the future should Brailled gift cards be provided for them. Contrary to the claim of the District Court, *Dominguez*, 2020 WL 1950496, at *4, Appellants should not have to specify the exact nature of the items they would purchase with Brailled store gift cards if such cards were provided for them in order to be deemed to have standing. Indeed, over time, Appellants needs and desires from Appellees stores will change based on changing needs, moods, seasons, etc. For example, Murphy may have wanted kitchen appliances from Kohl's at one time, but now wants clothing. Or Thorne may have wanted to buy sandwiches from Jersey Mike's previously, but now may be more interested in salads. Notably, the District Court wholly failed to recognize the fact that store gift cards are given as gifts. Without Brailled store gift cards, a visually impaired recipient will not know what they are receiving. The District Court wholly ignores these facts in its standing analysis.

Furthermore, if this Court were to adopt the District Court's rationale, it would be inconsistent with Supreme Court precedent. In providing a concrete plan to return to the place itself, the ADA's aim of integrating individuals with disabilities into the economic and social mainstream of American life would be frustrated. See *PGA Tour v. Martin*, 532 U.S. 661, 674-78 (2001). It is enough to allege an intent to return to the area and an interest in visiting the accommodation in the future when it becomes ADA complaint. *Id*. Plaintiffs may show a likelihood of future harm even if the sole reason for visiting or returning to an establishment is to assess ADA compliance. *Civil Rights Educ. & Enforce. Ctr. v. Hosp. Properties Trust ("CREEC")*, 867 F.3d 1093, 1098 (9th Cir. 2017) citing *Lujan*, 504 U.S. at 560. To require Appellants to have to plead a specific item of clothing or item of food they would procure from Appellees in order to have standing would controvert the principle that an ADA plaintiff has standing even if they only intend to return to ensure ADA compliance.

At minimum, the District Court should have relied on the guidance of this Court in *Bernstein v. City of New York*, 621 Fed.Appx. 56, 58-59 (2d Cir. 2015), which required fact finding on the issue as to whether an out of state plaintiff plausibly intended to return to Central Park, where there were accessibility barriers to the visually impaired. The District Court here could have done a similar fact finding in lieu of dismissal. It chose not to do so. Accordingly, the District Court erred when it held that Appellants lacked standing to pursue their claims for violations of the ADA.

III. Store Gift Cards are Services for Which Auxiliary Aids Must be Provided Under the ADA

Store gift cards are a means through which individuals are provided the opportunity to purchase items from stores. Store gift cards are not goods in and of themselves, but rather a service through which individuals may procure the actual goods sold by stores without utilizing cash, credit or debit cards. Store gift cards are services that help make the goods sold by the store accessible. As a service provided by a store to its patrons, store gift cards must be made available to all customers, including those with visual impairment. Federal regulation requires certain information be made available to all purchasers of store gift cards, and that includes the visually impaired. Accordingly, the District Court was in error when it found that Appellants could not state a cause of action for failure to provide Brailled store gift cards.

The ADA defines discrimination as:

> A failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good [or] service…or would result in an undue burden.

42 U.S.C. §12182(b)(2)(A)(iii). The goal of the ADA is to ensure that communication with people with disabilities is equally effective as communication with people without disabilities. U.S. Dep't of Justice, Civil Rights Division, Disability Rights Section, Effective Communication, at 1 (2014). The purpose of the effective communication rules is to ensure that the person with a vision, hearing, or speech disability can communicate with, receive information from, and convey information to, the covered entity. *Id*.

Section 12182(b)(2) of the ADA requires businesses to provide auxiliary aids that ensure that no disabled person is denied the same services that other individuals receive. The definition for auxiliary aids and services under the ADA includes, "effective methods of making visually delivered materials available to individuals with visual impairments" and "acquisition or modification of equipment or devices." 42 U.S.C § 12103(1)(a-c). The ADA defines common auxiliary aids and services to include: among other things: "qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments" and the "modification of equipment or devices." 42 U.S.C. §12103(1)(B)-(D). Regulations have expanded the types of auxiliary aids to include:

> Qualified readers; taped texts; audio recordings; *Brailled materials and displays*; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

28 CFR § 36.303(b)(2) (emphasis added).

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place." 28 C.F.R. § 36.303(c)(1)(ii). "[T]he ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." 28 CFR §36.303(c)(1)(iii). For example, "[w]hile restaurants are not necessarily required to have on hand large print menus that [a legally blind customer] would be able to read, they are required to ensure that their menu options are effectively communicated to individuals who…are legally blind." *Camarillo*, 518 F.3d at 157. In this case, any auxiliary aid would have to conform with the requirements of 12 CFR §205.20(c)(4), which mandates certain disclosures for store gift cards be contained on the store gift cards themselves.

As alleged in Appellants' Amended Complaints, and assumed to be true for purposes of the instant motions to dismiss, a Brailled gift card is the only adequate auxiliary aid that will allow the visually impaired to utilize the services of Appellees' store gift cards. As was stated in the various Amended Complaints:

> Without an effective auxiliary aid for the physical cards, Plaintiff, and others similarly situated, cannot independently access the information contained thereon in order use the card like a sighted person.

> Plaintiff cannot independently complete a transaction on-line through a website or by phone with a customer service agent because certain details such as the unique card number (or PIN code) and other important information such as the terms cannot be independently identified due to a lack of auxiliary aids on the card.
>
> Without an auxiliary aid, such as Braille, on the physical cards, Plaintiff cannot independently access the information, like a sighted person, to make a purchase: (a) in-store because the card is not distinguishable from other cards and Plaintiff would have to rely on the good will of strangers to pick the card out of their private bag or wallet or (b) through a website or by phone with a customer service agent because certain details such as the unique card number and other important information such as the terms cannot be independently identified.

JA 33-34, 99-100, 164-165, 284, 348, 414-415. In addition, a visually impaired person cannot even ascertain the name of the store on a store gift card if given one absent the store name being in Braille. The failure to accommodate a plaintiffs' disability in the administration of a defendants' program "impedes the full and equal enjoyment of goods and services" offered by defendant at a physical location and is an ADA violation. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32-33 (2d Cir. 1999); *Jamesson v. Citimortgage, Inc.*, 2010 WL 11595909, at *7 (C.D.Cal. Oct. 14, 2010) (citation omitted).

Furthermore, a Brailled store gift card may be an auxiliary aid and service of "special importance" because not only would it provide access to a store's goods and services, it would also provide "independence," "economic self-sufficiency," and "integration" into a shopping experience that a sighted person has. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1268-69 (D.C. Cir. 2008)[6]. A Brailled store gift card eliminates a barrier and instead provides access for the visually impaired shopper, who with a Brailled store gift card, can explore further services, browse goods, and purchase goods either online or at the store itself in a similar manner to sighted individuals. Without a Brailled store gift card, the visually impaired shopper is wholly precluded from online shopping using the store gift card. A visually impaired person who receives a store gift card without Braille will not even know what store the gift card is for, let alone the value of the card, the card's identifying number, the terms and conditions of the card, or the means through which to contact the merchant to ascertain that information. A qualified reader, taped text or other method would not help the visually impaired customer, at home, who wishes to use a store gift card. Those devices would also undermine any sense of financial independence and privacy of the visually impaired person if they were employed within a store. With a Brailled gift card, the visually impaired shopper can experience the same level of independence, economic self-sufficiency, and

[6] The District Court's attempt to distinguish cash from store gift cards, should be given little credence. While cash has "constitutional underpinnings" and "special importance," emerging technology since the founding of our country has made it so that credit cards, debit cards and store gift cards have supplanted cash as the primary means through which individuals make purchases. Online purchases, which have only grown in importance in a Covid-19 world. cannot be made using a store gift card without Braille. Though store gift cards may not be the universal medium for business transactions, they are growing in importance and must be made accessible to all.

integration that a sighted person experiences. A Brailled gift card is also the only way to ensure the disclosures required under 12 CFR §205.20(c)(4) are included on the store gift card itself.

In dismissing Appellants' arguments that store gift cards are services offered by Appellees' stores, the District Court's sole argument is that Appellants were required to inquire and plead regarding the availability of other auxiliary aides that may have been offered by Appellees, and explain how such aides were inadequate. *Dominguez*, 2020 WL 1950496, at *10-11. However, "[n]owhere in the ADA, implementing regulations, or anywhere in the analysis of the regulations is there a stated requirement that a disabled person, especially a person whose disability is readily apparent, must request an auxiliary aid or service." *Boyer v. Five Guys Enterprises, LLC*, 2018 WL 4680007, at *6 (S.D. Cal. Sept. 28, 2018). Appellants were not under any compulsion to ask for any or all available auxiliary aids from Appellees before bringing their claim.

Moreover, the standard applied by the District Court in dismissing the action is contrary to Appellants' burden at the motion to dismiss stage of proceedings. At the pleading stage, a plaintiff need only allege that a defendant provided them with insufficient accommodations for their disability; it is then a question of fact to be determined to be determined based on the evidence gathered whether the defendant offered auxiliary aides and whether those aides were, in fact, adequate. *Suvino v.*

Time Warner Cable, Inc., 2017 WL 3834777, at *2 (S.D.N.Y. Aug. 31, 2017) ("The sufficiency of the auxiliary aids and services provided by TWC is a matter for litigation at a later stage of this proceeding."); *Metropolitan Chicago v. Uber Technologies, Inc.*, 351 F.Supp.3d 1141, 1156-7 (N.D. Ill. 2018) ("At this stage, plaintiffs have sufficiently alleged that Uber is a transportation provider, and it is equal access to that service (not a particular type of transportation) that Uber has blocked. *See, e.g.*, [1] ¶¶ 3, 6, 73. If plaintiffs establish liability, it will still remain to be seen whether the requested remedy—that Uber provide service to those who require wheelchair-accessible vehicles—is appropriate under the statute."). As was explained by the court in *Nat'l Asscn. of the Deaf v. Harvard Univ*., 2016 WL 3561622 (D. Mass. Feb. 9, 2016), after the plaintiffs have alleged the denial of access, the burden shifts to the defendant to prove, as an affirmative defense, that it provides an accessible format. *Id*. at *11 citing *Noll v. Int'l Business Machs. Corp.*, 787 F.3d 89, 98 (2d Cir. 2015). It was improper for the District Court to require Appellants, at the motion to dismiss stage, to disprove any possible affirmative defenses that the Appellees might have as to how they provide the visually impaired with access to store gift cards.[7]

[7] In a similar vein, the District Court also inappropriately engaged in speculation about the feasibility of including Braille lettering on a store gift card. *Dominguez*, 2020 WL 1950496, at *11 n.7. Appellees may well argue, as an affirmative defense, that Brailled store gift cards are not feasible. However, an evaluation of the merits of this possible affirmative defense is only appropriate after the parties have engaged in discovery as to the feasibility of such an option.

Even if the District Court were permitted to consider the potentially available auxiliary aids such as a qualified reader, as was the case in *Camarillo*, 518 F.3d 153, those auxiliary aids would not help a visually impaired shopper at home who wished to use a store gift card. It would also not help a visually impaired shopper who received a store gift card as a gift. Such a person could not even ascertain which store the store gift card came from, let alone the pertinent information necessary to make a purchase. Even if a store employee read aloud the content of the store gift card while at the store, that would not enable the visually impaired shopper to have the same level of independence of shopping on their own that a sighted person enjoys. If Braille existed on store gift cards, a visually impaired shopper could identify the store, call customer service, go online, access the gift card's unique identification number, and experience full enjoyment of the store's services as sighted persons can. Federal regulations already require the inclusion of such information on the store gift card itself. 12 CFR §205.20(c)(4). Appellees cannot ignore mandatory disclosures that must be made to all individuals, both sighted and not, and say that the visually impaired can hopefully find out the information through some alternative method.

Notably, Brailled credit cards, which are roughly equal in dimensions to store gift cards, have been available, in some form, from Starbucks since 2011. https://money.cnn.com/2013/10/02/news/companies/starbucks-braille-gift-card/index.html (last visited July 19, 2020).

In light of the foregoing, the District Court erred when it determined that Appellants had not sufficiently pled Appellees lack of appropriate auxiliary aides necessary for the visually impaired to access the services of a store gift card.

IV. Store Gift Cards Are Places of Public Accommodation that Must be Made Accessible

In finding that store gift cards are not places of public accommodation, the District Court interpreted the ADA too narrowly. It is well established that the draftspersons of the ADA intended for its provisions to evolve over time to keep pace with emerging technologies. It is also clear that the courts have recognized that places of public accommodation are not solely physical spaces, but also includes more ephemeral places that provide individuals with the opportunity to access goods and services. In failing to adhere to this precedent, the District Court erroneously held that Appellees store gift cards were not places of public accommodation. *Dominguez*, 2020 WL 1950496, at *7-9.

The legislative history of the ADA reveals that Congress intended for accommodations that are provided to individuals with disabilities keep pace with the rapidly changing technology of the times:

> The Committee wishes to make it clear that technology advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and services in the future which today they would not be required because they would be held to impose undue burdens on such entities.

> Indeed, the Committee intends that the types of accommodations and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.

H.R. Rep. 101–485(II), at 108 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 391.

Numerous courts have recognized this principle. See e.g. *Baughman v. Walt Disney World Company*, 685 F.3d 1131, 1135 (9th Cir. 2012); *Enyart v. Nat'l Conference of Bar Examiners, Inc*., 630 F.3d 1153, 1163 (9th Cir. 2011); *Nat'l Fed'n of the Blind v. Scribd Inc*., 97 F. Supp. 3d 565, 573-5 (D. Vt. 2015); *Nat'l Ass'n of the Deaf v. Netflix, Inc*., 869 F. Supp. 2d 196, 201 (D. Mass. 2012); *Am. Council of Blind v. Astrue*, 2009 WL 3400686, at *20 (N.D.Cal. Oct. 20, 2009). While the ADA may list certain forms of places of public accommodations that must be made accessible to the disabled, 42 U.S.C. §12181(7)(A)-(L), it is well accepted that the list is not exhaustive and that the list must be construed liberally to effectuate congressional intent. *Nat'l Fed'n of the Blind*, 97 F.Supp.3d at 572. Indeed, in its recent decision in *Bostock v. Clayton County, Georgia*, the Supreme Court itself stated as much, writing:

> One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not possibly have meant to protect a disfavored group. Take this Court's encounter with the Americans with Disabilities Act's directive that no "'public entity'" can discriminate against any "'qualified individual with a disability.'" *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 208, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998). Congress, of course, didn't list every public entity the statute would

> apply to. And no one batted an eye at its application to, say, post offices. But when the statute was applied to prisons, curiously, some demanded a closer look: Pennsylvania argued that “Congress did not ‘envisio[n] that the ADA would be applied to state prisoners.’” *Id*., at 211–212, 118 S.Ct. 1952. This Court emphatically rejected that view, explaining that, “in the context of an unambiguous statutory text,” whether a specific application was anticipated by Congress “is irrelevant.” *Id*., at 212, 118 S.Ct. 1952. As *Yeskey* and today's cases exemplify, applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.

----U.S.----, 140 S.Ct. 1731, 1751 (June 15, 2020).

The Second Circuit, and district courts located therein, have been at the vanguard of recognizing that physical places are not the only places of public accommodation that must be made accessible. In *Pallozzi*, 198 F.3d 28, this Court held that an insurance company’s underwriting department could not deny the disabled policies on the basis of their disabled status. The Court found that the place of public accommodation at issue was not the physical insurance office, but the ability of the disabled to purchase policies from the insurer in and of itself. *Id*. at 32-33. In reliance on this authority, as well as similar authority from other circuits, courts in this Circuit have also found websites to be places of public accommodation, whether or not such websites are connected to a physical store. *Dominguez*, 2020 WL 1950496, at *8-9 (collecting cases).

In a similar vein, store gift cards should be deemed to be places of public accommodation. The common thread between *Pallozzi,* the website cases and Appellants' causes of action is that the non-physical spaces alleged to be places of public accommodations facilitate the purchase of goods and services. Precluding the disabled from the ability to purchase these goods and services in the same manner as the non-impaired represents an ADA violation. In *Pallozzi*, 198 F.3d at 32-33 this Court made clear that: "We believe an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability." By refusing to provide Brailled store gift cards, Appellees are discriminating against Appellants based on their disability. Appellants cannot procure a Brailled store gift card and then use those Brailled store gift cards to make purchases from Appellees. A visually impaired person cannot use a store gift card received as a gift. As discussed *supra*, there are many advantages to, and reasons for, making purchases with store gift cards. That there may be an alternative manner in which to procure the goods or services of Appellees, such as going into Appellees' stores and using cash is not dispositive, as the plaintiffs in many of the website cases could also access the defendants' physical stores if they so choose. See e.g. *Del-*

Orden v. Bonobos, Inc., 2017 WL 6547902 (S.D.N.Y. Dec. 20, 2017) (upholding ADA website lawsuit against retailer that also had thirty-eight brick and mortar stores). Like the plaintiffs in *Pallozzi* and the website cases, absent access to Brailled store gift cards Appellants are being prevented from using the goods and services of the Appellees in the same manner as sighted individuals. As the court in *Del-Orden* noted:

> On this point, the district court's reasoning in *National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012), is persuasive. Addressing an ADA claim based on allegedly unequal access for hearing-impaired persons to a video-streaming site, that court evaluated the ADA's definition of "public accommodation" in Section 12181(7) in concert with the anti-discrimination proscription of Section 12182(a). The latter's ban on discrimination, the court reasoned, "covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation. This distinction is crucial." 869 F. Supp. at 201.

2017 WL 6547902, at *10.

Appellees failure to make the opportunities of the public accommodation store gift card available to the visually impaired constitutes a violation of the ADA.

In rejecting the notion that store gift cards can be deemed places of public accommodation, the District Court held that store gift cards are not places of public accommodation because they may be used to make a purchase from a retailer, but are not a place where such purchases can be made. *Dominguez*, 2020 WL 1950496, at *8. However, Appellants respectfully submit that such an interpretation is overly narrow, and not in keeping with established precedent that prohibits discrimination in denying the disabled access to make purchases. Just because store gift cards are "small slabs of plastic," *Dominguez*, 2020 WL 1950496, at *9, they are substantially similar to insurance policies and websites to be considered places of public accommodation.

The ADA was enacted in 1990. Store gift card usage did not begin until 1994. The widespread use of store gift cards did not begin until sometime later. It is no wonder then that store gift cards are not listed among the categories of public accommodations that must be made accessible under the ADA. However, there is no reason that this emerging technology of store gift cards should not be considered a place of public accommodation, particularly given the broad interpretation given to the ADA.

V. Store Gift Cards are Not Goods

In arguing that store gift cards are goods, the District Court focused on the definition of the word "goods," *Dominguez*, 2020 WL 1950496, at *6, without ever addressing the definition of the term "store gift card." As set forth *supra*, the statutory definition of the term store gift card includes the requirement that the gift card be "honored upon presentation by such single merchant or affiliated group of merchants for goods or services." 15 U.S.C. 1693l-1(a)(2)(C). A store gift card is not a tangible item that has specific monetary value. The store gift card only has monetary value when the customer tenders cash or cash value to the merchant to place such value on the store gift card. The store gift card itself has no value.

Notably, the very definition of "goods" used by the District Court notes that the term goods are tangible items "usually excluding money." A store gift card is an alternative to money. As stated above, store gift cards have no intrinsic value in and of themselves until a value is put on them at the time of acquisition, when they are activated by stores. After activation, store gift cards have a cash value that a person can use all of, or a portion of, at the store at a given time to procure goods or services. If an item exceeds the cost of the store gift card, the consumer must then use another form of money, cash, debit, credit, to pay for the good. If the item is less than the store gift card value, then the customer retains the store gift card to make another purchase. Retailers retain the value of the monies paid for a gift card even if a customer chooses never to utilize the gift card to purchase goods. A store gift card is a money analog that must be made available to the visually impaired under the ADA[8]. It is not a good in and of itself, but rather a means to acquire goods or services.

[8] The fact that one "purchases" a store gift card from a retailer is not dispositive of the issue as to whether a store gift card is a good. There any number of cash equivalents that one purchases, such as prepaid debit cards, foreign currency, bank checks, travelers' cheques, etc. Like store gift cards, these too are not goods, but cash or payment alternatives.

Moreover, in holding that store gift cards are goods, the District Court ignores the fact that store gift cards are not goods that the Appellee retailers are in the business of selling. Appellees are retailers whose primary purpose is to sell goods such as food, clothing, accessories, housewares, personal grooming items, etc. Appellees do not exist to sell store gift cards. Store gift cards are a purchase mechanism that Appellees each provide for the convenience of the consumer. Aptly named as store gift cards, store gift cards are often given as gifts from one to another so that the recipient can purchase goods or services from a particular store. To classify store gift cards as equivalent to the goods that the Appellee retailers sell is to ignore the reality of Appellees' business and the role that store gift cards play in that business.

CONCLUSION

In light of the foregoing, it is clear that the District Court erred in finding that Appellants' did not have standing to bring their action, and that store gift cards were not subject to the same strictures of the ADA as are other services and places of public accommodation. Accordingly, the decisions of the District Court dismissing Appellants' Amended Complaints must be reversed and the matters remanded to the District Court for discovery, together with such other and further relief as this Court deems just, fair and equitable.

Dated: New York, New York
July 20, 2020

Law Offices of G. Oliver Koppell & Associates

By: ______/s/_________________

G. Oliver Koppell
Daniel F. Schreck
Counsel for Appellants
99 Park Avenue, Suite 1100
New York, New York, 10016
212-867-3838

Bradly G. Marks, Esq.
Marks Law Firm, P.C.
175 Varick Street, 3rd Floor
New York, New York, 10014
646-770 - 3775

Jeffrey M. Gottlieb
Gottlieb & Associates
150 East 18th Street, Suite PHR
New York, New York, 10003
212-228-9795

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,633 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

Dated: New York, New York
July 20, 2020

Law Offices of G. Oliver Koppell & Associates

By: ______/s/_________________

G. Oliver Koppell
Daniel F. Schreck
Counsel for Appellants
99 Park Avenue, Suite 1100
New York, New York, 10016
212-867-3838

Bradly G. Marks, Esq.
Marks Law Firm, P.C.
175 Varick Street, 3rd Floor
New York, New York, 10014
646-770 - 3775

Jeffrey M. Gottlieb
Gottlieb & Associates
150 East 18th Street, Suite PHR
New York, New York, 10003
212-228-9795

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HIMELDA MENDEZ, *on behalf of all other persons similarly situated*,

Plaintiff,

-against-

ANNTAYLOR, INC.,

Defendant.

1:19-cv-10625-GHW

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

This is another case where a visually impaired person has sued a retailer for failing to stock Braille or otherwise accessible gift cards. Because this complaint suffers from the same pitfalls as those in *Dominguez v. Banana Republic, LLC*, No. 1:19-CV-10171-GHW, 2020 WL 1950496 (S.D.N.Y. Apr. 23, 2020)[1], the Court comes to the same conclusion and GRANTS Defendant's motion to dismiss.

I. BACKGROUND

Like the allegations in *Banana Republic*, the facts presented in the complaint are relatively straightforward.

AnnTaylor, Inc. ("Defendant" or "Ann Taylor"), like many other retail businesses, offers consumers the opportunity to purchase "pre-paid cash cards, colloquially referred as 'store gift cards,'" that can be used in place of cash at its stores. First Amended Complaint ("FAC"), Dkt. No. 16, ¶ 4 & n.2. Though they look and feel like credit cards, *see* FAC ¶ 35, they are redeemable only at "a specified merchant or affiliated merchants." FAC ¶ 29 & n.4.

On October 21, 2019, Himelda Mendez ("Plaintiff") called Ann Taylor's customer service office to ask whether the store sold Braille gift cards. *See* FAC ¶ 16. An employee told her that Ann

[1] Indeed, both parties here are represented by the same counsel as the parties in *Banana Republic*.

Taylor did not. *See* FAC ¶ 16. During that call, the employee did not offer Plaintiff any alternative auxiliary aids or services. *See* FAC ¶ 17. Sometime later, Plaintiff unsuccessfully attempted to locate accessible Ann Taylor gift cards on her own. *See* FAC ¶ 18. The lack of an accessible gift card deterred Plaintiff from "fully and equally us[ing] or enjoy[ing]" the "facilities, goods, and services Defendant offers to the public at its retail stores." FAC ¶ 42. As soon as accessible gift cards are available, however, "Plaintiff intends to immediately go purchase" one. FAC ¶ 45.

Plaintiff sued Ann Taylor under the ADA, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.*, seeking compensatory damages, punitive damages, and a permanent injunction to "cause a change in Defendant's corporate policies, practices, and procedures so that Defendant's store gift cards will become and remain accessible to blind and visually-impaired consumers," and, of course, attorney's fees.

Ann Taylor moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. ANALYSIS

The Court refers the reader to the legal standard articulated in Part II of *Banana Republic*, 2020 WL 1950496, at *2. The discussion and application of the law there applies in equal force in here.

Because the Plaintiff here has failed to provide the Court with sufficient evidence of her intent to return to Ann Taylor, she, like the plaintiff in *Banana Republic*, lacks standing to assert her ADA claim. The difference between the two complaints are slight: unlike Dominguez, Mendez asserts that she lives about two blocks from Defendant's retail store at 149 5th Avenue, New York, NY. FAC ¶ 25. Like Dominguez, Mendez generically asserts only that she "has been a customer at Defendant's stores on prior occasions and intends to immediately purchase at least one store gift card from the Defendant as soon as the Defendant sells store gift cards that are accessible to the blind and utilize it at Defendant's retail store." FAC ¶ 21. Although the identification of a single

Ann Taylor store near her home provides the slightest bit more color than the plaintiff's complaint in *Banana Republic*, Plaintiff still fails to plausibly allege an intent to return to Ann Taylor. The intent-to-return inquiry, as explained in *Banana Republic*, is a "highly fact-sensitive inquiry that incorporates a range of factors" such as "the frequency of the plaintiff's past visits" and "the proximity of the defendant's services, programs, or activities to the plaintiff's home" along with any other factors "relevant to the calculation" including the plaintiff's "occupation or demonstrated travel habits." *Bernstein v. City of New York*, 621 F. App'x 56, 59 (2d Cir. 2015) (citing *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187–88 (2d Cir. 2013) (per curiam) and *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d. Cir. 2008) (per curiam)). And Mendez never asserts, for instance, that she is curating a closet of business workwear, or that she frequently shops for cashmere sweaters at retail stores close to her home. *See Banana Republic,* 2020 WL 1950496, at *4.

Plaintiff's ADA claim would also fail under Rule 12(b)(6) for all of the reasons identified in *Banana Republic*. *See* 2020 WL 1950496, at *5–12. Indeed, there are no substantive differences between either the complaint or the briefing in this case and *Banana Republic* that would compel a different conclusion. Plaintiff has even made the same errors in her opposition as the plaintiff in *Banana Republic*: like Banana Republic, Ann Taylor does not sell food. *See Opp'n* at 3, 15, 16, 20; *see also* 2020 WL 1950496, at *2.

Because the Court would dismiss Plaintiff's ADA claims, it need not engage in a substantive analysis of the merits of Plaintiff's NYSHRL and NYCHRL claims; this Court would decline to exercise supplemental jurisdiction over Plaintiff's state and city claims. *See Banana Republic*, 2020 WL 1950496, at *5, 12.

III. CONCLUSION

This case is indistinguishable from *Banana Republic*. It should therefore come as no surprise that the Court comes to the exact same conclusion.

For these reasons, Defendant's motion to dismiss is GRANTED. Within fifteen days, Plaintiff may file a second amended complaint to cure the deficiencies articulated in this opinion by alleging additional facts about the interactions she has had with Ann Taylor. If no amended complaint is filed within that time frame, the Court will enter a final judgment of dismissal and direct the Clerk of Court to close this case.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 20.

SO ORDERED.

Dated: April 24, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HIMELDA MENDEZ, *on behalf of all other persons similarly situated*,

Plaintiff,

-against-

ANNTAYLOR, INC.,

Defendant.

1:19-cv-10625-GHW

<u>ORDER</u>

GREGORY H. WOODS, United States District Judge:

On April 24, 2020, the Court issued a memorandum opinion and order, granting Defendant's motion to dismiss Plaintiff's first amended complaint. Dkt. No. 24. The Court's order granted Plaintiff leave to file an amended complaint within fifteen days. *Id.* at 3-4. Therefore, Plaintiff's second amended complaint was due no later than May 9, 2020. As of the date of this order, the Court has not received Plaintiff's amended complaint.

Accordingly, the Clerk of Court is directed to enter judgment in favor of Defendant, terminate all pending motions, adjourn all deadlines, and to close this case.

SO ORDERED.

Dated: May 11, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

HIMELDA MENDEZ, *on behalf of all other persons similarly situated*,

Plaintiff,

-against-

ANNTAYLOR, INC.,

Defendants.

---X

19 **CIVIL** 10625 (GHW)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated May 11, 2020, Judgment is entered in favor of Defendant, and this case is closed.

Dated: New York, New York

May 11, 2020

RUBY J. KRAJICK

Clerk of Court

BY: David J. [signature]

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

MARCOS CALCANO, *on behalf of all other persons similarly situated*,

Plaintiff,

-against-

SWAROVSKI NORTH AMERICA LIMITED,

Defendant.

---X

1:19-cv-10536-GHW

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

This is another case where a visually impaired person has sued a retailer for failing to stock Braille or otherwise accessible gift cards. Because this complaint suffers from the same pitfalls as those in *Dominguez v. Banana Republic, LLC*, No. 1:19-CV-10171-GHW, 2020 WL 1950496 (S.D.N.Y. Apr. 23, 2020)[1], the Court comes to the same conclusion and GRANTS Defendant's motion to dismiss.

I. BACKGROUND

Like the allegations in *Banana Republic*, the facts presented in the complaint are relatively straightforward.

Swarovski North America Limited ("Defendant" or "Swarovski"), like many other retail businesses, offers consumers the opportunity to purchase "pre-paid cash cards, colloquially referred as 'store gift cards,'" that can be used in place of cash at its stores. First Amended Complaint ("FAC"), Dkt. No. 20, ¶ 4 & n.2. Though they look and feel like credit cards, *see* FAC ¶ 35, they are redeemable only at "a specified merchant or affiliated merchants." FAC ¶ 29 & n.4.

On November 9, 2019, Marcos Calcano ("Plaintiff") called Swarovski's customer service office to ask whether the store sold Braille gift cards. *See* FAC ¶ 16. An employee told him that

[1] Indeed, both parties here are represented by the same counsel as the parties in *Banana Republic*.

Swarovski did not. *See* FAC ¶ 16. During that call, the employee did not offer Plaintiff any alternative auxiliary aids or services. *See* FAC ¶ 17. Sometime later, Plaintiff unsuccessfully attempted to locate accessible Swarovski gift cards on his own. *See* FAC ¶ 18. The lack of an accessible gift card deterred Plaintiff from "fully and equally us[ing] or enjoy[ing]" the "facilities, goods, and services Defendant offers to the public at its retail stores." FAC ¶ 42. As soon as accessible gift cards are available, however, "Plaintiff intends to immediately go purchase" one. FAC ¶ 45.

Plaintiff sued Swarovski under the ADA, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.*, seeking compensatory damages, punitive damages, and a permanent injunction to "cause a change in Defendant's corporate policies, practices, and procedures so that Defendant's store gift cards will become and remain accessible to blind and visually-impaired consumers," and, of course, attorney's fees.

Swarovski moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. ANALYSIS

The Court refers the reader to the legal standard articulated in Part II of *Banana Republic*, 2020 WL 1950496, at *2. The discussion and application of the law there applies in equal force in here.

Because the Plaintiff here has failed to provide the Court with sufficient evidence of his intent to return to Swarovski, he, like the plaintiff in *Banana Republic*, lacks standing to assert his ADA claim. There is virtually no difference between the two complaints: like Dominguez, Calcano generically asserts that he "resides within close proximity to at least one of Defendant's physical locations," and "has been a customer at Defendant's stores on prior occasions and intends to immediately purchase at least one store gift card from the Defendant as soon as the Defendant sells store gift cards that are accessible to the blind and utilize it at Defendant's retail store." FAC ¶¶ 21,

25. The intent-to-return inquiry, as explained in *Banana Republic*, is a "highly fact-sensitive inquiry that incorporates a range of factors" such as "the frequency of the plaintiff's past visits" and "the proximity of the defendant's services, programs, or activities to the plaintiff's home" along with any other factors "relevant to the calculation" including the plaintiff's "occupation or demonstrated travel habits." *Bernstein v. City of New York*, 621 F. App'x 56, 59 (2d Cir. 2015) (citing *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187–88 (2d Cir. 2013) (per curiam) and *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d. Cir. 2008) (per curiam)). And Calcano never asserts, for instance, that he is curating a collection of glass jewelry, figurines, ornaments, watches, or accessories. *See Banana Republic*, 2020 WL 1950496, at *4.

Plaintiff's ADA claim would also fail under Rule 12(b)(6) for all of the reasons identified in *Banana Republic*. *See* 2020 WL 1950496, at *5–12. Indeed, there are no substantive differences between either the complaint or the briefing in this case and *Banana Republic* that would compel a different conclusion.

Because the Court would dismiss Plaintiff's ADA claims, it need not engage in a substantive analysis of the merits of Plaintiff's NYSHRL and NYCHRL claims; this Court would decline to exercise supplemental jurisdiction over Plaintiff's state and city claims. *See Banana Republic*, 2020 WL 1950496, at *5, 12.

III. CONCLUSION

This case is indistinguishable from *Banana Republic*. It should therefore come as no surprise that the Court comes to the exact same conclusion.

For these reasons, Defendant's motion to dismiss is GRANTED. Within fifteen days, Plaintiff may file a second amended complaint to cure the deficiencies articulated in this opinion by alleging additional facts about the interactions he has had with Swarovski. If no amended complaint is filed within that time frame, the Court will enter a final judgment of dismissal and direct the Clerk of Court to close this case.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 22.

SO ORDERED.

Dated: April 24, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARCOS CALCANO, *on behalf of himself and all other persons similarly situated*,

Plaintiff,

-against-

SWAROVSKI NORTH AMERICA LIMITED,

Defendant.

1:19-cv-10536-GHW

ORDER

GREGORY H. WOODS, United States District Judge:

On April 24, 2020, the Court issued a memorandum opinion and order, granting Defendant's motion to dismiss Plaintiff's first amended complaint. Dkt. No. 26. The Court's order granted Plaintiff leave to file an amended complaint within fifteen days. *Id.* at 3. Therefore, Plaintiff's second amended complaint was due no later than May 9, 2020. As of the date of this order, the Court has not received Plaintiff's amended complaint.

Accordingly, the Clerk of Court is directed to enter judgment in favor of Defendant, terminate all pending motions, adjourn all deadlines, and to close this case.

SO ORDERED.

Dated: May 11, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

MARCOS CALCANO, *on behalf of himself and all other persons similarly situated,*

Plaintiff,

-against-

19 **CIVIL** 10536 (GHW)

JUDGMENT

SWAROVSKI NORTH AMERICA LIMITED

Defendants.

---X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated May 11, 2020, Judgment is entered in favor of Defendant, and this case is closed.

Dated: New York, New York

May 11, 2020

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YOVANNY DOMINGUEZ, *individually and on behalf of all other persons similarly situated,*

Plaintiff,

-v -

BANANA REPUBLIC, LLC,

Defendant.

1:19-cv-10171-GHW

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

Although the question presented in this case is novel, it is certainly not unique. Over the past eight months, the Southern and Eastern Districts of New York have been flooded with litigation from a handful of plaintiffs seeking injunctive relief, compensatory damages, and, of course, attorneys' costs and fees for alleged failures by numerous retail and service establishments to sell accessible gift cards.[1] Much of this litigation is premised on the meritless argument that Title III of the American with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12181, *et seq.*, requires retailers to create specialty goods for the visually impaired. Because no read of the ADA supports that allegation, Banana Republic, LLC's motion to dismiss is GRANTED.

I. BACKGROUND[2]

The premise of this case is relatively straightforward. Banana Republic, LLC ("Defendant" or "Banana Republic"), like many other retail businesses, offers consumers the opportunity to purchase "pre-paid cash cards, colloquially referred as 'store gift cards,'" that can be used in place of cash at its stores. First Amended Complaint ("FAC"), Dkt. No. 22, ¶¶ 4 & n.2, 55. Though they

[1] Plaintiff's counsel, Bradly G. Marks of The Marks Law Firm, and Jeffrey M. Gottlieb of Gottlieb & Associates are responsible for filing many of these cases. This Court alone has eleven of counsel's cases pending before it.
[2] The facts in the First Amended Complaint are presumed true for the purpose of this motion.

look and feel like credit cards, *see* FAC ¶ 35, they are redeemable only at "a specified merchant or affiliated merchants." FAC ¶ 29 & n.4.

On October 26, 2019, Yovanny Dominguez ("Plaintiff") called Banana Republic's customer service office to ask whether the store sold Braille gift cards. *See* FAC ¶ 16. An employee told him that Banana Republic did not. *See* FAC ¶ 16. During that call, the employee did not offer Plaintiff any alternative auxiliary aids or services. *See* FAC ¶ 17. Sometime later, Plaintiff unsuccessfully attempted to locate accessible Banana Republic gift cards on his own. *See* FAC ¶ 18. The lack of an accessible gift card deterred Plaintiff from "fully and equally us[ing] or enjoy[ing]" the "facilities, goods, and services Defendant offers to the public at its retail stores." FAC ¶ 42. As soon as accessible gift cards are available, however, "Plaintiff intends to immediately go purchase" one. FAC ¶ 45.

Plaintiff sued Banana Republic under the ADA, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.*, seeking compensatory damages, punitive damages, and a permanent injunction to "cause a change in Defendant's corporate policies, practices, and procedures so that Defendant's store gift cards will become and remain accessible to blind and visually-impaired consumers," and, of course, attorney's fees.

Banana Republic moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. LEGAL STANDARD

A. Standing

A district court must dismiss a claim under Rule 12(b)(1) if a plaintiff fails to allege facts sufficient to establish standing under Article III of the Constitution. *See Cortlandt Street Recovery Corp. v. Hellas Telecomm.*, 790 F.3d 411, 416–17 (2d Cir. 2015). The plaintiff bears the burden of "alleging facts that affirmatively and plausibly suggest that it has standing to sue." *Id.* at 417 (quotation and alteration omitted). Each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Here, this requires the Court to "accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party," but the Court may "rely on evidence outside the complaint." *Hellas Telecomm.*, 790 F.3d at 417 (quotation and alterations omitted).

Constitutional standing has three "irreducible" elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (internal citations and quotations omitted). Plaintiffs seeking injunctive relief must also prove that the identified injury in fact presents a "real and immediate threat of future injury." *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004).

B. Failure to state a claim

For a complaint to survive a motion to dismiss under Rule 12(b)(6), it "must allege sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Courts follow a "two-pronged approach" in determining plausibility. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "First, although a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (brackets and internal quotation marks omitted) (quoting *Iqbal*, 556 U.S. at 678). Second, a court determines "whether the 'well-pleaded factual allegations,' assumed to be true, 'plausibly give rise to an entitlement to relief.'" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679). This analysis is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. A district court may consider not only the "facts stated on the face of the complaint," but also "documents appended to the complaint or incorporated in the complaint by reference," as well as "matters of which judicial notice may be taken." *Leonard F. v. Israel Discount Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (internal quotations omitted omitted).

To state a claim for violation of Title III, a plaintiff must "establish that (1) he or she is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA." *Roberts v. Royal Atlantic Corp.*, 542 F.3d 363, 368 (2d Cir. 2008).

Plaintiff alleges violations of the ADA, the NYSHRL, and the NYCHRL. The Court turns first to the jurisdictional question of whether it has standing to adjudicate Plaintiff's claims before determining whether the First Amended Complaint survives Defendant's motion to dismiss.

III. STANDING

A. ADA

Under Second Circuit precedent, a plaintiff has standing in an ADA suit seeking injunctive relief—the only relief available to private plaintiffs under Title III—"where (1) the plaintiff alleged past injury under the ADA; (2) it was reasonable to infer that the discriminatory treatment would continue; and (3) it was reasonable to infer, based on the past frequency of plaintiff's visits and the proximity of defendants' [services] to plaintiff's home, that plaintiff intended to return to the subject location." *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187–88 (2d Cir. 2013) (per curiam). "Applying this standard in *Camarillo* [*v. Carrols Corp.*, 518 F.3d 153 (2d. Cir. 2008)], for example, [the Second Circuit] found standing where (1) defendants had failed to effectively communicate menu items to the legally blind plaintiff—an alleged ADA violation, (2) this discriminatory treatment was likely to continue, and (3) the plaintiff's past visits and proximity to the restaurant made it reasonable to infer her intent to return." *Bernstein v. City of New York*, 621 F. App'x 56, 57 (2d Cir. 2015). The "intent to return" element is critical; "Plaintiffs lack standing to pursue injunctive relief where they are unable to establish a 'real or immediate threat' of injury." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 111–12 (1983)). "The Supreme Court has repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 800 (2d Cir. 2015) (emphasis in original, alterations and internal quotation marks omitted).

Turning first to injury-in-fact: An injury-in-fact under Title III of the ADA exists where plaintiffs "have encountered barriers at public accommodations" and "if they show a plausible intention or desire to return to the place but for the barriers to access." *Small v. General Nutrition Cos., Inc.*, 388 F. Supp. 2d 83, 86 (E.D.N.Y. 2005). This injury can take two forms: "direct injury from personally encountering disability-based discrimination" or "deterrence from using Defendant's property because it is not ADA compliant." *Feltzin v. Triangle Properties #1, LLC*, No. 14-CV-5131(JMA)(ARL), 2016 WL 11599264, at *4 (E.D.N.Y. Dec. 15, 2016) (quotations omitted); *see also Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187–88 (2d Cir. 2013). For the purposes of the standing inquiry here, it is sufficient that Plaintiff alleges to have called Banana Republic's customer service department in an effort to procure a Braille gift card. During that call, Plaintiff learned that the store does not stock Braille gift cards, directly encountering the alleged disability-based discrimination. *See* FAC ¶¶ 16–18.

Similarly, Plaintiff's complaint—though lacking color—sufficiently alleges that Defendant does not plan to start selling Braille gift cards, satisfying the second element of the ADA's standing inquiry. *See* FAC ¶ 15.

The third element is where Plaintiff's all-too-generic complaint fails. "Intent to return is a highly fact-sensitive inquiry that incorporates a range of factors" such as "the frequency of the plaintiff's past visits" and "the proximity of the defendant's services, programs, or activities to the plaintiff's home" along with any other factors "relevant to the calculation" including the plaintiff's "occupation or demonstrated travel habits." *Bernstein*, 621 F. App'x at 59 (citing *Kreisler*, 731 F.3d at 187–88 and *Camarillo*, 518 F.3d at 158); *see also Castillo v. John Gore Org., Inc.*, No. 19-CV-388 (ARR) (PK), 2019 WL 6033088, at *6 (E.D.N.Y. Nov. 14, 2019). Some factors prove more important in some cases than in others. In *Pincus v. Nat'l R.R. Passenger Corp.*, for example, the Second Circuit noted that where a plaintiff is "seeking future access not to one of many local restaurants, but to the only national railway system," she need not "plead the frequency with which she visited Tampa's Amtrak station, the proximity of her home to the station, or reasons for future travel" to establish an intent to return. 581 F. App'x 88, 90 (2d Cir. 2014).

Plaintiff has simply not alleged enough facts to plausibly plead that he intends to "return" to the place where he encountered the professed discrimination. Put differently, there are not enough facts in Plaintiff's complaint to plausibly suggest that he will be injured by Banana Republic's failure to sell Braille gift cards in future. Plaintiff does not profess an interest in procuring contemporary, affordable workwear, nor does he assert that he owns several Banana Republic pieces already and wishes to continue compiling a collection with the help of a Banana Republic gift card. Instead, Plaintiff only vaguely notes that he had "been a customer at Defendant's stores on prior occasions" and that several Banana Republic "stores are located in the Southern District of New York, and in close proximity to Plaintiffs residence." FAC ¶¶ 21, 27. These generic, conclusory statements are plainly insufficient—Dominguez must provide the Court with *some* specific facts demonstrating that it is likely he will be injured by Banana Republic in future. *Cf. Kreisler*, 731 F.3d at 186 (plaintiff sufficiently alleged an intent to return because he asserted that he passed the defendant's diner three to four times a week, frequented other restaurants in his neighborhood, and would attempt to enter the diner were there some indication that it was actually accessible); *Camarillo*, 518 F.3d at 155 (plaintiff sufficiently alleged an intent to return by listing six establishments owned and operated by the defendants that she had recently visited and found inaccessible, and asserted that she often patronized the fast food restaurants near her home); *see also John Gore Org., Inc.*, 2019 WL 6033088, at *6. And it is well established that, in evaluating whether a plaintiff has established standing to sue, a Court "need not credit a complaint's conclusory statements without reference to its factual context." *Amidax Trading Group v. S.W.I.F.T. SCR*, 671 F.3d 140, 146 (2d Cir. 2011) (quotation omitted).

True, the more generic the complaint, the more easily it can be repurposed for use against different defendants. But the greatest asset of copy-and-paste litigation can also be its greatest weakness. And here, that weakness is fully on display; by failing to allege any nonconclusory facts of a real or immediate threat of injury, Plaintiff lacks standing to pursue injunctive relief under the ADA. Or, more pithily: "There is nothing inherently wrong with filing duplicative lawsuits against multiple defendants if the harms to be remedied do exist and are indeed identical. But those who live by the photocopier shall die by the photocopier." *Mendez v. Apple Inc.*, No. 18 CIV. 7550 (LAP), 2019 WL 2611168, at *4 (S.D.N.Y. Mar. 28, 2019).

B. State and City Laws

Plaintiff's "New York State and City claims are governed by the same standing requirements as the ADA," and, accordingly, fail alongside their federal counterpart. *Mendez v. Apple*, Inc., 2019 WL 2611168, at *4.

Alternatively, after dismissing Plaintiff's ADA claims for lack of standing this Court would decline to exercise supplemental jurisdiction over Plaintiff's remaining claims. A district court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). And doing so is particularly appropriate where, like here, "all federal-law claims are eliminated before trial." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctr. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 727 (2d Cir. 2013) (quotations omitted).

IV. MERITS OF PLAINTIFF'S CLAIMS

In the alternative—and mindful that a number of courts around the country are grappling with similar (if not identical) litigation[3]—this Court turns to the merits of Plaintiff's complaint and finds that it would fail under Rule 12(b)(6).

A. ADA

Determining whether Plaintiff has alleged a violation of the ADA presents a number of issues of first impression, all of which can be reduced to one relatively straightforward question: does Title III of the ADA obligate retailers to provide legally blind consumers with Braille-embossed (or otherwise accessible) gift cards? Plaintiff's complaint presents a number of theories why it does: (1) gift cards are goods that need to be accessible; (2) gifts cards are, like websites, places of public accommodation and therefore must be independently accessible; and (3) Plaintiff was denied access to Banana Republic's services when Banana Republic denied him a Braille (or otherwise accessible) gift card. None of these arguments are persuasive.

1. The ADA does not require a business to stock specialty goods

Banana Republic did not violate Title III by failing to stock Braille gift cards, or any other type of accessible gift card. After all, as Plaintiff seems to concede in its opposition, Title III regulates access to places of public accommodation—not the type of merchandise a place of public accommodation sells.

We start, as is axiomatic, with the text of the statute. Title III of the ADA 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). Discrimination includes:

[3] In an attachment to their memorandum of law supporting their motion to dismiss, Defendants submitted PACER records identifying over fifty identical lawsuits Plaintiff has filed against other retailers. *See* Mot. to Dismiss, Dkt. No. 25, App'x A. Those defendants include shoe stores (Allbirds, Inc.), bookstores (Taschen America LLC), car companies (Mercedez - Benz USA, LLC, General Motors, LLC), gyms (Technogym USA Corp.), spas (Aire Ancient Baths UES, LLC), and assisted living facilities (The Palm Beach Home For Adults, LLC, Five Star Senior Living Inc., Meridian Senior Living, LLC). *See id.*

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

Id. § 12182(b)(2)(A)(ii). And:

> a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

Id. § 12182(b)(2)(A)(iii).

As courts across the country have explained, a plain reading of this text makes clear that Title III prohibits a place of public accommodation from discriminating on the basis of disability when providing *access to* whatever goods and services ordinarily provided at that place of public accommodation. "This language does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000). To make this more concrete, a bookstore could not prohibit a visually impaired person from entering its store, but it need not ensure that the books it sells are available in both Braille and standard print. *See id.* Essentially:

> The prohibition of [Title III] is directed against owners, etc., of places of public accommodation. It prohibits them from discriminating against the disabled. The discrimination prohibited is that the owner, etc., may not deny the disabled *the full and equal enjoyment* of the business's goods and services. Practically speaking, how can an owner, etc., deny the full and equal enjoyment of the goods or services that he offers? By denying access to, or otherwise interfering with, the use of the goods or services that the business offers. The goods and services that the business offers exist *a priori* and independently from any discrimination. Stated differently, the goods and services referred to in the statute are simply those that the business normally offers.

McNeil v. Time Ins. Co., 205 F.3d 179, 186–87 (5th Cir. 2000) (footnotes omitted); *see also Funches v. Barra*, No. 14 CIV. 7382 (KPF), 2016 WL 2939165, at *4 (S.D.N.Y. May 17, 2016).

Gift cards are plainly the type of goods a business normally offers that need not be made accessible pursuant to Title III. It is a "fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quotations omitted). As the ADA does not define "goods," we look to the dictionary. The most relevant entry defines goods as "tangible movable personal property having intrinsic value usually excluding money and other choses in action but sometimes including all personal property . . . chattels, wares, merchandise, food products, chemical compounds, and agricultural products." *Good*, Merriam Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/good (last visited Mar. 31, 2020); *see also Dastar Corp. v. Twentieth Century Fox Film Corp.,* 539 U.S. 23, 31 (2003) (analyzing the definition of "goods" under the Lanham Act, which, like the ADA, does not define the word, and concluding that the most natural definition of the term is "wares" and "merchandise"). The fact that, according to Plaintiff, the Internal Revenue Service's Internal Revenue Manual requires a retailer to defer the reporting of gift card income until the gift card is used does not change the analysis here. *See* Opp'n at 15 n.42. How and when the retailer ultimately reports the income generated from the sale of a gift card is irrelevant for the purposes of the ADA, and functionally does not change the fact that a retailer sells gift cards to consumers the same way that they sell any other product in its stores.

The Department of Justice's implementing regulations[4] further support the well-established proposition that retailers need not create special, accessible merchandise for legally blind patrons: "[Title III] does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R.

[4] The ADA charged the Attorney General with issuing implementing regulations. *See* 42 U.S.C. 12186(b). After a notice-and-comment period, the Department of Justice promulgated regulations implementing Title III. *See generally* 28 C.F.R., Pt. 36; 56 F.R. 35544 (July 26, 1991). Because the text of Title III is unambiguous, Court need not defer to the implementing regulations to conclude that the ADA does not require that a public accommodation alter its inventory for legally blind patrons. *See Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 171 (2d Cir. 2013). Still, these regulations provide useful data and further reinforce the fact that the Court's conclusion accords with the plain meaning of the text.

§ 36.307(a). In other words, "[t]he purpose of the ADA's public accommodations requirements is to ensure *accessibility* to the goods offered by a public accommodation, not to *alter the nature* or mix of goods that the public accommodation has typically provided." 28 C.F.R. pt. 36, App'x C (emphasis added). And "[a]ccessible or special goods" are defined by example: "Brailled versions of books, books on audio cassettes, closed-captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs." 28 C.F.R. § 36.307(c). Just as a bookstore need not create Brailled versions of books that it ordinarily sells to comply with Title III, the Code of Federal Regulations does not require Banana Republic to "design, implement, distribute and sell store gift cards integrated with the Defendant's retail stores that are accessible to blind and vision-impaired individuals[.]" FAC ¶ 55.

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

2. Gift cards are not places of public accommodation

If a gift card was a place of public accommodation, it is conceivable that a "failure to take such steps as may be necessary to ensure that no individual with a disability is excluded" from the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of" the gift card itself would violate the ADA. But this provision does not apply for two simple reasons: gift cards are neither public accommodations nor are they places.

Title III prohibits discrimination by "any place of public accommodation." 42 U.S.C. § 12182(a). The ADA does not define a "*place* of public accommodation," but does enumerate twelve categories of places that qualify as "public accommodations" as long as their operations "affect commerce." 42 U.S.C § 12181(7). Each category is featured in a separate subparagraph and is formulated the same way: a disjunctive list of specific examples followed by a general residual clause. *See id.* Take, for example, the fifth category: "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." 42 U.S.C. § 12181(7)(E). Or the seventh: "a museum, library, gallery, or other place of public display or collection." 42 U.S.C. § 12181(7)(H). Gift cards are not public accommodations because they fit into none of these categories; they are not places of lodging, establishments serving food and drink, places of exhibition or entertainment, places of public gathering, sales or rental establishments, service establishments, a station used for public transportation, places of public display or collection, places of recreation, places of education, social service center establishments, or places of exercise or recreation.

Even if gift cards could be shoehorned into any one of these twelve categories, plastic cards are not *places.* Courts in this district have already addressed the question of what constitutes a "place" for the purpose of Title III in the context of deciding that websites are places of public accommodation. *See Harty v. Nyack Motor Hotel Inc.*, No. 19-CV-1322 (KMK), 2020 WL 1140783, at *4 (S.D.N.Y. Mar. 9, 2020) (citing cases). In short, those courts have read the word "place" broadly to include every "sales or rental establishment" and "service establishment." *See Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017). In other words, the word "place" need not be read as limiting the reach of the ADA to physical spaces. Congress likely used the words "place of public accommodation" because it could find "no other less cumbersome way to describe businesses that offer" the particular goods or services enumerated in section 12181 "to the public." *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 572 (D. Vt. 2015). In fact, coupled with the word "of," the phrase "place of public accommodation" most logically reads as referring to a space—figurative or not—that can provide the services of a public accommodation. *See id.*

Though broad, this interpretation is not nearly broad enough to encompass gift cards. Cruise ships are places. *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 129 (2005). Gift cards are not. Gift cards do not sell or rent goods. They may be *used* to purchase goods from a retailer, but they are not spaces where those purchases can be made. Put differently, a consumer can make a purchase *with* a gift card, but not *on* or *in* a gift card.

Plaintiff's opposition addresses these points—comprehensively litigated in Defendant's motion—only briefly, and only in the section of Plaintiff's brief asserting that a gift card is a service that Banana Republic offers. *See* Opp'n at 19. In a single sentence, Plaintiff contends that "[l]ike websites, this Court should "deem gift cards a 'place of public accommodation' in and of themselves." In support, Plaintiff quotes at length from a case arising out of the Southern District of Florida: *Gomez v. General Nutrition Corp.*, 323 F. Supp. 3d 1368, 1375, 1379 (S.D. Fla. 2018). But this case does not lend any support for the proposition that a gift card is a place of public accommodation.

In *General Nutrition Corporation* ("GNC"), the Southern District of Florida was determining whether defendant GNC's website was a place of public accommodation within the meaning of the ADA. The relevant portion of the opinion begins with the proposition that, unlike courts within the Second Circuit, "[d]istrict [c]ourts within the Eleventh Circuit agree that the ADA does not apply to a website that is wholly unconnected to a physical location." *GNC*, 323 F. Supp. 3d at 1375. According to these courts, the ADA bars discrimination *outside* of a physical place of public accommodation that deprives an individual of the right to enjoy the goods or services offered to the public *at* the physical place of public accommodation. *See Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1285 (11th Cir. 2002). In other words, "if a retailer chooses to have a website, the website cannot impede a disabled person's full use and enjoyment of the brick-and-mo[r]tar store." *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-CV-23801, 2017 WL 1957182, at *4 (S.D. Fla. Feb. 2, 2017). Thus, the *GNC* court needed to determine whether there was a sufficient nexus between GNC's physical stores and GNC's website such that the inaccessible website impeded the plaintiff's full use and enjoyment of the company's stores. In doing so, the court noted several factors that district courts in the Eleventh Circuit consider in determining whether a website has a sufficient nexus to the physical store, and included elements such as, "[w]hether the website provides a service of the public accommodation like the ability to purchase or preorder products" and "whether the website facilitates use of the physical stores." *GNC*, 323 F. Supp. 3d at 1376.

As a threshold matter, courts in the Second Circuit generally agree that Title III's prohibition on discrimination in places of "public accommodation" extends to private commercial websites that affect interstate commerce. *See Harty v. Nyack Motor Hotel Inc.*, No. 19-CV-1322 (KMK), 2020 WL 1140783, at *4 (S.D.N.Y. Mar. 9, 2020) (citing cases). Those courts have relied on a combination of persuasive authority from the First and Seventh Circuits, the ADA's text and legislative history, as well as an instructive Second Circuit case, *Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999), *opinion amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000), applying the ADA to insurance services, to determine that the list of businesses covered by section 12181(7) would include private commercial websites even if those websites existed entirely online and had no nexus to a physical storefront. *See Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 388–98 (E.D.N.Y. Aug. 1, 2017); *Del-Orden v. Bonobos, Inc.*, No. 17 CIV. 2744 (PAE), 2017 WL 6547902, at *7–10 (S.D.N.Y. Dec. 20, 2017); *Scribd Inc.*, 97 F. Supp. 3d at 571 ("The fact that the ADA does not include web-based services as a specific example of a public accommodation is irrelevant because such services did not exist when the ADA was passed and because Congress intended the ADA to adapt to changes in technology . . . . Notably, Congress did not intend to limit the ADA to the specific examples listed and the catchall categories must be construed liberally to effectuate congressional intent.")

This Court agrees with that construction for largely the same reasons articulated in those opinions. As Judge Weinstein persuasively articulated in *Blick Art Materials*, a test that determined whether a website is subject to the ADA by analyzing whether and to what extent the website impedes a "plaintiff's access to a specific, physical, concrete space, and establishes some nexus between the website and the physical place of public accommodation" is both unworkable and would produce absurd results. *Blick Art Materials*, 268 F. Supp. 3d at 396 (quotation omitted).

> For example, Blick would need to change its website to allow a blind person to find, successfully complete, and use the email list that provides for in-store coupons, but would not need to do so for the email list that only provides online discounts. Blick would have to make accessible information about products available for in-store pickup, but would not have to do so for items available only online, though presumably which item a category falls into could depend on the store selected for pick-up and the inventory it has on hand.

Id.; *see also Scribd Inc.*, 97 F. Supp. 3d at 571 (noting that the nexus test would arguably permit a company to "freely refuse to sell its goods or services to a disabled person as long as it did so online rather than within the confines of a physical office or store") Applying such an interpretation of Title III would violate the foundational precept that a statute should be read to avoid "absurd" results. *Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356, 368 (2d Cir. 2006).[5]

True, "[a]s a remedial statute, the ADA must be broadly construed to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Noel v. New York City Taxi and Limousine Comm'n*, 687 F.3d 63, 68 (2d Cir. 2012) (quotation omitted). That is why courts in the Second Circuit have found that it would be absurd to exclude cyberspace from the ADA's mandate. But reading the words "place of public accommodation" to include small slabs of plastic requires more than just a broad construction of Title III—it requires a rewrite of Title III entirely. "[C]ourts are charged with interpreting the actual text of the laws Congress enacts, and not with rewriting or expanding the scope of the laws in the absence of statutory text, no matter how much one may think it may

[5] It is also implausible that an inaccessible gift card could impede a blind person from enjoying all of the benefits of Banana Republic's retail locations. Banana Republic is a retail store that sells clothing and accessories. Customers visit the store to try on clothing and to make purchases. Plaintiff never alleges that Banana Republic gift cards are so intertwined with the store's physical presence that he cannot enter, browse, and try on clothing at Banana Republic stores without an accessible gift card. In fact, his complaint suggests the opposite: The moment Banana Republic starts selling accessible gift cards—and without one in hand—Plaintiff intends to go to a retail store to buy one. *See* FAC ¶ 21. Presumably Dominguez will make that purchase using a credit card, debit card, cash, or even an inaccessible gift card—the same method by which he could purchase any other goods at a Banana Republic store.

advance purported remedial goals or represent congressional intent." *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395, 412 (2d Cir. 2019).

3. Banana Republic did not deny Plaintiff access to a service by failing to provide him with an accessible gift card

The third of Plaintiff's theories of how liability might attach under the ADA rests on the unsupported premise that Banana Republic's failure to offer Braille or otherwise accessible gift cards excludes him from one of Banana Republic's services: the opportunity to use a Banana Republic gift card to make a purchase at a Banana Republic store. *See* Opp'n at 19.

The law is clear. Section 12182(b)(2) prohibits, among other things, the "failure to take steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii). The ADA defines auxiliary aids and services broadly: it includes, among other things, "qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments," as well as "modification of equipment or devices" and "other similar services and actions." 42 U.S.C. § 12103(1)(B)–(D).

The Department of Justice's implementing regulations offer additional guidance, further emphasizing that the ADA empowers retailers, not customers, to choose what auxiliary aid to offer:

> The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but *the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication.*

28 CFR § 36.303(c)(1)(ii) (emphasis added); *see also* 28 C.F.R. Pt. 36, App'x C ("The auxiliary aid requirement is a flexible one. A public accommodation can choose among various alternatives as long as the result is effective communication. For example, a restaurant would not be required to provide menus in Braille for patrons who are blind, if the waiters in the restaurant are made available to read the menu. Similarly, a clothing boutique would not be required to have Brailled price tags if sales personnel provide price information orally upon request; and a bookstore would not be required to make available a sign language interpreter, because effective communication can be conducted by notepad."); *see also Camarillo*, 518 F.3d at 157 ("While restaurants are not necessarily required to have on hand large print menus that [plaintiff] would be able to read, they are required to ensure that their menu options are effectively communicated to individuals who . . . are legally blind.").

The universe of relevant facts in Dominguez's complaint is as follows: On a phone call with a Banana Republic customer service employee, he inquired whether the store stocks Braille gift cards. *See* FAC ¶ 16. The employee confirmed that the store did not, and did not, of her own accord, offer Plaintiff an auxiliary aid or service. *See* FAC ¶¶ 16–17. The Plaintiff then unsuccessfully attempted to locate an accessible Banana Republic gift card. *See* FAC ¶ 18. Finding nothing, Plaintiff sued.

Plaintiff was not denied access to an auxiliary aid or service, much less one that effectively communicated information about Banana Republic's gift cards. The recitation of facts in Dominguez's complaint make it clear that he never even asked for one, even though Plaintiff acknowledges that "no one specific auxiliary aid is mandated" by the ADA. Opp'n at 22.[6] He

[6] In his opposition, Plaintiff emphasizes that he was never offered an auxiliary aid or service by the Banana Republic employee over the phone. It is unclear what part of the ADA requires that an employee magically divine, from the single question Plaintiff asked about Braille gift cards, that he was disabled and in need of an auxiliary aid or service. Indeed, the implementing regulations contemplate that a public accommodation will "*consult* with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed

knows nothing about the range of auxiliary aids and services Banana Republic offers the visually impaired. He asked only about Braille gift cards and learned only that Banana Republic does not sell accessible gift cards. *See* FAC ¶¶ 17–18.

To bridge this gap, Plaintiff relies on the rote assertion in his complaint that "[u]pon information and belief, Defendant does not offer auxiliary aids with respect to the gift cards." FAC¶ 19. This is insufficient. "A litigant cannot merely plop 'upon information and belief' in front of a conclusory allegation and thereby render it non-conclusory. Those magic words will only make otherwise unsupported claims plausible when the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Citizens United v. Schneiderman*, 882 F.3d 374, 384–85 (2d Cir. 2018) (internal quotations and citations omitted). No such facts are peculiarly within the possession or control of Banana Republic—Plaintiff could have easily asked Banana Republic's customer service office what gift card related accommodations Banana Republic offers legally-blind patrons, just as he asked whether Banana Republic sells Braille gift cards.

To be clear, there is no doubt that Plaintiff alleges that he was denied a Braille or otherwise accessible gift card. And it is possible that only a fully accessible gift card could provide the effective communication necessary pursuant to Title III.[7] But Plaintiff never tried to discover whether that

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to ensure effective communication." 28 C.F.R. § 36.303(c)(1)(ii) (emphasis added). A consultation implies a conversation. It would be absurd to read the ADA as requiring that a public accommodation offer every single customer the help of all available auxiliary aids and services before the customer asks for one. *See Castillo v. Hudson Theatre, LLC*, 412 F. Supp. 3d 447, 451 (S.D.N.Y. 2019) (asserting that notice of a patron's alleged disability is an "assumed prerequisite" of a Title III claim for failure to make reasonable accommodations).

[7] Many improbable things are theoretically possible. Although the posture of this case means that the Court need not and should not determine the viability of a Braille gift card as an effective auxiliary aid, it is helpful to keep in mind the following: a gift card is small. It is roughly three inches wide and two inches tall. Still, Dominguez asserts that it should somehow display the following information in Braille somewhere on its surface: the name of the merchant, the denomination of the gift card, the expiration date, the unique card number or PIN, any applicable fees, the terms and conditions of use, a toll-free telephone number, other material information about the card, and somehow, the card's remaining balance. *See* FAC ¶¶ 6, 7, 20, 35, 36, 41, 44, 46, 55. As amicus curiae noted in support of the motion to dismiss in *Murphy v. Kohl's Corporation*, 1:19-cv-09921-GHW (S.D.N.Y.), one of the many identical gift card cases filed in this Court, this ignores a

was the case here.[8] Thus, as a matter of law, his claim fails.

B. State and City Laws

The Court need not engage in a substantive analysis of the merits of Plaintiff's NYSHRL and NYCHRL claims. Because the Court finds that Plaintiff has failed to state a claim under the

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very elemental problem: "Braille is big. It takes 10 volumes of Braille, for example, to publish Harry Potter and the Goblet of Fire. Printing Webster's Unabridged Dictionary requires 72 volumes. Using ADA-mandated size and spacing, the industry-standard gift card could only fit between 11 and 14 Braille characters, horizontally, and 5 lines, vertically. Thus, a card could hold, at most, 55 to 70 Braille characters." Br. of the Retail Litigation Center, Inc., Restaurant Law Center, National Retail Federation, Retail Gift Card Association, and Nat'l Assoc. of Theater Owners, as *Amici Curiae*, 1:19-cv-09921-GHW, Dkt. No. 30 at 11 (footnotes omitted).

[8] In a strange interlude in Plaintiff's opposition, Dominguez asserts that this Court, notwithstanding Title III's broad view of appropriate auxiliary aids, should find that a "sufficient" auxiliary aid must make the accessible gift card independently accessible. *See* Opp'n at 19–22. That is, Plaintiff should not have to rely on a qualified reader as an auxiliary aid, even though the definition of "auxiliary aids and services" distinctly includes "qualified readers," because it would deny Plaintiff the privacy and independence afforded to other customers that choose to use gift cards. In support, Plaintiff also cites to *American Council of the Blind v. Paulson*, 525 F. 3d 1256 (D.C. Cir. 2008), where the D.C. Circuit required that the Secretary of the Treasury redesign paper currency to make it independently accessible to the legally blind.

To be sure, the Department of Justice's regulations require places of public accommodation to consider "the privacy and independence of the individual with a disability" when providing auxiliary aids and services. 29 C.F.R. § 36.303(c)(ii). ATMs for example, must "provide the opportunity for the same degree of privacy of input and output available to all individuals," presumably because ATMs require users to input inherently private personal information, like a PIN number, the theft of which could deplete a user of all of their savings. *See* 36 C.F.R. Pt. 1191, App. D. § 707. No such specific provision of the ADA or its implementing regulations exempts gift cards from the general rule that a business may offer any auxiliary aid or service that ensures effective communication. *E.g. West v. Moe's Franchisor, LLC*, No. 15-CV-2846, 2015 WL 8484567, at *3 (S.D.N.Y. Dec. 9, 2015) ("Nothing in the ADA or its implementing regulations supports Plaintiffs' argument that [the retailer defendant] must alter its [drink] machines in a way that allows blind individuals to retrieve beverages without assistance.")

And the analogy to cash falls apart under even modest scrutiny. In *Paulson*, the D.C. Circuit declared that cash—with its "constitutional underpinnings" and "special importance"— is intended to function as a "universal medium or common standard" by which individuals "maximize their employment, economic self-sufficiency, independence, and inclusion and integration into society." 525 F. 3d at 1268–69. It is functionally a non-optional gateway to economic participation. Because the visually impaired cannot distinguish between individual bills, they lack "meaningful access" to paper currency "that is not remedied by use of existing coping mechanisms." *Id.* at 1268. Refusing the visually impaired this access, the court concluded, denies them the ability to engage in economic activity and therefore undermines the thesis of Section 504 of the Rehabilitation Act. *Id.* at 1269.

As even Plaintiff acknowledges, gift cards are not cash. Unlike cash, Banana Republic's gift cards are not a "universal medium" by which someone can pay for goods—a retailer's gift cards are an optional method of payment usually accepted only at its own stores, or a few affiliated merchants. *See* FAC ¶ 29 & n.4. The constitution makes no mention of gift cards. And Plaintiff has not asserted that gift cards maximize a person's employment, economic self-sufficiency, independence, or inclusion and integration into society.

ADA, this Court would decline to exercise supplemental jurisdiction over Plaintiff's state and city claims. *See infra* Part III(B).

V. CONCLUSION

Computers have made a lot of things in life easier. Copy-and-paste litigation is one of them. The pitfalls of such an approach is evident here where, among other things, Plaintiff's opposition responds to arguments never made by its opponent in its motion and failed to even correctly identify what Defendant sells. *See, e.g.*, Opp'n at 3, 15, 16, 20 (referring to Banana Republic as a "food establishment"). Although it features the fruit in its name, Banana Republic does not sell bananas.

For the aforementioned reasons, Defendant's motion to dismiss is GRANTED. Within fifteen days, Plaintiff may file a second amended complaint to cure the deficiencies articulated in this opinion by alleging additional facts about the interactions he has had with Banana Republic. If no amended complaint is filed within that time frame, the Court will enter a final judgment of dismissal and direct the Clerk of Court to close this case.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 24.

SO ORDERED.

Dated: April 23, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YOVANNY DOMINGUEZ, *and on behalf of all other persons similarly situated*,

Plaintiff,

-v -

BANANA REPUBLIC, LLC,

Defendant.

1:19-cv-10171-GHW

ORDER

GREGORY H. WOODS, United States District Judge:

On April 23, 2020, the Court issued a memorandum opinion and order, granting Defendant's motion to dismiss Plaintiff's first amended complaint. Dkt. No. 28. The Court's order granted Plaintiff leave to file a second amended complaint within fifteen days. *Id.* at 20. Therefore, Plaintiff's second amended complaint was due no later than May 8, 2020. As of the date of this order, the Court has not received Plaintiff's second amended complaint. Accordingly, the Clerk of Court is directed to enter judgment in favor of Defendant and to close this case.

SO ORDERED.

Dated: May 9, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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YOVANNY DOMINGUEZ, *and on behalf of all other persons similarly situated,*

Plaintiff,

-against-

19 **CIVIL** 10171 (GHW)

JUDGMENT

BANANA REPUBLIC, LLC,

Defendants.

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It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated May 9, 2020, Judgment is entered in favor of Defendant, and this case is closed.

Dated: New York, New York

May 11, 2020

RUBY J. KRAJICK

Clerk of Court

BY: David J. ...

Deputy Clerk

USDC SDNY
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DOC #: _____________
DATE FILED: 4/27/2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

BRAULIO THORNE, *on behalf of himself and all other persons similarly situated*,

Plaintiff,

-against-

JERSEY MIKE'S FRANCHISE SYSTEMS, INC,

Defendant.

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1:19-cv-9934-GHW

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

This is another case where a visually impaired person has sued a restaurant for failing to stock Braille or otherwise accessible gift cards. Because this complaint suffers from the same pitfalls as those in *Dominguez v. Banana Republic, LLC*, No. 1:19-CV-10171-GHW, 2020 WL 1950496 (S.D.N.Y. Apr. 23, 2020), the Court comes to the same conclusion and GRANTS Defendant's motion to dismiss.

I. BACKGROUND

Like the allegations in *Banana Republic*, the facts presented in the complaint are relatively straightforward.

Jersey Mike's Franchise Systems, Inc. ("Defendant" or "Jersey Mike's"), like many restaurants, offers consumers the opportunity to purchase "pre-paid cash cards, colloquially referred as 'store gift cards,'" that can be used in place of cash at its stores. First Amended Complaint ("FAC"), Dkt. No. 21, ¶¶ 4 & n.1. Though they look and feel like credit cards, *see* FAC ¶ 35, gift cards are redeemable only at "a specified merchant or affiliated merchants." FAC ¶ 29 & n.3.

On October 23, 2019, Braulio Thorne ("Plaintiff"), called Jersey Mike's customer service office to ask whether the store sold Braille gift cards. *See* FAC ¶ 16. An employee told him that Jersey Mike's did not. *See* FAC ¶ 16. During that call, the employee did not offer Plaintiff any alternative auxiliary aids or services. *See* FAC ¶ 17. Sometime later, Plaintiff unsuccessfully attempted to locate accessible Jersey Mike's gift cards on his own. *See* FAC ¶ 18. The lack of an accessible gift card deterred Plaintiff from "fully and equally us[ing] or enjoy[ing]" the "facilities, goods, and services Defendant offers to the public at its restaurants." FAC ¶ 43. As soon as accessible gift cards are available, however, "Plaintiff intends to immediately go purchase" one. FAC ¶ 46.

Plaintiff sued Jersey Mike's under the ADA, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.*, seeking compensatory damages, punitive damages, and a permanent injunction to "cause a change in Defendant's corporate policies, practices, and procedures so that Defendant's store gift cards will become and remain accessible to blind and visually-impaired consumers," and, of course, attorney's fees. FAC ¶ 10.

Jersey Mike's moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. ANALYSIS

The Court refers the reader to the legal standard articulated in Part II of *Banana Republic*, 2020 WL 1950496, at *2. The discussion and application of the law there applies in equal force in here.

Because the Plaintiff here has failed to provide the Court with sufficient evidence of his intent to return to Jersey Mike's, he, like the plaintiff in *Banana Republic*, lacks standing to assert his ADA claim. There is virtually no difference between the two complaints: like Dominguez, Thorne generically asserts that he "resides in New York, NY, close to Defendant's restaurant located in Bronx, NY"[1] and "has been a customer at Defendant's restaurant on prior occasions and intends to

[1] This generic assertion is also at odds with another one of Plaintiff's claims: "Defendant owns, operates and/or controls Jersey Mike's restaurants across the United States. Several of these restaurants are located in the Southern District of New York, and in close proximity to Plaintiff's residence." FAC ¶ 27. The Court is

immediately purchase at least one store gift card from the Defendant as soon as the Defendant sells store gift cards that are accessible to the blind and utilize it at Defendant's restaurant." FAC ¶¶ 21, 25. The intent-to-return inquiry, as explained in *Banana Republic*, is a "highly fact-sensitive inquiry that incorporates a range of factors" such as "the frequency of the plaintiff's past visits" and "the proximity of the defendant's services, programs, or activities to the plaintiff's home" along with any other factors "relevant to the calculation" including the plaintiff's "occupation or demonstrated travel habits." *Bernstein v. City of New York*, 621 F. App'x 56, 59 (2d Cir. 2015) (citing *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187–88 (2d Cir. 2013) (per curiam) and *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d. Cir. 2008)). Since the Court may "refer to evidence outside the pleadings" when adjudicating a Rule 12(b)(1) motion, *see Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000), the Court notes that "New York, NY" is not necessarily very close to "Bronx, NY" at all. Regardless, Throne never asserts, for instance, that he frequently visits submarine sandwich shops near Yankee Stadium, or that he routinely travels to the Bronx to visit fast food establishments. *See Banana Republic,* 2020 WL 1950496, at *4.

Plaintiff's ADA claim would also fail under Rule 12(b)(6) for all of the reasons identified in *Banana Republic*. *See* 2020 WL 1950496, at *5–12. Indeed, there are no substantive differences between either the complaint or the briefing in this case and *Banana Republic* that would compel a different conclusion. Thorne has even made similar errors in his opposition as the plaintiff in *Banana Republic*: he consistently references Defendant's retail products in his opposition, even though Jersey Mike's is a restaurant. *See* Plaintiff's Opposition, Dkt. No. 26, at 3, 13, 14, 18.

Because the Court would dismiss Plaintiff's ADA claims, it need not engage in a substantive analysis of the merits of Plaintiff's NYSHRL and NYCHRL claims; this Court would decline to exercise supplemental jurisdiction over Plaintiff's state and city claims. *See Banana Republic*, 2020 WL

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aware of only one Jersey Mike's restaurant in New York: the one in the Bronx by Yankee Stadium. *See* Find a Location, https://www.jerseymikes.com/locations?search=new+york (last visited April 26, 2020).

1950496, at *5, 12.

III. CONCLUSION

This case is indistinguishable from *Banana Republic*. It should therefore come as no surprise that the Court comes to the exact same conclusion.

For these reasons, Defendant's motion to dismiss is GRANTED. Within fifteen days, Plaintiff may file a second amended complaint to cure the deficiencies articulated in this opinion by alleging additional facts about the interactions he has had with Jersey Mike's. If no amended complaint is filed within that time frame, the Court will enter a final judgment of dismissal and direct the Clerk of Court to close this case.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 24.

SO ORDERED.

Dated: April 26, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRAULIO THORNE, *on behalf of himself and all other persons similarly situated,*

Plaintiffs,

-v-

JERSEY MIKE'S FRANCHISE SYSTEMS, INC.,

Defendant.

1:19-cv-9934-GHW

ORDER

GREGORY H. WOODS, United States District Judge:

On April 27, 2020, the Court issued a memorandum opinion and order, granting Defendant's motion to dismiss Plaintiff's first amended complaint. Dkt. No. 28. The Court's order granted Plaintiff leave to file an amended complaint within fifteen days. *Id.* at 4. Therefore, Plaintiff's second amended complaint was due no later than May 12, 2020. As of the date of this order, the Court has not received Plaintiff's amended complaint.

Accordingly, the Clerk of Court is directed to enter judgment in favor of Defendant, terminate all pending motions, adjourn all deadlines, and to close this case.

SO ORDERED.

Dated: May 13, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
BRAULIO THORNE, on behalf of himself and
all other persons similarly situated,

Plaintiff,

-against-

19 **CIVIL** 9934 (GHW)

JUDGMENT

JERSEY MIKE'S FRANCHISE SYSTEMS, INC.,

Defendant.
---X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated May 13, 2020, judgment is entered in favor of Defendant and this case is closed.

Dated: New York, New York

May 13, 2020

RUBY J. KRAJICK

Clerk of Court

BY: David J. Moms

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARCOS CALCANO, *on behalf of all other persons similarly situated*,

Plaintiff,

-against-

THE ART OF SHAVING – FL, LLC,

Defendant.

1:19-cv-10432-GHW

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

This is another case where a visually impaired person has sued a retailer for failing to stock Braille or otherwise accessible gift cards. Because this complaint suffers from the same pitfalls as those in *Dominguez v. Banana Republic, LLC*, No. 1:19-CV-10171-GHW, 2020 WL 1950496 (S.D.N.Y. Apr. 23, 2020), the Court comes to the same conclusion and GRANTS Defendant's motion to dismiss.

I. BACKGROUND

Like the allegations in *Banana Republic*, the facts presented in the complaint are relatively straightforward.

The Art of Shaving – FL, LLC ("Defendant" or "The Art of Shaving"), like many other retail businesses, offers consumers the opportunity to purchase "pre-paid cash cards, colloquially referred as 'store gift cards,'" that can be used in place of cash at its stores. First Amended Complaint ("FAC"), Dkt. No. 17, ¶¶ 4 & n.1. Though they look and feel like credit cards, *see* FAC ¶ 35, they are redeemable only at "a specified merchant or affiliated merchants." FAC ¶ 29 & n.3.

On November 1, 2019, Marcos Calcano ("Plaintiff") called The Art of Shaving's customer service office to ask whether the store sold Braille gift cards. *See* FAC ¶ 16. An employee told him that The Art of Shaving did not. *See* FAC ¶ 16. During that call, the employee did not offer Plaintiff any alternative auxiliary aids or services. *See* FAC ¶ 17. Sometime later, Plaintiff unsuccessfully attempted to locate accessible The Art of Shaving gift cards on his own. *See* FAC ¶ 18. The lack of an accessible gift card deterred Plaintiff from "fully and equally us[ing] or enjoy[ing]" the "facilities, goods, and services Defendant offers to the public at its retail stores." FAC ¶ 43. As soon as accessible gift cards are available, however, "Plaintiff intends to immediately go purchase" one. FAC ¶ 46.

Plaintiff sued The Art of Shaving under the ADA, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq*., and New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq*., seeking compensatory damages, punitive damages, and a permanent injunction to "cause a change in Defendant's corporate policies, practices, and procedures so that Defendant's store gift cards will become and remain accessible to blind and visually-impaired consumers," and, of course, attorney's fees.

The Art of Shaving moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. ANALYSIS

The Court refers the reader to the legal standard articulated in Part II of *Banana Republic*, 2020 WL 1950496, at *2. The discussion and application of the law there applies in equal force in here.

Because the Plaintiff here has failed to provide the Court with sufficient evidence of his intent to return to The Art of Shaving, he, like the plaintiff in *Banana Republic*, lacks standing to assert his ADA claim. There is virtually no difference between the two complaints: like Dominguez, Calcano generically asserts that he resides "in Bronx, NY, and close to Defendant's retail store located at 10 Columbus Circle, New York, NY," and "has been a customer at Defendant's store on prior occasions and intends to immediately purchase at least one store gift card from the Defendant as soon as the Defendant sells store gift cards that are accessible to the blind and utilize it at Defendant's retail store." FAC ¶¶ 21, 25. The intent-to-return inquiry, as explained in *Banana Republic*, is a "highly fact-sensitive inquiry that incorporates a range of factors" such as "the frequency of the plaintiff's past visits" and "the proximity of the defendant's services, programs, or activities to the plaintiff's home" along with any other factors "relevant to the calculation" including the plaintiff's "occupation or demonstrated travel habits." *Bernstein v. City of New York*, 621 F. App'x 56, 59 (2d Cir. 2015) (citing *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187–88 (2d Cir. 2013) (per curiam) and *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d. Cir. 2008)).

Since the Court may "refer to evidence outside the pleadings" when adjudicating a Rule 12(b)(1) motion, *see Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000), the Court notes that the Bronx is not very close to Columbus Circle at all. Of course, distance is relative, but Columbus Circle is located at the southwest corner of Central Park in Manhattan, whereas the Bronx is a separate borough of New York City located to the northeast and east of Manhattan, across the Harlem River. Regardless, Calcano never asserts, for instance, that he frequently purchases hand-crafted razors and other shaving accessories. *See Banana Republic,* 2020 WL 1950496, at *4.

Plaintiff's ADA claim would also fail under Rule 12(b)(6) for all of the reasons identified in *Banana Republic*. *See* 2020 WL 1950496, at *5–12. Indeed, there are no substantive differences between either the complaint or the briefing in this case and *Banana Republic* that would compel a different conclusion. Calcano has even made similar errors in his opposition as the plaintiff in *Banana Republic*: he addresses arguments and cases that Defendant never raised in his motion, *see* Plaintiff's Opposition ("Opp'n"), Dkt. No. 22, at 22, and repeatedly describes the phone call with Defendant as having taken place on October 29, 2019, even though the First Amended Complaint alleges that the call took place on November 1, 2019, *see* Opp'n at 2, 7, 11.

Because the Court would dismiss Plaintiff's ADA claims, it need not engage in a substantive analysis of the merits of Plaintiff's NYSHRL and NYCHRL claims; this Court would decline to exercise supplemental jurisdiction over Plaintiff's state and city claims. *See Banana Republic*, 2020 WL 1950496, at *5, 12.

III. CONCLUSION

This case is indistinguishable from *Banana Republic*. It should therefore come as no surprise that the Court comes to the exact same conclusion.

For these reasons, Defendant's motion to dismiss is GRANTED. Within fifteen days, Plaintiff may file a second amended complaint to cure the deficiencies articulated in this opinion by alleging additional facts about the interactions he has had with The Art of Shaving. If no amended complaint is filed within that time frame, the Court will enter a final judgment of dismissal and direct the Clerk of Court to close this case.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 20.

SO ORDERED.

Dated: April 26, 2020

GREGORY H. WOODS
United States District Judge

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: ______________
DATE FILED: 5/13/2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

MARCOS CALCANO, *on behalf of himself and all other persons similarly situated,*

Plaintiff,

-v-

THE ART OF SHAVING - FL, LLC,

Defendant.

---X

1:19-cv-10432-GHW

ORDER

GREGORY H. WOODS, United States District Judge:

On April 27, 2020, the Court issued a memorandum opinion and order, granting Defendant's motion to dismiss Plaintiff's first amended complaint. Dkt. No. 24. The Court's order granted Plaintiff leave to file a second amended complaint within fifteen days. *Id.* at 4. Therefore, Plaintiff's second amended complaint was due no later than May 12, 2020. As of the date of this order, the Court has not received Plaintiff's second amended complaint. Accordingly, the Clerk of Court is directed to enter judgment in favor of Defendant and to close this case.

SO ORDERED.

Dated: May 13, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
MARCOS CALCANO, and on behalf of all other Persons similarly situated,

Plaintiff,

-against-

19 **CIVIL** 10432 (GHW)

JUDGMENT

THE ART OF SHAVING-FL, LLC,

Defendant.
---X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated May 13, 2020, judgment is entered in favor of Defendant and this case is closed.

Dated: New York, New York

May 13, 2020

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MURPHY, *on behalf of all other persons similarly situated*,

Plaintiff,

-against-

KOHL'S DEPARTMENT STORES, INC.,

Defendant.

1:19-cv-09921-GHW

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

This is another case where a visually impaired person has sued a retailer for failing to stock Braille or otherwise accessible gift cards. Because this complaint suffers from the same pitfalls as those in *Dominguez v. Banana Republic, LLC*, No. 1:19-CV-10171-GHW, 2020 WL 1950496 (S.D.N.Y. Apr. 23, 2020), the Court comes to the same conclusion and GRANTS Defendant's motion to dismiss.

I. BACKGROUND

Like the allegations in *Banana Republic*, the facts presented in the complaint are relatively straightforward.

Kohl's Department Stores, Inc. ("Defendant" or "Kohl's"), like many other retailers, offers consumers the opportunity to purchase "pre-paid cash cards, colloquially referred as 'store gift cards,'" that can be used in place of cash at its stores. FAC ¶ 4 & n.2. Though they look and feel like credit cards, *see* FAC ¶ 35, they are redeemable only at "a specified merchant or affiliated merchants." FAC ¶ 29 & n.4.

On October 22, 2019, James Murphy ("Plaintiff") called a Kohl's customer service office to ask whether its stores sold Braille gift cards. *See* FAC ¶ 16. An employee told him that Kohl's did not. *See* FAC ¶ 16. During that call, the employee did not offer Plaintiff any alternative auxiliary aids or services. *See* FAC ¶ 17. Sometime later, Plaintiff unsuccessfully attempted to locate accessible Kohl's gift cards on his own. *See* FAC ¶ 18. The lack of an accessible gift card deterred Plaintiff from "fully and equally us[ing] or enjoy[ing]" the "facilities, goods, and services Defendant offers to the public at its retail stores." FAC ¶ 42. As soon as accessible gift cards are available, however, "Plaintiff intends to immediately go purchase" one. FAC ¶ 45.

Plaintiff sued Kohl's under the ADA, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.*, seeking compensatory damages, punitive damages, and a permanent injunction to "cause a change in Defendant's corporate policies, practices, and procedures so that Defendant's store gift cards will become and remain accessible to blind and visually-impaired consumers," and, of course, attorney's fees. FAC ¶ 10.

Kohl's moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. ANALYSIS

The Court refers the reader to the legal standard articulated in Part II of *Banana Republic*, 2020 WL 1950496, at *2. The discussion and application of the law there applies in equal force in here.

Because the Plaintiff here has failed to provide the Court with sufficient evidence of his intent to return to Kohl's, he, like the plaintiff in *Banana Republic*, lacks standing to assert his ADA claim. The difference between the two complaints are slight: unlike Dominguez, Murphy asserts that he lives on the same street as one of Defendant's retail store Defendant's retail store at 271 W. 23rd St, New York, NY. FAC ¶ 25. Like Dominguez, Murphy generically asserts only that he "has been a customer at Defendant's stores on prior occasions and intends to immediately purchase at least one store gift card from the Defendant as soon as the Defendant sells store gift cards that are accessible to the blind and utilize it at Defendant's retail store." FAC ¶ 21. Although the identification of a single Kohl's store near his home provides the slightest bit more color than the plaintiff's complaint in *Banana Republic*, Plaintiff still fails to plausibly allege an intent to return to Kohl's. The intent-to-return inquiry, as explained in *Banana Republic*, is a "highly fact-sensitive inquiry that incorporates a range of factors" such as "the frequency of the plaintiff's past visits" and "the proximity of the defendant's services, programs, or activities to the plaintiff's home" along with any other factors "relevant to the calculation" including the plaintiff's "occupation or demonstrated travel habits." *Bernstein v. City of New York*, 621 F. App'x 56, 59 (2d Cir. 2015) (citing *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187–88 (2d Cir. 2013) (per curiam) and *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d. Cir. 2008) (per curiam)). And because the Court may "refer to evidence outside the pleadings" when adjudicating a Rule 12(b)(1) motion, *see Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000), the Court notes that there is no Kohl's retail store located at that address. Indeed, there are no Kohl's stores anywhere in Manhattan. *See* Kohl's Store Locations, https://www.kohls.com/stores/ny.shtml (last visited April 24, 2020); *see also* Defendant's Opposition, Dkt. No. 24 at 20. Regardless, Murphy never asserts, for instance, that he regularly visits department stores to do his shopping. *See Banana Republic,* 2020 WL 1950496, at *4.

Plaintiff's ADA claim would also fail under Rule 12(b)(6) for all of the reasons identified in *Banana Republic*. *See* 2020 WL 1950496, at *5–12. Indeed, there are no substantive differences between either the complaint or the briefing in this case and *Banana Republic* that would compel a different conclusion.

Because the Court would dismiss Plaintiff's ADA claims, it need not engage in a substantive analysis of the merits of Plaintiff's NYSHRL and NYCHRL claims; this Court would decline to exercise supplemental jurisdiction over Plaintiff's state and city claims. *See Banana Republic*, 2020 WL 1950496, at *5, 12.

III. CONCLUSION

This case is indistinguishable from *Banana Republic*. It should therefore come as no surprise that the Court comes to the exact same conclusion.

For these reasons, Defendant's motion to dismiss is GRANTED. Within fifteen days, Plaintiff may file a second amended complaint to cure the deficiencies articulated in this opinion by alleging additional facts about the interactions he has had with Kohl's. If no amended complaint is filed within that time frame, the Court will enter a final judgment of dismissal and direct the Clerk of Court to close this case.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 23.

SO ORDERED.

Dated: April 24, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MURPHY, *and on behalf of all other persons similarly situated*,

Plaintiff,

-v -

KOHL'S DEPARTMENT STORES, INC.,

Defendant.

1:19-cv-09921-GHW

ORDER

GREGORY H. WOODS, United States District Judge:

On April 24, 2020, the Court issued a memorandum opinion and order, granting Defendant's motion to dismiss Plaintiff's first amended complaint. Dkt. No. 33. The Court's order granted Plaintiff leave to file a second amended complaint within fifteen days. *Id.* at 4. Therefore, Plaintiff's second amended complaint was due no later than May 11, 2020. As of the date of this order, the Court has not received Plaintiff's second amended complaint. Accordingly, the Clerk of Court is directed to enter judgment in favor of Defendant and to close this case.

SO ORDERED.

Dated: May 12, 2020

GREGORY H. WOODS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
JAMES MURPHY, and on behalf of all other persons similarly situated,

Plaintiff,

-against-

19 **CIVIL** 9921 (GHW)

JUDGMENT

KOHL'S DEPARTMENT STORES, INC.,

Defendant.
---X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated May 12, 2020, judgment is entered in favor of Defendant and this case is closed.

Dated: New York, New York

May 13, 2020

RUBY J. KRAJICK

Clerk of Court

BY: David J Thomas

Deputy Clerk