UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| EDELMIRA GUERRERO, Individually, and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>v.<br><br>THE TACK ROOM, INC.,<br><br>Defendant. | : | Case No.: 1:22-cv-02585 (MKV) |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

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**Motion to Dismiss**

Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6), Defendant The Tack Room, Inc. (Tack Room) moves to dismiss the First Amended Complaint (FAC), ECF No. 15, for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. This motion is supported by the accompanying declaration of John Potter (Potter Dec.).

*First*, this Court lacks subject matter jurisdiction because Plaintiff Edelmira Guerrero lacks Article III standing to sue Tack Room under federal, state, or local law—she failed to assert a sufficiently concrete and particularized injury; Tack Room previously addressed the minor website accessibility issues alleged in the FAC, and thus the claimed discriminatory treatment is unlikely to continue; and, most significantly in this regard, Plaintiff failed to allege sufficient facts to reasonably infer that she has an intent to return to Tack Room's website. *Second*, this Court lacks personal jurisdiction over Tack Room because operating a website visible anywhere in the world is not transacting business in New York, and because assertion of personal jurisdiction based simply on Plaintiff's viewing Tack Room's website in New York would violate the Due Process Clause. *Third*, Plaintiff fails to state a claim against Tack Room under Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181, *et seq.*, based on the alleged (and disputed) inaccessibility of its website because Plaintiff never notified Tack Room of her alleged disability and sought an accommodation, and because a website is not a "place of public accommodation" under 42 U.S.C. § 12182(a). If the Court dismisses Plaintiff's federal claim for failure to state a claim, it then should decline to exercise supplemental jurisdiction over Plaintiff's state and local claims pursuant to 28 U.S.C. § 1337(c).

**Background**

Plaintiff Edelmira Guerrero alleges that she is a blind, visually-impaired, handicapped person living in the Bronx, New York, and brings this lawsuit, on behalf of herself and all others similarly situated, against the Tack Room based on the alleged inaccessibility of its website, www.tackroomonline.com. FAC ¶ 1. Plaintiff claims that she visited the website twice—a week before filing the original complaint and again on the day the amended complaint was due—either because it offered "hats, shirts, license plates, and related items," ECF No. 1, ¶ 2 (original complaint), or because she wanted to purchase an "Oklahoma Casting Thoroughbred Horse Lamp with Linen Shade." FAC ¶ 2.

Tack Room describes its offerings differently: "Tack Room sells equestrian equipment — everything you need to ride, handle, and care for horses, including riding gear, horse health and wellness products, supplies for horse stables, and clothing and apparel." Potter Dec. ¶ 3. In its "About Us" description on the website that is the subject of this lawsuit, the company's tagline is "Serving Generations of Horsemen and Women." *Id*. ¶ 4.

According to Pacer, this is one of 38 lawsuits Plaintiff has filed in this district this year alleging website inaccessibility, including seven other virtually identical complaints filed the same day as this lawsuit against companies selling ATV equipment (in the Rocky Mountains), nicotine products, massage chairs, and fitness equipment, among other things. A legal blog that follows these types of cases states that there were nearly 3,000 such cases filed last year, of which over 2,000 were filed in New York. Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2021 Despite Mid-Year Pandemic Lull* (Mar. 21, 2022), available at https://www.adatitleiii.com/2022/03/federal-website-accessibility-lawsuits-increased-in-2021-despite-mid-year-pandemic-lull.

Tack Room is a family-owned business located in Camden, South Carolina, which sells equestrian equipment through its single store in Camden, South Carolina, its pop-up mobile units at horse shows in North and South Carolina, its toll-free telephone number, and its website. Potter Dec. ¶¶ 5, 13–18. It does not have any real or personal property in New York, does not have any employees in New York, and does not target its website, business solicitations, marketing, or advertising efforts to New York. *Id*. ¶¶ 6–12, 18–20.

Because it is good for business, Tack Room aims to make its website accessible to all individuals, including blind, visually-impaired, handicapped people. *Id*. ¶¶ 23–27. For several years, Tack Room has worked with an accessibility consultant to make its website even more accessible, and unveiled a new website less than a week after Plaintiff filed the original complaint that has built-in accessibility tools. *Id*. ¶¶ 28–29, 33.

Tack Room encourages customers and potential customers to contact it if they experience accessibility issues; needless to say, Tack Room has no record of Plaintiff ever alerting Tack Room about any alleged accessibility issues (or ever purchasing a product, sending an email, or even visiting the website). *Id*. ¶¶ 47–50. Just like Tack Room's non-disabled customers or potential customers, Plaintiff could have contacted Tack Room through its toll-free number if she had any questions or problems with the website. *Id*. ¶ 48.

Meanwhile, for the two vague issues raised by Plaintiff in her amended complaint, Tack Room disputes that either are actual accessibility issues. Neither Tack Room nor its accessibility consultant could recreate either claimed issue, and review of the referenced webpage confirms this conclusion. *Id*. ¶¶ 34–44. *If* Tack Room had been able to recreate either alleged accessibility issue, it would have immediately worked to correct the issue, usually solving the problem within 48

hours. *Id*. ¶ 31. In sum, Tack Room has aimed to address—and has succeeded in addressing—every alleged accessibility issue raised by Plaintiff in her amended complaint.

Against this mosaic, we turn to Tack Room's motion to dismiss.

## Argument

### I. This Court Lacks Subject Matter Jurisdiction Because Plaintiff Lacks Standing.

When presented with multiple grounds for dismissal, "the Court must first analyze the Rule 12(b)(1) motion to determine whether the Court has subject matter jurisdiction necessary to consider the merits of the action." *Lopez v. Peapod, LLC*, 2021 WL 1108559, *3 (S.D.N.Y. Mar. 23, 2021) (ADA accessibility claim) (quotation omitted). We therefore begin with Plaintiff's lack of standing.

"Courts may dismiss an otherwise sufficient complaint for a lack of subject matter jurisdiction 'when the district court lacks the statutory or constitutional power to adjudicate it.'" *Diaz v. Kroger Co*., 2019 WL 2357531, *2 (S.D.N.Y. June 4, 2019) (same Plaintiff's counsel) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). "A plaintiff asserting subject matter jurisdiction has the burden of proving that it exists by a preponderance of the evidence." *Mendez v. Apple Inc*., 2019 WL 2611168, *1 (S.D.N.Y. Mar. 28, 2019) (same Plaintiff's counsel) (citation omitted). Although the Court must accept as true all material factual allegations in the complaint, "a court may not premise jurisdiction on favorable inferences drawn from the pleadings." *Kroger*, 2019 WL 2357531, at *2 (citation omitted). "Instead, a plaintiff must show by a preponderance of the evidence that subject matter jurisdiction lies over the dispute." *Id*. (citation omitted). "When deciding a motion under Rule 12(b)(1), a court may rely on evidence outside the complaint." *Id*. (citation omitted).

"Standing is the threshold question in every federal case, determining the power of the court to entertain the suit." *Lopez v. Capital Grille Holdings, Inc*., 2020 WL 4735121, *2 (S.D.N.Y. Aug. 14, 2020) (ADA accessibility claim) (quotations omitted). "That is because under Article III of the Constitution, federal courts can resolve only 'cases' and 'controversies.'" *Apple*, 2019 WL 2611168, at *1 (citing U.S. Const. art. III, § 2). "To establish standing a plaintiff is constitutionally required to have suffered (1) a concrete, particularized, and actual or imminent injury-in-fact (2) that is traceable to defendant's conduct and (3) likely to be redressed by a favorable decision." *Apple*, 2019 WL 2611168, at *1 (quotation omitted).

"A plaintiff satisfies standing requirements to bring suit under Title III of the ADA only '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' restaurants to plaintiff's home, that plaintiff intended to return to the subject location.'" *Lopez v. Arby's Franchisor, LLC*, 2021 WL 878735, *3 (S.D.N.Y. Mar. 8, 2021) (ADA accessibility claim) (quoting *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187–88 (2d Cir. 2013)). Plaintiff cannot satisfy *any* of these three requirements.

"There are no injuries in fact pleaded because the purported injuries described lack all the requisite specificity." *Apple*, 2019 WL 2611168, at *2. "Where, as here, the plaintiff seeks injunctive relief, he cannot rely on past injury to satisfy the injury in fact requirement." *Dominguez v. Grand Lux Café LLC*, 2020 WL 3440788, *3 (S.D.N.Y. June 22, 2020) (ADA accessibility claim) (cleaned up) (citations omitted). "Rather, standing to seek injunctive relief requires a real and immediate threat of future injury." *Id*. (citations omitted).

Plaintiff does not allege that her claimed issues were a barrier, just that they "impeded" her ability to purchase a single product of interest. *See* FAC ¶¶ 2(a), 2(b). But, a more fundamental problem afflicts Plaintiff's amended complaint, namely, neither Tack Room nor its accessibility consultant could replicate the two accessibility issues alleged by Plaintiff, as explained in great detail in the supporting declaration. *See* Potter Dec. ¶¶ 34–43. Although the amended complaint *asserts* that Tack Room's website is inaccessible, the Court should not give such unsworn and conclusory assertions any credence. *See Capital Grille*, 2020 WL 4735121, at *2 ("While the Court will accept non-conclusory factual allegations as true, the Court need not credit a complaint's conclusory statements without reference to its factual context.") (quotation omitted). To repeat, in deciding a motion under Rule 12(b)(1), the Court properly may rely on a sworn declaration that contradicts conclusory assertions in an unsworn complaint. *See, e.g.*, *Kroger*, 2019 WL 2357531, at *3–4 (relying upon company affidavit to find company corrected alleged accessibility issues and thus plaintiff lacked standing). This is not a he said-she said dispute, and it can be resolved on a motion to dismiss for lack of standing.

Furthermore, the very webpage Plaintiff claims is inaccessible refutes her claim. It does not matter that Plaintiff chose not to attach the accused webpage or incorporate it in her complaint, https://www.tackroomonline.com/oklahoma-casting-thoroughbred-horse-lamp-w-linen-shade-0583-bl.html. *See* Potter Dec. ¶ 34 (providing URL for accused webpage).

> [I]t it is well settled that "when a plaintiff chooses not to attach to the complaint or incorporate by reference a document upon which it solely relies and which is integral to the complaint, the court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding into one for summary judgment."

*Allah v. New York City*, 2019 WL 6875410, *3 (S.D.N.Y. Dec. 17, 2019) (cleaned up) (quoting *Int'l Audiotext Network, Inc. v. American Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995)) (other

citation omitted). Even on a motion to dismiss under Rule 12(b)(6), if a document relied upon in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the Court need not accept the allegations in the complaint as true. *See James v. Gage*, 2019 WL 1429520, *7 (S.D.N.Y. Mar. 29, 2019) (collecting cases). Because even a cursory review of the accused webpage reveals an extensive menu of built-in accessibility tools that flatly contradict Plaintiff's accessibility claims, *see* Potter Dec. ¶ 34, Plaintiff's claims fall by wayside. Plaintiff has failed to meet her burden of proving standing that she suffered past injury under the ADA that is likely to continue.

Plaintiff's allegations here mirror those in her other 37 lawsuits, so perhaps she confused Tack Room's website with someone else's website. *Id*. ¶ 44. As this Court has stated several times, "[t]here 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." *Dominguez v. Pizza Hut of Am., LLC*, 2020 WL 3639977, *4 (S.D.N.Y. July 6, 2020) (ADA accessibility claim) (quoting *Apple*, 2019 WL 2611168, at *4).

> 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.

*Dominguez v. Banana Republic LLC*, 2020 WL 1950496, *4 (S.D.N.Y. Apr. 23, 2020) (ADA accessibility claim).

Plaintiff not only failed to establish any past injury, but she cannot demonstrate that any alleged injury is likely to continue. We recognize that "a claim under the ADA can become moot only if a defendant completely remedies the access barrier during the pendency of the litigation." *Hecht v. Magnanni Inc*., 2022 WL 974449, *1 (S.D.N.Y. Mar. 31, 2022) (ADA accessibility claim) (citation omitted). Not only did Tack Room's revamped website with built-in accessibility

tools address Plaintiff's specific allegations, Tack Room's immediate, comprehensive, response to all accessibility issues satisfies this exacting standard. Tack Room's accessibility consultant routinely scans the Tack Room website in real time for accessibility barriers, and accessibility issues are ordinarily resolved within 48 hours. Potter Dec. ¶¶ 30–32. Moreover, Tack Room has no intention of reversing or abandoning its many improvements to its website. *Id*. ¶¶ 46, 51. In short, Plaintiff fails to prove the second requirement to obtain standing in an ADA case, namely, that the alleged discriminatory treatment will continue. *See Arby's*, 2021 WL 878735, at *3**.**

Of the three requirements to assert standing, courts most frequently find in these types of ADA cases that the plaintiff fails to satisfy the third requirement for standing, namely, a reasonable inference of the plaintiff's intent to return to the currently inaccessible place of public accommodation. *See Arby's*, 2021 WL 878735, at *3–4 (collecting cases). "The last factor—intent to return—is obviously essential for the likelihood of future injury required for injunctive relief." *Pizza Hut*, 2020 WL 3639977, at *2. Plaintiff's allegations fall short of meeting this standard.

"Intent to return is a 'highly fact-sensitive inquiry.'" *Grand Lux Café*, 2020 WL 3440788, at *3 (quoting *Bernstein v. City of New York*, 621 F. App'x 56, 59 (2d Cir. 2015)) (other citation omitted). "To establish this factor, '[t]he plaintiff must allege specific facts that show a plausible intention or desire to return to the place but for the barriers to access.'" *Arby's*, 2021 WL 878735, at *3 (quoting *Grand Lux Café*, 2020 WL 3440788, at *3). "Merely asserting an intent to return to the place of injury some day, when the alleged barriers have been rectified, is insufficient." *Pizza Hut*, 2020 WL 3639977, at *4 (cleaned up) (citations omitted).

Plaintiff claims that she wants to purchase a single product from Tack Room's website, namely, "a horse lamp for her home, specifically an Oklahoma Casting Thoroughbred Horse Lamp with Linen Shade." FAC ¶ 2. Setting aside the fact that Plaintiff could purchase that lamp today

through Tack Room's toll-free number, *see* Potter Dec. ¶ 49, and the fact that she only asserts her ability to purchase the lamp on the website has been "impeded" not prohibited, *see* FAC ¶¶ 2(a), 2(b), Plaintiff does not even assert any interest in any other product on Tack Room's website.

As quoted above, courts need not credit a complaint's conclusory statements without reference to its factual context, and that is particularly in the context of an alleged intent to return. "The Second Circuit and other courts have failed to find a sufficient intent to return even in cases where plaintiffs had pled far more specific allegations than what Plaintiff has done here." *Arby's*, 2021 WL 878735, at *3 (citing cases).

Quite simply, Plaintiff's "complaint does not offer sufficient non-conclusory factual allegations to establish an intent to return." *Id*. at *4 (quotation omitted). To be sure, some outlier courts in this district have largely relied on a plaintiff's say-so to conclude that the plaintiff had standing to assert an ADA website accessibility claim. *See, e.g.*, *Quezada v. U.S. Wings, Inc.*, 2021 WL 5827437 (S.D.N.Y. Dec. 7, 2021) (same Plaintiff's counsel). But the consensus approach, as reflected by this Court's rulings in *Capital Grille*, *Grand Lux Café*, *Pizza Hut*, and *Matzura v. Red Lobster Hospitality LLC*, 2020 WL 3640075, *3 (S.D.N.Y. July 6, 2020) (ADA accessibility claim), dictates otherwise. Those cases, if anything, present a stronger inference of an intent to return—at least there the plaintiffs alleged that they were patrons of the defendant restaurants. Here, Plaintiff has expressed an interest in purchasing a single lamp. Such a one-off interest is insufficient to prove an intent to return. "Plaintiff's boilerplate, cut-and-paste, fill-in-the-blanks Amended Complaint does not provide enough specificity to satisfy the requirements for standing under the ADA." *Arby's*, 2021 WL 878735, at *4.

Because the same standard applies to Plaintiff's non-ADA claims, those claims fail as well. *See, e.g.*, *Red Lobster*, 2020 WL 3640075, at *2. In sum, Plaintiff's entire complaint should be

dismissed for lack of standing and thus lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

## II. This Court Lacks Personal Jurisdiction Over Tack Room Under New York's Long Arm Statute and the Due Process Clause.

"[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." *Southern Oil of La., Inc. v. Saberioon*, 2021 WL 5180056, *2 (S.D.N.Y. Nov. 8, 2021) (quoting *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007)) (other citation omitted). "In opposing a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, "[a] plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit.'" *American Girl, LLC v. Zembrka*, 2021 WL 1699928, *3 (S.D.N.Y. Apr. 28, 2021) (quoting *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010)) (other citation omitted). "Specifically, the plaintiff must make a *prima facie* showing that jurisdiction exists by including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant." *Id*. (citations omitted). "However, the Court is "not bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions." *Id*. (citations omitted). "[W]hen considering arguments related to personal jurisdiction, the Court may look beyond the four corners of the complaint and consider materials outside the pleadings, including accompanying affidavits, declarations, and other written materials." *Id*. (citations omitted).

"Whether a foreign defendant can be sued in a federal court 'is determined in accordance with the law of the state where the court sits, with federal law entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee.'" *Southern Oil*, 2021 WL 5180056, at *4 (quoting *Metro. Life Ins. Co. v. Robertson-*

*Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996)) (other citation omitted). "In assessing whether personal jurisdiction exists, courts engage in a two-part analysis, first determining whether there is a statutory basis for exercising personal jurisdiction, and second deciding whether the exercise of jurisdiction comports with due process." *Southern Oil*, 2021 WL 5180056, at *4 (citations omitted).

There is no doubt that Tack Room, a South Carolina company with its headquarters and principal place of business in South Carolina, *see* Potter Dec. ¶¶ 4, 13–15, is not subject to general jurisdiction in New York. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) ("the paradigm forum for the exercise of general jurisdiction … for a corporation … is … one in which the corporation is fairly regarded as at home") (ellipses added).

This leaves specific jurisdiction. New York's long-arm statute, 35 N.Y. C.P.L.R. § 302(a), does not reach to the limits of the Due Process Clause. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 244 (2d Cir. 2007). Plaintiff's counsel has previously asserted in these types of cases that the Court has personal jurisdiction because the defendant "transacts any business" in New York. *See* 35 N.Y. C.P.L.R. § 302(a)(1); *cf. Kroger*, 2019 WL 2357531, at *5–7 (finding no personal jurisdiction); *U.S. Wings*, 2021 WL 5827437, at *6–7 (finding personal jurisdiction). "Therefore, a court has to determine (1) whether the defendant transacts any business in New York and, if so, (2) whether this cause of action arises from such a business transaction." *U.S. Wings*, 2021 WL 5827437, at *6 (cleaned up) (quotation omitted).

Tack Room lacks any of the usual connections that are used to ground specific personal jurisdiction. It does not rent, own, or maintain any offices, facilities, or physical structures in New York; it does not employ any individuals in New York; it does not maintain any bank accounts, business records, or documents in New York; it does not maintain any computer servers or other

computer hardware in New York; it does not target any business solicitations, marketing, or advertising efforts to New York; and it does not advertise in New York. Potter Dec. ¶¶ 6–12. That leaves its website, which is visible in New York and everywhere else in the world. That is not enough.

Simply operating a website that can be accessed anywhere in the world is insufficient to establish that Tack Room is transacting business in New York:

> While there is some contrary authority within the District, several other judges in the District have reached the same conclusion as the Court does here, and have held that simply operating a website, absent more, is insufficient to establish that Defendants "transact business" in New York within the meaning of C.P.L.R. § 302(a)(1) sufficient to subject a defendant to jurisdiction in New York.

*American Girl*, 2021 WL 1699928, at *6 (collecting cases); *see also Best Van Lines*, 490 F.3d at 350 ("[I]t is now well established that one does not subject himself to the jurisdiction of the courts in another state simply because he maintains a web site which residents of that state visit.") (quoting *Starmedia Network, Inc. v. Star Media, Inc.*, 2001 WL 417118, *3 (S.D.N.Y. Apr. 23, 2001)).

The critical element that is missing is any purposeful activity by *Tack Room* to target or aim its website at potential New York customers. *See* Potter Dec. ¶¶ 19–20; *cf. Best Van Lines*, 490 F.3d at 246 ("New York courts define transacting business as purposeful activity—some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.") (cleaned up) (citations omitted). In other words, "[i]t is 'insufficient to rely on a defendant's "random, fortuitous, or attenuated contacts" or on the "unilateral activity" of a plaintiff' with the forum to establish long-arm/specific jurisdiction." *Southern Oil*, 2021 WL 5180056, at *4 (quoting *Walden v. Fiore*, 571 U.S. 277, 286 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). In short, absent

some action taken by Tack Room to specifically target New York with its website, Plaintiff cannot establish that Tack Room "transacts business" in New York through its website for the purposes of personal jurisdiction. *See American Girl*, 2021 WL 1699928, at *7.

Because Plaintiff cannot establish that the Court has personal jurisdiction under New York's long-arm statute, we need not consider the second requirement to establish personal jurisdiction, namely, whether the assertion of such jurisdiction comports with due process. Nevertheless, it should be apparent that jurisdiction based solely on *Plaintiff's* unilateral decision to access Tack Room's website in New York would violate the Due Process Clause.

The Supreme Court twice has declined to establish the limits of specific jurisdiction created solely through internet contacts. *Cf. Ford Motor Co. v. Mont. Eighth Jud. Distr. Ct.*, 141 S. Ct. 1017, 1028 n.4 (2021) ("And we do not here consider internet transactions, which may raise doctrinal questions of their own."); *Walden*, 571 U.S. at 290 n.9 ("[T]his case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State."). Still, recent caselaw strongly suggests that Plaintiff's personal jurisdiction theory—allowing suit anywhere any person encounters any website accessibility issue—would violate Tack Room's right to due process.

The Supreme Court has repeatedly required the contact with the forum be the result of the defendant's actions, and not the unilateral actions of the plaintiff. The defendant must "purposefully avail itself of the privilege of conducting activities in the forum State." *Ford Motor*, 141 S. Ct. at 1024 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The defendant's ties to the forum, in other words, must be ties that "the defendant *himself*" purposefully forged. *Walden*, 571 U.S. at 284 (emphasis added by Court and quoting *Burger King*, 471 U.S. at 475).

Furthermore, "[t]he plaintiff's claims, we have often stated, must arise out of or relate to the defendant's contacts with the forum." *Ford Motor*, 141 S. Ct. at 1025 (collecting cases).

The suggestion that selling some products through its website to New York residents opens Tack Room up to claims not only about the products it sells, but also to the operation of the website itself, runs into the brick wall of Supreme Court jurisprudence. Under the Due Process Clause, "[w]hat is needed—and what is missing here—is a connection between the forum and the *specific* claims at issue." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (emphasis added). "[F]or a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy.... When there is no such connection, specific jurisdiction is lacking *regardless of the extent of a defendant's unconnected activities in the State.*" *Id*. (ellipsis and emphasis added by court). Thus, it does not matter one whit that Tack Room sells a small number of products to New York citizens—Plaintiff's claim concerns Tack Room's website, not its products.

Reading these cases together leads inevitably to the conclusion that the Fifth Circuit recently reached: "Accessibility alone cannot sustain our jurisdiction. If it could, lack of personal jurisdiction would be no defense at all." *Johnson v. TheHuffingtonPost.com, Inc*., 21 F.4th 314, 320 (5th Cir. 2021). As that court explained, if a defendant could be sued anywhere its website could be accessed, that would eliminate the distinction between general and specific jurisdiction, and would allow any website operator to be sued anywhere. *Id*. at 323–24. And that would violate the Due Process Clause.

In sum, Plaintiff's complaint should be dismissed for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2).

## III. This Court Should Dismiss Plaintiff's ADA Claim Because Plaintiff Did Not Seek an Accommodation and a Website is not a Place of Public Accommodation.

Even if Plaintiff has standing to assert her claims, and even if this Court has specific personal jurisdiction over Tack Room, dismissal would still be warranted because Plaintiff fails to state a claim for relief under the ADA. To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6**),** "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Even treating Plaintiff's factual allegations as true for purposes of this motion, the Court's standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "A complaint need not make 'detailed factual allegations,' but it must contain more than mere 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Arby's*, 2021 WL 878735, at *3 (quoting *Iqbal*, 556 U.S. at 678).

As explained above, Plaintiff's broad-brush allegations of inaccessibility are squarely contradicted by the referenced webpage itself, https://www.tackroomonline.com/oklahoma-casting-thoroughbred-horse-lamp-w-linen-shade-0583-bl.html, which this Court properly should consider and credit over the allegations in the amended complaint on a motion to dismiss under Rule 12(b)(6). *See James v. Gage*, 2019 WL 1429520, at *7. Plaintiff's claim of inaccessibility is not plausible in the face of the actual challenged webpage.

In this case, Plaintiff's First Amended Complaint comes up short on two additional grounds. *First*, Plaintiff does not allege that she notified Tack Room of her alleged disability and sought an accommodation under the ADA. *Second*, a website is not a place of public accommodation under the ADA.

### A. Plaintiff Did Not Notify Tack Room of her Claimed Disability and Seek an Accommodation under the ADA Before Filing Suit.

"'[N]otice of the alleged disability ... is an assumed prerequisite' of a Title III claim for failure to make reasonable accommodations." *Castillo v. Hudson Theater, LLC*, 412 F. Supp. 3d 447, 451 (S.D.N.Y. 2019) (ellipsis added by court and quoting *Shaywitz v. Am. Bd. of Psychiatry & Neurology*, 848 F. Supp. 2d 460, 466 (S.D.N.Y. 2012)). Thus, the Second Circuit has identified notice as a required element of a failure to accommodate claim in an employment discrimination case. *See, e.g., McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 97 (2d Cir. 2009). "Reason dictates that in order for a defendant to be liable for discrimination 'on the basis of disability,' 42 U.S.C. § 12182(a) , the defendant must have had adequate knowledge of the plaintiff's disability." *Shaywitz*, 848 F. Supp. 2d at 467.

In addition to notifying Tack Room of her alleged disability, Title III of the ADA requires Plaintiff to request *and* Tack Room to refuse to make a reasonable accommodation. "That is because Title III's requirement that private entities make 'reasonable accommodations' for disabled individuals would be rendered meaningless if the entity had no basis for knowing (1) what accommodations the plaintiff was seeking, and (2) whether those accommodations were reasonable in light of the disability and the test." *Castillo*, 412 F. Supp. 3d at 451 (cleaned up and quoting *Shaywitz*, 848 F. Supp. 2d at 467).

Applying these standards leads inevitably to dismissal in this case. Plaintiff does not allege in the First Amended Complaint that she ever informed Tack Room of her alleged disability or sought a reasonable accommodation for that claimed disability. Nor could she. *See* Potter Dec. ¶¶ 50–51. Under the ADA, Plaintiff cannot sue first and ask questions later.

**B. A Website Is Not a Place of Public Accommodation under the ADA.**

Title III of the ADA prohibits discrimination against individuals "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[.]" 42 U.S.C. § 12182(a). Thus, "[t]o state [a] claim for violation of Title III of the ADA, 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.'" *Lopez v. W. Elm, Inc.*, 2020 WL 6546214, *3 (S.D.N.Y. Nov. 6, 2020) (ADA accessibility case) (quoting *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 94–95 (2d Cir. 2012)). In this case, calling a website a "place of public accommodation" does not make it so.

In determining what constitutes a place of public accommodation, we begin, and end, with the statute. "The statute enumerates 12 categories of 'private entities' that 'are considered public accommodations.'" *Lopez v. Jet Blue Airways*, 662 F.3d 593, 599 (2d Cir. 2011) (citing 42 U.S.C. §§ 12181(7)(A)-(L)); *see also Suris v. Gannett Co.*, 2021 WL 2953218, *1 (E.D.N.Y. July 14, 2021) (ADA accessibility case) ("In order to be a place of public accommodation, a facility ... must fall within one of these 12 categories.") (ellipsis added by court and quoting 28 C.F.R. § 36.104, Appendix C).

"Under the interpretive maxim of *noscitur a sociis*, a word is known by the company it keeps." *Arby's*, 2021 WL 878735, at *5 (quotation omitted). "Similarly, under the statutory canon of *ejusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id*. (cleaned up) (quotation omitted). "Considering each of these maxims, every single example listed among the twelve categories in § 12181(7) is a place or

establishment[.]" *Arby's*, 2021 WL 878735, at *5; *see also Winegard v. Newsday*, 2021 WL 3617522, *3 (E.D.N.Y. Aug. 16, 2021) (ADA accessibility case) (of the 50 examples contained in section 12181(7), at least 49 "indisputably relate to physical places"). "Websites or other virtual businesses are not included explicitly or implicitly among any of the categories." *Martinez v. MyLife.com, Inc*., 2021 WL 5052745, *2 (E.D.N.Y. Aug. 16, 2021) (ADA accessibility case). Based on these maxims, this Court should conclude that websites are not a place of public accommodation.

Although the Second Circuit has not yet decided whether a website is a place of public accommodation, the majority of Circuits addressing this issue have held that websites are *not* places of public accommodation. *Id*. (citing *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1276–77 (11th Cir.), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021); *Robles v. Domino's Pizza LLC*, 913 F.3d 898, 905 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019)); *see also Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998) (public accommodations are limited to actual, physical places); *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995) (same).

Although district courts in this Circuit have reached conflicting decisions on this issue, the more recent, and, in our view, better reasoned, decisions have concluded that websites are not places of public accommodation. We point in particular to the decision in *Winegard v. Newsday*, 2021 WL 3617522 (E.D.N.Y. Aug. 16, 2021).

There, the court traced the "long history" of the phrase "public accommodation," which "referred to the particular subset of businesses that had heightened duties of service … because of the public nature of their physical facilities." *Id*. at *2 (ellipsis added and citations omitted). The court further noted that Congress deliberately chose not to expand the scope of the ADA beyond physical places even though there were numerous examples of mail order and other types of

retailers that had eschewed brick-and-mortar establishments by the time the ADA was passed in 1990. *Id*. at *3–4. Likewise, Congress did not seek to expand the scope of the ADA to websites when it amended the ADA in 2008 even though the online economy had exploded and courts had held the ADA was limited to physical places. *Id*. at *4 n.11.

"All this is clear enough even before we get to the statute's use of the phrase 'place of' to modify the term 'public accommodation.'" *Id*. at *5. "Set together in sequence, the collective phrasing leaves no doubt that Section 12182(a) was not meant to reach" websites. *Newsday*, 2021 WL 3617522, at *5. Drawing on additional sources, the court concluded that "place" ordinarily refers to physical places, not websites. *Id*. at *6. The bottom line is that a website is not a place of public accommodation.

To be sure, some courts in this Circuit have concluded otherwise. "Most district court cases reaching the opposite conclusion in this Circuit have done so in reliance on the Second Circuit's decision in *Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999)." *Newsday*, 2021 WL 3617522, at *6. As the *Newsday* court further explained, "*Pallozzi* involved a lawsuit against an insurance company that refused to issue a policy based on the plaintiffs' mental-health diagnoses. The holding did not turn on the definition of 'place of public accommodation' in Section 12181(7)." *Newsday*, 2021 WL 3617522, at *6. Because the insurance office in *Pallozzi* was not only a physical place, but also a place expressly listed in the statute, *see* 42 U.S.C. § 12181(7)(F), the question was whether the goods and services offered at that physical place of accommodation had to accommodate the plaintiff's disability. Therefore, neither *Pallozzi* nor its progeny mandate or suggest any conclusion as to whether a stand-alone website, such as the one at issue here, is a place of public accommodation. *MyLife.com*, 2021 WL 5052745, at *3; *accord Newsday*, 2021 WL 3617522, at *6.

In the final analysis, Congress limited the scope of the ADA to a place of public accommodation, and a website is neither a "place" nor a "public accommodation," as those terms are defined in the statute. Accordingly, Plaintiff's ADA claim based on alleged website inaccessibility should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

## IV. This Court Should Decline Supplemental Jurisdiction over Plaintiff's State and Local Claims.

"Ordinarily, pursuant to 28 U.S.C. § 1337(c), when a plaintiff's federal claims are dismissed before trial, the state claims should be dismissed as well." *Arby's*, 2021 WL 878735, at *7 (cleaned up) (citations omitted). Hence, the Court should also decline supplemental jurisdiction over Plaintiff's state and local accessibility claims.

**Conclusion**

Defendant respectfully requests that its motion to dismiss be granted.

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