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September 20, 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.,*
No. 1:24-cv-04848-PKC

Dear Judge Castel,

Counsel for Plaintiff, Sherwin K. Parikh MD, P.C. d/b/a Tribeca Skin Center ("Tribeca Skin Ctr.") offer the following in response to Defendant's notice of its intent to file a motion under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Briefly stated, Plaintiff does not believe such a motion should prevail or that it should fundamentally change the nature of this case.

Plaintiff brings this putative class action based on Accessibe's misrepresentations in its advertising, its Terms of Use, and in standard form documents that constitute contracts with its customers. Accessibe represents that its software obviates the need for manual website remediation and automatically causes websites to satisfy Web Content Accessibility Guidelines ("WCAG") standards at the AA level. Yet Accessibe's automated software is not capable of causing websites to meet these exacting standards. Consequently, Accessibe deceived Plaintiff and all purchasers of its website remediation "widget" into purchasing a useless product. Moreover, Plaintiff alleges that installing Accessibe's widget and its visible badge, increases the likelihood that a business will face ADA related litigation.

Defendant's Article III standing argument is at odds with the facts alleged. Defendant cites cases finding threats of future harm to be insufficient to constitute injury in fact. This action is not premised on threats of future harm; the Complaint alleges that Plaintiff already paid money to purchase Accessibe's product and subscribe to its service (Complaint ¶¶ 54, 57), that Plaintiff would not have purchased the product or paid for a subscription if it knew the truth (*Id*. ¶¶ 58, 63); that it allocated time and resources as a result of its purchase and the resulting litigation Accessibe's widget caused—including the lawsuit it faced as a result of

using Accesibe's product. *Id*. ¶¶ 55, 60-62. Indeed, the threat that Accessibe's product would expose Plaintiff to litigation alleging ADA violations is not a threat of future harm, but one that materialized. *Id*.

Payment of money based, in part, on a misrepresentation constitutes sufficient injury to confer standing. See, e.g., *Orlander v. Staples*, 802 F.3d 289, 301-02 (2d. Cir. 2015) (finding that a plaintiff pled an injury stemming from a misleading practice by alleging that he would not have purchased services from the defendant had he known the defendant intended to provide less than what it promised). Similarly, time spent seeking to mitigate the harm of wrongful conduct suffice to plead injury and harm. *See, e.g., Clemens v. ExecuPharm Inc.,* 48 F. 4th 146, 155-56 (3d Cir. 2022).

Accessibe states an intent to argue that its Terms of Service contains waivers that effectively shield it from liability for any of its misrepresentations, deceptions, and breaches of express contractual terms. While the substance of this argument is dubious, a threshold question will be whether the Terms of Service are binding at all. The Complaint alleges that attempts to waive warranties are procedurally and substantively unconscionable. See, Complaint, ¶ 107.

Among other flaws, the waivers are in Terms of Service that are hidden in a "browse-wrap"—in which terms are only presented by hyperlink to a separate web page that users need not visit in order to use the site. Browse-wrap agreements exist on the outer edge of what courts recognize as legitimate contract formation. *See Nguyen v. Barnes & Noble Inc.,* 763 F.3d 1171, 1176 (9th Cir. 2014) (describing browse-wrap agreements). Where there is no evidence of actual knowledge of the terms of service, "the validity of the browse-wrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract." *Id*. at 1177. Determining whether a consumer was on inquiry notice is a "fact-intensive inquiry." *Applebaum v. Lyft, Inc*., 263 F. Supp. 3d 454, 465 (S.D.N.Y. 2017), citing *Nguyen*.

Even if the browse-wrap Terms of Service were sufficiently conspicuous as to be binding (which Plaintiff disputes), Plaintiff alleges that Accessibe breached the fundamental consideration for which its customers paid, and which is specifically stated in the same Terms of Service—that its software causes websites to conform with WCAG version 2.1 at the AA level success criteria. See, Complaint ¶¶ 79, 80. Plaintiff alleges that Accessibe's product does not live up to these promises. *Id*. ¶ 83.

Even if not procedurally and substantively unconscionable, which it appears to be, reading Accessibe's waiver as nullifying express terms in the same document renders the document self-contradictory and therefore ambiguous. If a contract is

ambiguous as applied to the facts that furnish the basis of the suit, "a court has insufficient data to dismiss a complaint for failure to state a claim." *Orlander*, 802 F.3d at 295. Moreover, any ambiguities in a contract are construed against the drafter. *Village of Ilion v. County of Herkimer*, 18 N.E.3d 359, 363 (N.Y. 2014).

Aside from alleging a breach of express contract terms, Plaintiff alleges a breach of the covenant of good faith and fair dealing—the implied promise that "is so interwoven into the contract 'as to be necessary for effectuation of the purposes of the contract.'" *Thyroff v. Nationwide Mut. Ins. Co*., 460 F.3d 400, 407 (2d Cir. 2006). The duties of good faith and fair dealing "encompass 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" *511 W. 232nd Owners Corp. v. Jennifer Realty Co*., 773 N.E.2d 496, 500-01 (N.Y. 2002). Plaintiff's position is that a waiver that is read in the way Accessibe intends to argue, runs afoul of this basic covenant of good faith.

Plaintiff also adequately alleged a violation of New York General Business Law § 349. To support a claim for violation of this statute, a Plaintiff must plead facts to support the following: "(1) consumer- oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co*., 875 F.3d 107, 124 (2d Cir. 2017) (quoting § 349(a)). The Complaint extensively pleads specific facts to support each of these elements, and specifically alleges that Plaintiff saw and relied on Accessibe's alleged misrepresentations. Complaint ¶¶ 49, 50, 54, 58, 63.

Defendant apparently intends to use the same language in its browse-wrap document that it claims nullify explicit promises to also argue that it nullifies all warranties, express and implied, along with New York's basic law that is intended to "even the playing field in [consumers'] disputes with better funded and superiorly situated fraudulent businesses." *Teller v. Bill Hayes, Ltd*., 630 N.Y.S.2d 769, 774 (N.Y. App. Div. 1995). Again, whether the waiver language is even part of an enforceable contract involves questions of fact. But if the browse-wrap terms and conditions apply at all, courts typically find attempts to unilaterally waive laws of basic fairness to be unenforceable. See, e.g., *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc*., 851 F. Supp. 2d 494, 500 (S.D.N.Y. 2011).

While nothing in Defendant's letter causes significant concern as to whether the Complaint adequately pleads each cause of action, Plaintiff intends to file an amended complaint. Counsel does not anticipate adding or removing any of causes of action but intends to add an additional named plaintiff as a proposed class representative. Counsel expects to file an amended complaint in the coming weeks.

Notwithstanding the anticipated amendment (that will not change the nature of the claims), Plaintiff asks that the initial conference go forward as

scheduled. Plaintiff respectfully suggests discussing a timetable for the initial phases of discovery. To date, Defendant has ignored three separate requests to conduct a Fed. R. Civ. P. 26(f) initial discovery conference, has refused to engage in any preliminary planning matters, and is taking the position that its intent to file a motion to dismiss imposes an automatic discovery stay. Plaintiff disagrees that such a stay is appropriate. Plaintiff respectfully submits that rather than engage in immediate motions practice, the Parties would benefit from the Court's early input regarding the discovery procedure.

As to scheduling of the motion, Plaintiff proposes that Defendant file its motion within 20 days of receiving the amended complaint. Plaintiff will file a response 30 days thereafter, with Defendant having 15 days to reply.

Respectfully submitted,

Ari Y. Brown