

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

JUAN CARLOS GIL,

CASE NO.: 1:16-cv-23020-RNS

Plaintiff,

v.

WINN-DIXIE STORES, INC.,

Defendant.

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**DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 12(c), Federal Rules of Civil Procedure, Defendant, Winn-Dixie Stores, Inc. (“Winn-Dixie”), by and through its undersigned counsel, hereby moves for judgment on the pleadings as to the Complaint filed against it by Plaintiff, Juan Carlos Gil (“Gil”). Winn-Dixie respectfully submits that, application of controlling legal principles to the uncontroverted facts based upon the pleadings, mandates the conclusion that the University, as a matter of law, is entitled to judgment in its favor on the Complaint [D.E. 1]. More specifically, Internet websites are not places of public accommodation as defined under the Americans with Disabilities Act (“ADA”). Accordingly, Gil’s claim must fail and judgment properly should be entered in favor of Winn-Dixie.

**I. Relevant Facts of the Complaint**

In his complaint, Gil asserts that he is legally blind and has a qualified disability under the ADA. (D.E. 1 ¶¶ 11-12.) Winn-Dixie is the owner and operator of a regional grocery store chain in the Southeastern United States. (D.E. 1 ¶¶ 13-14, 18; D.E. 7 ¶¶ 13-14, 18.) Because Winn-Dixie’s stores operate as grocery stores, and in some instances pharmacies, Winn-Dixie’s

physical brick-and-mortar locations are places of public accommodations as defined under the ADA. (D.E. 1 ¶ 16; D.E. 7 ¶ 16.)

Winn-Dixie also has a public website at [www.winndixie.com](http://www.winndixie.com).<sup>1</sup> (D.E. 1 ¶ 17; D.E. 7 ¶ 17.) The website provides information to the general public regarding its stores' hours, product information, Winn-Dixie's services, among other things. (D.E. 1 ¶¶ 17, 19; D.E. 7 ¶¶ 17, 19; *see* <https://www.winndixie.com/>.) Winn-Dixie's website also permits its patrons to manage and refill their pharmacy prescriptions online. (D.E. 1 ¶¶ 19, 21; D.E. 7 ¶¶ 19, 21; *see, e.g.*, <https://www.winndixie.com/pharmacy/transfer-prescription>.)

## II. Standard on Motion for Judgment on the Pleadings

"After the pleadings are closed . . . a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "To obtain a judgment on the pleadings, the moving party must clearly establish that no material issue of fact remains unresolved and that it is entitled to judgment as a matter of law." *ThunderWave, Inc. v. Carnival Corp.*, 954 F. Supp. 1562, 1564 (S.D. Fla. 1997). "Judgment on the pleadings under Rule 12(c) is appropriate when there are no material facts in

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<sup>1</sup> Gil has relied upon and cited to [www.winndixie.com](http://www.winndixie.com) in his complaint, *see generally* D.E. 1, and, therefore, Winn-Dixie submits that Gil has incorporated the website by reference into his Complaint and it may properly be relied upon by Winn-Dixie in its motion without converting it to a motion for summary judgment. *See Caravello v. Am. Airlines, Inc.*, 315 F. Supp. 2d 1346, 1348 (S.D. Fla. 2004) (citing *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment.")). To the extent the Court disagrees that the website is a document incorporated into the complaint, Winn-Dixie requests that the Court take judicial notice of the website and the information provided on that website [www.winndixie.com](http://www.winndixie.com). Fed. R. Evid. 201 ("The court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information."); *see, e.g., Flynn v. Tucker*, No. 11-22765-CIV, 2012 WL 4863051, at \*2 (S.D. Fla. Oct. 11, 2012) (taking judicial notice of Third DCA website docket); *Grupo Televisa, S.A. v. Telemundo Comm's Group, Inc.*, No. 04-20073-CIV, 2005 WL 5955701, at \*5 (S.D. Fla. Aug. 17, 2005) (taking judicial notice of website and information found therein).

dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts.” *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002) (citing *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998)). “If upon reviewing the pleadings it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations, the court should dismiss the complaint.” *Id.* (citing *White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir. 1999)).

### **III. Winn-Dixie is Entitled to Judgment as a Matter of Law**

In his Complaint, Gil purports to bring a single claim for violation of Title III of the ADA against Winn-Dixie, asserting that its website is not in compliance with the ADA. The viability of Gil’s claim hangs on the single legal determination: whether Winn-Dixie’s website is a place of public accommodation that is subject to the ADA. The ADA was initially passed into law in 1990 and amended in 2008. Americans with Disabilities Act of 1990, Pub. L. 101–336, 104 Stat. 328 (1990); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). To date, however, Congress has not expanded the ADA’s definition of places of public accommodations to include internet websites. Similarly, the United States Department of Justice, which enforces the ADA, has not promulgated any rules or regulations to govern website accessibility.<sup>2</sup>

[I]n light of the rapidly developing technology at issue, and the lack of well-defined standards for bringing a virtually infinite number of Internet websites into compliance with the ADA, a precondition for taking the ADA into “virtual” space is a meaningful input from all interested parties via the legislative process. As Congress has created the statutorily defined rights under the ADA, it is the role of Congress, and not this Court, to specifically expand the ADA’s definition of “public accommodation” beyond physical, concrete places of public accommodation, to include “virtual” places of public accommodation.

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<sup>2</sup> While Gil may contend in his complaint that “[t]he Department of Justice has long taken the position” that websites are places of public accommodations, it has not issued any regulations or rules to date to support that supposed position.

*Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 n.13 (S.D. Fla. 2002).

Because the ADA only covers physical locations, or discrimination that bars access to physical locations, Gil's ADA claim based on alleged inaccessibility of Winn-Dixie's website must fail as a matter of law.

#### **A. The ADA Only Applies to Physical Locations**

Title III prohibits disability discrimination in places of public accommodation. 42 U.S.C. § 12182. The statute list twelve finite and definitive categories of physical entities that qualify as places of public accommodation. 42 U.S.C. § 12181(7). While nationally there is a split of authority on whether Title III applies to websites, *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), unequivocally answered that question the negative.<sup>3</sup> In that case, the court held the plain language of the ADA and its enforcing regulations as well as the prior rulings of the Eleventh Circuit show the ADA only extends to access to physical locations.

First, the court noted the ADA protects persons with disabilities from discrimination in “any place of public accommodation.” *Id.* at 1317 (citing 42 U.S.C. § 12182(a)). That phrase is defined exclusively in terms of physical locations. As the court explained, the ADA enumerates twelve particular categories of places of public accommodation, none of which include websites. *Id.* at 1317 (citing 42 U.S.C. § 12181(7)). “Furthermore . . . the applicable federal regulations also define a ‘place of public accommodation’ as ‘a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve (12) enumerated categories set forth in 42 U.S.C. § 12181(7).]’” *Id.* at 1317-18 (citing 28 C.F.R. § 36.104.5). The

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<sup>33</sup> The Eleventh Circuit has yet to rule on whether a website is a place of public accommodation under the ADA.

applicable regulations define “facility” as “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.” *Id.* at 1318 (citing 28 C.F.R. § 36.104.). As such, both the ADA and its corresponding regulations speak of places of public accommodation exclusively in physical terms of real or personal property.

Second, “[i]n interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress’ clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation.” *Id.* at 1318 (citing *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283-84 (11th Cir. 2002); *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) (noting that “[b]ecause Congress has provided such a comprehensive definition of ‘public accommodation,’ we think that the intent of Congress is clear enough”)). Ultimately, the court concluded,

Where Congress has created specifically enumerated rights and expressed the intent of setting forth “clear, strong, consistent, enforceable standards,” courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. ***To expand the ADA to cover “virtual” spaces would be to create new rights without well-defined standards.***

*Id.* at 1318 (emphasis added).

Gill’s allegations solely involve Winn-Dixie’s website, and his alleged inability to access and patronize the website, not Winn-Dixie’s brick and mortar stores. (*See, e.g.*, D.E. 1 ¶¶ 27, 30, 31.) Gil repeatedly emphasizes that it is the website that is inaccessible, not the physical stores. Gill asserts that the website is a “sales establishment” as that term is defined under § 12181(7)(E)

and (F). Section 12181(7)(E) defines a place of public accommodation as “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment.” Section 12181(7)(F) defines a place of public accommodation as “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.” However, as stated above, the ADA only applies to physical facilities. “[T]he general term[] . . . “sales establishment,” [is] limited to [its] corresponding specifically enumerated terms[], all of which are physical, concrete structures, namely” a grocery store or a pharmacy. *Southwest Airlines*, 227 F. Supp. 2d at 1319. To apply the ADA to Gil’s claim of website accessibility would be to create the very “new rights without well-defined standards” as warned by the court in *Southwest Airlines*. *Id.* As the ADA, pursuant to the plain language of the statute and its regulations, only applies to physical locations, Gil’s claim must fail. For this reason alone, the Court properly should enter judgment in favor of Winn-Dixie.

#### **B. Winn-Dixie’s Physical Locations Do not Subject its Website to the ADA**

Gil, perhaps conceding that the ADA does not apply to websites, alleges that, because Winn-Dixie’s website allows the public to locate its stores, there is a direct nexus between Winn-Dixie’s website and its stores and, therefore, the website is a physical extension of its stores. (D.E. 1 ¶ 20.) The fact that Winn-Dixie has physical stores, and the information concerning the location of those stores are on its website, does not save Gil’s claim because his allegations involve only access to the website, not any physical location. In *Southwest Airlines*, the Court considered the concept that the ADA *might* apply to a non-physical location where a particular form of discrimination prevents a disabled person from accessing a specific physical location.

*Southwest Airlines*, 227 F. Supp. 2d at 1319-21. For instance, the Eleventh Circuit found the ADA applied to the use of telephone dialing systems that made it difficult for individuals with physical disabilities to be selected as contestants for a gameshow, because the system was a barrier to the individuals' access to a specific physical location: the television studio where the gameshow was filmed. *Id.* at 1320 (citing *Rendon*, 294 F.3d at 1284 n.8).

In that case, however, “the Eleventh Circuit noted that the plaintiffs stated a claim under Title III because they demonstrated ‘a nexus between the challenged service and the premises of the public accommodation,’ namely the concrete television studio.” *Id.* In the Court *Southwest Airlines* did not find a sufficient nexus between the plaintiff’s inability to use the defendant airline’s website and access to any physical location. Particularly since “the Internet is ‘a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.’” *Id.* at 1321 (quoting *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001)).

“In recognizing the requirement that a plaintiff establish ‘a nexus between the challenged service and the premises of the public accommodation,’ the Eleventh Circuit noted that the plaintiffs in *Rendon* stated a claim under Title III of the ADA because they sought “‘the privilege of competing in a contest held in a *concrete space* . . .’” *Id.* (quoting *Rendon*, 294 F.3d at 1284 (emphasis added)). Here, Plaintiff has not alleged an adequate nexus between Winn-Dixie’s website and any particular physical location. First, the Complaint is devoid of any allegations suggesting the alleged inaccessibility of Winn-Dixie’s website makes Winn-Dixie’s brick and mortar stores inaccessible to Gil. Gil alleges generally that Winn-Dixie’s website has information on Winn-Dixie’s store locations, but Gil does not assert the alleged inaccessibility of that information on the website prevented him from visiting a Winn-Dixie store or a pharmacy.

Second, while Gil alleges that he wishes to become a customer of Winn-Dixie, he alleges that he is “unable to participate in the shopping experience online” and that he “continues to desire to patronize [Winn-Dixie’s] website,” not its physical locations.<sup>4</sup> (D.E. 1 ¶¶ 30-31.) Gil makes no allegation, nor could he, that the Winn-Dixie website’s alleged inaccessibility was a physical barrier to his entry to Winn-Dixie’s stores or that it would bar him from use of Winn-Dixie’s services. In short, Gil has not alleged that the inaccessibility of Winn-Dixie’s website prevents access to Winn-Dixie’s stores or pharmacies, generally, or that it impacted *his* ability to access a Winn-Dixie store, individually. Consequently, even under a more expansive reading of the term “place of public accommodation,” the ADA does not apply to Winn-Dixie’s website. Accordingly, the Court properly should enter judgment in favor of Winn-Dixie.

WHEREFORE, on the basis of the foregoing, Defendant, Winn-Dixie Stores, Inc., respectfully requests that the Court enter final judgment in its favor as to the Complaint filed against it by Plaintiff, Juan Carlos Gil, along with all other and such further relief as this Court deems appropriate under the circumstances.

Respectfully submitted,

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<sup>4</sup> As noted previously, Winn-Dixie does not conduct any sales or shopping via its website. (See generally <https://www.winndixie.com/>.)



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24th day of October 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing

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s/Susan V. Warner

Susan V. Warner

**SERVICE LIST**

**JUAN CARLOS GIL vs. WINN-DIXIE STORES, INC.**

**CASE NO: 1:16-cv-23020-RNS**

**United States District Court, Southern District of Florida**

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