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September 16, 2024

VIA ECF FILING

Honorable P. Kevin Castel
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Sherwin K. Parikh MD, P.C. d/b/a Tribeca Skin Center v. Accessibe, Inc., Civil Action No. 1:24-cv-04848-PKC*

Dear Judge Castel,

We are counsel to Defendant accessiBe, Inc. (“Accessibe”), and write pursuant to Rule 3(A) of the Court’s Individual Rules and Procedures for Civil Cases, to notify the Court of Accessibe’s request to file a Fed. R. Civ. P. 12(b)(1) and 12(b)(6) dismissal motion. The initial conference for the matter is scheduled for October 7, 2024 at 10:30 am.

Plaintiff Tribeca Skin Center, a former Accessibe customer, filed this putative class action lawsuit claiming that certain Accessibe website services and products were misrepresented to the public as to their efficacy. Plaintiff alleges that it opened an Accessibe account in 2022 to utilize ‘accessWidget,’ a product which Plaintiff claims it understood would render its website ADA accessible and compliant.¹ When opening the account, Plaintiff consented to Accessibe’s Terms of Service which, among other protections, disclaims all of the claims now asserted in the Complaint and refutes all of the alleged reliance Plaintiff placed on ‘accessWidget’ to render its website ADA compliant. Plaintiff was sued for a website accessibility claim in 2024, and promptly settled the action, wherein no findings of fact were made, thus, no conclusion that ‘accessWidget’ did not perform as represented and as intended.

Plaintiff sues for (1) violation of New York General Business Law (“GBL”) § 349; (2) breach of contract and the covenant of good faith and fair dealing; (3) breach of implied warranty and the Magnuson Moss Warranty Act (“MMWA”); and (4) negligent misrepresentation. Even assuming the truth of the Complaint’s allegations, none of the claims can be sustained as a matter of law.

¹ While Plaintiff references Accessibe’s product ‘accessFlow’ in the Complaint several times (¶¶ 4, 21, 103) it never purchased ‘accessFlow,’ which is exclusively for the use of developers.

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First, Plaintiff lacks Article III standing to pursue damages or injunctive relief because the Complaint does not allege a real or immediate threat of future injury, nor a concrete injury in fact. *Buonasera v. Honest Co., Inc.*, 208 F. Supp. 3d 555, 564 (S.D.N.Y. 2016) (“named plaintiffs must have standing in order to seek injunctive relief on behalf of the class.”). Plaintiff must demonstrate that it faces an “imminent” threat of “concrete, particularized” harm. As the Supreme Court observed in *Clapper v. Amnesty Int’l USA*, 568, U.S. 398, 407 (2013), the threatened injury must be “*certainly impending*”; it is not enough to identify a “speculative” or “possible future injury” or one for which there is only an “objectively reasonable likelihood” that it may occur. A claim to sue on behalf of a putative class does not excuse a plaintiff’s failure to demonstrate future injury to itself. *Id.* An allegation of “possible future injury,” or of “past exposure to illegal conduct” is insufficient to sustain standing. *Lugones v. Pete & Gerry’s Organic, LLC*, 440 F. Supp. 3d 226, 238 (S.D.N.Y. 2020). Here, Plaintiff no longer uses Accessibe’s product and does not allege it will purchase the product again, having engaged a separate remediation service for its website. (Compl. ¶ 62.) No future injury is therefore possible, rendering Plaintiff without Article III standing. Further, the Second Circuit rejects standing to seek injunctive relief premised on the idea that a dissatisfied customer would purchase the same product, and again be deceived. *Berni v. Barilla S.p.A.*, 964 F.3d 141, 147-148 (2d Cir. 2020).

Under Rule 12(b)(1), the Complaint should thereby be dismissed in its entirety.

Additionally, all of Plaintiff’s claims are subject to Rule 12(b)(6) dismissal:

Breach of Contract & Covenant of Good Faith & Fair Dealing: Accessibe’s Terms of Service—a conspicuous sign-up-wrap agreement which places the user on inquiry notice—are enforceable. *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 829 (S.D.N.Y. 2020) (plain sign-in-wrap agreement places reasonable user on notice) (Castel, J.). When Plaintiff created its Accessibe account, it consented to the plain and unambiguous Terms of Service, which disclaim every theory of Complaint relief sought by Plaintiff, including that (i) any legal services were to be furnished; (ii) all accessibility services were permanently resolved by installation of the widget; (iii) full protection is offered against ADA lawsuits; (iv) the customer is responsible for its website content and accessibility; and (v) other disclaimers which will be detailed in the dismissal motion.

More specifically, all warranties are waived and disclaimed, especially given that Plaintiff understood the product was installed “as is” and was not accompanied by any promise of express performance to avoid a lawsuit; to the contrary, the Terms of Service specifically contemplate lawsuits concerning accessibility, a fact well known to Plaintiff given the Complaint allegations that the existence of such lawsuits prompted Plaintiff to contract with Accessibe (¶¶ 47-48.) Further, the Terms of Service disclaim any damages arising from contract breach, negligence, or the performance of the product and services. With regard to the provision of legal protection, the Terms of Service clearly define the Litigation Support package as “providing [Plaintiff] with relevant documentation and/or materials to demonstrate the accessibility features implemented through [the product] on the Customer Website(s).” Accessibe made it clear that it did not provide legal services or advice, and that Plaintiff should consult its own legal counsel.

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The covenant of good faith and fair dealing “cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights.” *Consol. Edison, Inc. v. Ne. Utils.*, 426 F.3d 524, 529 (2d Cir. 2005) (citation omitted). The Accessibe Terms of Service include disclaimers that are clear and unambiguous, and bad faith cannot be evidenced. *See, e.g., Roberts v. Weight Watchers Int’l, Inc.*, 217 F. Supp. 3d 742, 751 (S.D.N.Y. 2016), *aff’d*, 712 Fed. Appx. 57 (2d Cir. 2017). In addition, the Terms of Service limits liability (§ 41), which courts routinely uphold; the maximum Plaintiff may recover is the amount paid to Accessibe for its services during the six months leading to the alleged breach. *See Roberts*, 217 F. Supp. 3d at 754.

GBL § 349: Plaintiff must allege that the defendant’s: (i) conduct was consumer-oriented; (ii) the act or practice was materially deceptive or misleading; and (iii) injury as a result of the alleged deception. *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 525 (S.D.N.Y. 2003). . A plaintiff’s claim can only be based on alleged statements and images that the plaintiff actually viewed before purchasing a product. *Lugones*, 440 F. Supp. 3d at 240. While Plaintiff may have reviewed Accessibe’s website, it also agreed to the Terms of Service; the presence of the disclaimers defeats any alleged claim of deception given that every Complaint allegation regarding purported deception is waived. *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013). Additionally, Plaintiff does not plead that only Accessibe was in possession of alleged omitted information nor that a consumer could not reasonably obtain the information itself. *See Pelman*, 237 F. Supp. 2d at 529. While Plaintiff may assert that Accesibe’s advertising was misleading, it waived any claim through the Terms of Service.

Implied Warranty: The Terms of Service at § 40 specifically disclaim any warranty claim. In addition, Plaintiff fails to plead it provided Accessibe with UCC 2-607(3)(a) timely notice of the alleged breach of warranty. *Wheeler v. Topps Co., Inc.*, 652 F. Supp. 3d 426, 432 (S.D.N.Y. 2023). Though Plaintiff makes a bare assertion that the warranty disclaimer is unconscionable, New York courts require a party to show that a contract is both procedurally and substantively unconscionable when made. *Shema Kolainu-Hear Our Voices v. ProviderSoft, LLC*, 832 F. Supp. 2d 194, 200 (E.D.N.Y. 2010). Because Plaintiff fails to make such an allegation, its breach of implied warranty claim is infirm, and should be dismissed. Because Plaintiff fails to plead a sufficient breach of implied warranty claim, its Magnuson-Moss Warranty Act claim also fails as a matter of law, and should be dismissed. *Kamara v. Pepperidge Farm, Inc.*, 570 F. Supp. 3d 69, 80–81 (S.D.N.Y. 2021) (Castel, J.) (dismissing “MMWA claim because Plaintiff did not plausibly allege an underlying breach of warranty.”).

Negligent Misrepresentation: Plaintiff fails to plead a “special relationship” of trust between the parties. *See Izquierdo v. Mondelez Int’l, Inc.*, No. 16-CV-04697 (CM), 2016 WL 6459832, at *9 (S.D.N.Y. Oct. 26, 2016) (a “basic commercial transaction does not give rise to a special relationship”). It is additionally barred by the economic loss doctrine. *See, e.g., Elkind v. Revlon Consumer Prod., Corp.*, No. 14–CV–2484 (JS)(AKT), 2015 WL 2344134, at *12 (E.D.N.Y. May 14, 2015) (dismissing negligent misrepresentation claim where plaintiffs alleged only economic loss).

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Accessibe proposes that it has 30 days from the conference to file its dismissal motion, and does not object to Plaintiff having 45 days to respond to the motion, with Accessibe taking 30 days to reply.

Respectfully submitted,

/s/ Samuel D. Levy

Samuel D. Levy

C: All counsel of record (via ECF)