IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

ANTHONY FAUCI,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	C.A. No. 20-00238
	)	
SPICY PEACH, INC.	)	
	)	
Defendant-Appellant.	)	

ORDER CERTIFYING ISSUE ON APPEAL

The United States District Court for the District of Emory granted summary judgment in favor of Plaintiff Anthony Fauci and denied Defendant Spicy Peach, Inc.'s request to dismiss. Defendant-Appellant Spicy Peach, Inc. appeals to this Court.

This Court holds that there are no genuine issues of material fact and hereby certifies the following issues for appeal:

I. Whether the district court properly considered Fauci's novel legal argument which was not submitted to or considered by the magistrate judge; and

II. Whether Spicy Peach, Inc.'s website is a place of public accommodation under the Americans with Disabilities Act in whole or in part.

It is so ordered.

INSTRUCTIONS

1. Do not use any cases past August 16, 2020. You may look at them for reasoning, but you may not use them in your oral argument or written brief.
2. Assume Spicy Peach, Inc. otherwise meets the requirements to be subject to the ADA, and that their brick-and-mortar store follows ADA regulations.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EMORY

ANTHONY FAUCI,	)	
	)	
Plaintiff,	)	C.A. No. 19-CV-01203
	)	
v.	)	**REPORT & RECOMMENDATION**
	)	**OF**
SPICY PEACH, INC.	)	**U.S. MAGISTRATE JUDGE**
	)	(Motion for Preliminary Injunction)
Defendant.	)	

A. CUOMO, Magistrate Judge:

This action has been filed by a Plaintiff alleging discrimination on the basis of disability in violation of Title III of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12188 et seq. The Plaintiff is seeking both declaratory and injunctive relief. Both Plaintiff and Defendant filed a motion for summary judgement pursuant to Rule 56, Fed.R.Civ.P., on July 1, 2019. The motion for summary judgement is now before the Court for disposition.[1]

Background

Plaintiff, Anthony Fauci, is an individual with a hearing impairment which renders him completely deaf. Defendant, Spicy Peach, Inc., is an adult entertainment business which rents adult videos both in-store and online. Spicy Peach, Inc. opened first in 2000 as a brick-and-mortar store that rented physical DVDs of its adult content. In 2015, Spicy Peach, Inc. opened its website, www.spicypeachrentals.com, to operate in tandem with its brick-and-mortar store. On the website, customers can rent and stream adult videos completely online, similar to such video services as Amazon Prime Video. On March 15, 2019, Fauci rented "Home Alone 2:

[1] This case was referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B). The Plaintiff and Defendant have filed a motion for summary judgment. As this is a dispositive motion, this Report and Recommendation is entered for review by the Court.

Quarantined Together" from Spicy Peach's website. Fauci then discovered that the video did not provide closed captioning, rendering the video inaccessible to Fauci due to his hearing impairment.[2] After he discovered the lack of closed captioning in "Home Alone 2: Quarantined Together," Fauci then rented three additional adult videos, and discovered that those too provided no closed captioning.

Spicy Peach's website is separate in function from the brick-and-mortar store. While the website contains many of the same videos available for rental at the brick-and-mortar store, not all video content is available in both spaces. Only one of the videos rented by Fauci, "Home Alone 2: Quarantined Together," is available both online and in-store. The other three videos are only available online. Spicy Peach has stated that none of the videos available for rental on Spicy Peach's website provide closed captioning. However, every video for rental at Spicy Peach's brick-and-mortar location provides closed captioning.

Spicy Peach's website does have location and contact information for the brick-and-mortar store, and also provides customers the option to purchase gift cards online which can be used either online or in the brick-and-mortar store. However, all online transactions are entirely separate from in-store transactions. There is no option, for example, to purchase a video online and then pick the video up in-store. Online rentals are only available to download or stream through the customer's Web browser or a "Smart" TV. Fauci is bringing this action against Spicy Peach, alleging that Spicy Peach's website is in violation of the ADA due to its failure to provide closed captioning on its videos.

[2] Fauci's initial complaint alleged "As a parody of the famous 'Home Alone' franchise, dialogue plays a critical role in developing the plot," and that he "cannot enjoy the movie without closed captioning due to his hearing impairment."

Discussion

The parties have both moved for summary judgment on all claims. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. Since both parties have agreed there is no genuine issue of fact for trial, this Court can submit a Report and Recommendation on the underlying requested injunction against Spicy Peach, Inc.

Fauci alleges that Spicy Peach's website is subject to Title III under the ADA, which would require Spicy Peach to provide closed captioning to accommodate the hearing impaired.[3] Title III of the ADA regulates discrimination on the basis of disability in public accommodations and commercial facilities. U.S.C.S. § 12182. A "place of public accommodation" is defined to include 12 categories of establishments. 42 U.S.C.S. § 12181(7). Fauci contends that Spicy Peach's website fits into the following four defined categories: "place of exhibition or entertainment," "sales or rental establishment," "service establishment," and "places of exercise or recreation." *Id.* This Court agrees that Spicy Peach's website could be considered a place of public accommodation under each of the four defined categories suggested by Fauci. Fauci and Spicy Peach, Inc. both bring forward the nexus test for this Court's review. Spicy Peach, Inc. also argues in the alternative that websites are never subject to the ADA because the ADA requires a physical location being accessed. This Court recommends that the district court utilize

[3] Hearing impairments are explicitly included in the text of the ADA as a protected disability. ADA 42 U.S.C.S. § 12102.

the nexus test, and additionally recommends that the district court hold that Spicy Peach, Inc. is not in violation of the ADA.

The nexus test provides that only websites with a sufficient nexus to a physical place are considered a "public accommodation" under the ADA. The nexus test is supported by the Sixth, Nineth, and Eleventh Circuits. *See Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946 (N.D. Cal. 2006); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *Haynes v. Dunkin' Donuts LLC et al*, 741 Fed. App'x 752 (11th Cir. 2018). The nexus approach considers whether inaccessibility of the website "impedes the full and equal enjoyment of goods and services" offered in the physical place. *Nat'l Fed'n of the Blind*, 452 F.Supp.2d at 956. If there is a sufficient nexus, then all information and services connected to that nexus are subject to ADA accommodations. *Id.* However, even with a sufficient nexus all information and services unconnected to the physical place are not subject to ADA accommodations. *Id.* ("To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA").

Fauci contends that there is a sufficient nexus between Spicy Peach's brick-and-mortar store and Spicy Peach's website because of the similarity in content offered in both. Spicy Peach disagrees. This Court does not find similarity in content sufficient to create a nexus. Cases in which courts have found a sufficient nexus involve a direct link between the online website and the physical store such that the website facilitates in-store transactions.[4] Here, the only link complained of is the similarity in content, which this Court would not recommend as sufficient

[4] *E.g. Haynes*, 741 Fed. Appx. at 754 (website provided instructions to get to the physical store and sold gift cards that could be used at the physical store).

due to the lack of supporting case law. While Spicy Peach's website does allow customers to purchase gift cards for use in-store or online and provides location information, these services are accessible to individuals who have a hearing impairment. The nexus must be related to the actual issue complained of. Here, there is undoubtedly a nexus between Spicy Peach's website and the brick-and-mortar store through the location and contact information and the ability to purchase gift cards online for use in-store. However, Fauci's complaint is in regard to the video content, not the aforementioned points of overlap.

Fauci's provides examples of cases in which courts have found a sufficient nexus where consumers could purchase the same content online as they could purchase in-store. *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 880 (N.D. Ohio 2018) (ability to make product purchases online); *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131-JFW(SKX), 2017 WL 2957736, at *1 (C.D. Cal. June 15, 2017) (consumers can purchase an array of products on the website, some of which are also available in Hobby Lobby stores). However, Spicy Peach appropriately distinguished these cases from the present case. Neither of Fauci's proposed cases rely *solely* on the ability to purchase the same product online and in-store to create a nexus. Both *Castillo* and *Gorecki* also include alleged negative treatment as to store locations and the ability to purchase gift cards online. *Castillo*, 286 F. Supp. 3d at 880; *Gorecki*, No. CV 17-1131-JFW(SKX), 2017 WL 2957736. This Court is not persuaded that case law supports the claim that the ability to purchase some of the same items is sufficient to create a nexus. Therefore, absent case law to support Fauci's claims, this Court recommends the district court find that there is not a sufficient nexus between Spicy Peach's online video rentals and in-store video rentals, and as such, Spicy Peach's website is not in violation of the ADA.

Spicy Peach, Inc. also argues that websites are never subject to regulations placed by the ADA, regardless of whether a nexus exists. This is a minority approach, followed only by the Fifth Circuit. *See Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530 (5th Cir. 2016). The Fifth Circuit holds that places of public accommodation only include physical places, and as such websites can never be a place of public accommodation due to their very intangible nature. Spicy Peach argues that a physical place is required under the ADA due to a textualist interpretation of the ADA itself. While a textualist reading of the ADA may indeed neglect to mention websites, this is easily attributable to the fact that the internet was not opened to the public until 1991, a year after the ADA was signed into law. This Court recommends the district court follow the majority approach rather than this minority approach followed only by the Fifth Circuit.[5]

Conclusion

Based on the foregoing, it is recommended that Defendant's claim for summary judgment be **granted**, and that this case be **dismissed**.

/s/ Judge A. Cuomo
Andrew Cuomo
United States Magistrate Judge

[5] As the wise adage coined by the Texas Department of Transportation goes, "Don't mess with Texas," and at least for today, this Court agrees.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EMORY

ANTHONY FAUCI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 19-CV-01203
	)	
SPICY PEACH, INC.	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

C.D. SEEK, District Judge:

Plaintiff Anthony Fauci is suing Spicy Peach, Inc., claiming it violated Title III of the Americans with Disabilities Act, 42 U.S.C. § 12188 et seq., by failing to provide closed captioning for all rentable videos. Fauci is seeking declaratory and injunctive relief under 42 U.S.C. § 12188. Plaintiff Anthony Fauci and Defendant Spicy Peach, Inc. have both moved for summary judgment under F.R.C.P. 56. For the foregoing reasons, summary judgement is granted in favor of Plaintiff.

BACKGROUND

I. FACTS

Fauci was born with a hearing impairment, rendering him completely deaf. Partly due to his hearing impairment, Fauci has struggled to obtain a job which pays higher than minimum wage. To watch videos and movies, Fauci relies heavily on closed captioning. Spicy Peach, Inc. is an adult entertainment business which rents adult videos. Spicy Peach, Inc. opened its first physical video rental store in 2000, which was successful at first, but began to decline in sales along with

many other video rental stores with the advent of streaming technology. In 2015, Spicy Peach opened a website, www.spicypeachrentals.com, to operate in addition to its brick-and-mortar store, where customers could rent and stream adult videos completely online. The website features many of the same adult videos available for rent at the brick-and-mortar store, but not all content is the same.

Spicy Peach's website has location information for customers to contact the brick-and-mortar store. The website also gives customers the option to purchase gift cards which can be used either at the brick-and-mortar store or on the website. However, Fauci is not alleging this location information nor the ability to purchase gift cards is inaccessible to him. All transactions consummated online are separate from transactions conducted in-store.[6] Spicy Peach's website does not allow customers to rent videos online to pick up in store. Online rentals are available to download or to stream through the customer's Web browser and compatible Internet-connected TVs. Rental videos are available for 48 hours after the customer has commenced streaming or downloading. Videos rented by Spicy Peach's brick-and-mortar store are on a physical DVD which must be returned 48 hours after the customer has completed their purchase.

On March 15, 2019, Fauci attempted to rent "Home Alone 2: Quarantined Together" from Spicy Peach's website, when he discovered that the video did not provide closed captioning. Fauci's complaint states, "As a parody of the famous 'Home Alone' franchise, dialogue plays a critical role in developing the plot," and Fauci "cannot enjoy the movie without closed captioning due to his hearing impairment." Fauci then rented three additional adult videos, none of which provided closed captioning. Spicy Peach carries "Home Alone 2: Quarantined Together" in its

[6] With the exception of gift cards which can be purchased online and used in store or purchased in store and used online.

brick-and-mortar store, where the video includes closed captioning. Spicy Peach does not carry any of the other three movies Fauci rented in its brick-and-mortar store. Fauci's sole complaint is that the video content available for rent on Spicy Peach's website does not provide closed captioning.

II. PROCEDURAL HISTORY

Fauci filed his claim in district court on April 1, 2019, *pro se*. Fauci has not indicated why he decided to proceed *pro se*. On July 1, 2019, both Spicy Peach, Inc. and Fauci moved for summary judgment. On July 7, 2019, this Court referred the motion to the assigned magistrate judge, the Honorable Andrew Cuomo, for a Review and Recommendation ("R&R"). Judge Cuomo instructed the parties to file their oppositions to the motions by August 1, 2019. Fauci did not oppose the motions, but instead moved for additional time to conduct discovery pursuant to Rule 56(d) of the Federal Rules of Civil Procedure. Although Fauci had ninety days to perform discovery, he failed to finish sorting through the documents he had requested. On August 8, 2019, Judge Cuomo denied Fauci's motion for additional discovery time but granted Fauci until September 1, 2019, to oppose the summary judgment order.

Sometime in early August, Coron & Varis, LLP became aware of Fauci's ADA claims and reached out to him about the possibility of representing him *pro bono*. Fauci agreed, and attorneys from Coron & Varis immediately pored over the discovery documents that Fauci had not yet reviewed. Fauci's newly appointed counsel was able to prepare a new summary judgment motion by the September 1st deadline set by Judge Cuomo, but because of the short time between the beginning of their representation and the filing deadline, the attorneys of Coron & Varis missed a key legal argument, the one now before this Court, that they could have raised in support of Fauci's position. On August 29th Fauci, through his new counsel, moved to stay adjudication of the

summary judgment motion and sought reconsideration of the Order denying the extension of discovery. Judge Cuomo considered the various motions, and on October 15, 2019, granted both motions. Fauci had until January 13, 2020, to complete discovery. On January 27, 2020, Judge Cuomo issued an R&R recommending that the district court grant Spicy Peach, Inc.'s motions for summary judgment against Fauci's ADA claim. Judge Cuomo reminded both parties in the R&R that, pursuant to FRE Rule 72(b), any objection to the R&R was due by February 10, 2020.

On February 1, 2020, Fauci's counsel submitted by electronic filing a letter with this Court seeking an extension of time to object to Judge Cuomo's R&R. However, due to an e-filing error, the letter was not entered in the e-filing system until February 11, 2020. Fauci incorrectly assumed that the letter had been read and acknowledged and the district court was simply late in responding to a routine extension. This Court was not aware of Fauci's letter when it issued an order adopting Judge Cuomo's R&R on February 14, 2020.

On February 20, 2020, Fauci filed a motion opposing this Court's adoption of Judge Cuomo's R&R. Fauci attacked the R&R on new legal grounds - namely that websites are always required to accommodate disabilities under the ADA. Fauci also filed a voluminous series of affidavits and exhibits supporting the new legal argument. The first affidavit contained several hundred pages of material rehashing the legal arguments Fauci had raised before Judge Cuomo's hearing on motion for summary judgment. The second set of affidavits contained no less than eighty-four pages of exhibits and various legal documents in support of his new legal argument.

As an initial matter, Fauci's request for an extension of time to file objections to the R&R is granted, and therefore the January 27, 2020, Memorandum and Order is hereby vacated. This Court will also consider Fauci's objections to Judge Cuomo's R&R as if they had been timely filed. This Court reviews Fauci's objections to the R&R *de novo*.

DISCUSSION

I. Whether New Legal Arguments Not Raised Before a Magistrate Judge May be Raised Before a District Court.

Before this Court today is a matter of first impression in this Circuit: whether a party may raise new legal arguments in opposition to a magistrate judge's R&R. While this Court today must forge a new path ahead for the Thirteenth Circuit, it can do so by consulting a steadily growing body of case law from our sister Circuits across the nation. The Supreme Court has not spoken definitively on this issue. Today, this Court decides that it is constitutionally compelled to consider all novel legal arguments raised before it, even if they were not raised before a magistrate judge when there was opportunity to do so.

In deciding whether Fauci's novel legal argument is to be allowed before this Court, it is prudent to first turn to the Federal Magistrate Act itself. A plain reading of the statute does not include any language indicating that a party can definitively waive their right to object to a magistrate judge's findings. 28 U.S.C. § 636. While some other Circuits have opted to read a waiver in, relying on the Supreme Court's decision in *Thomas v. Arn,* 474 U.S. 140 (1985), this Court does not elect to read in a waiver. The text of the FMA is clear; it does not explicitly provide for any waiver of a party's right to object to a magistrate judge's R&R. If Congress truly desired for parties to be able to waive their right to present new legal arguments before the district court, it could have written that waiver into the statute itself. Congress could also amend the Act to say so.

This Court's decision to require itself to hear novel legal arguments not raised before a magistrate judge follows the approach adopted by the Fourth Circuit. The Fourth Circuit requires district courts to consider all new legal arguments not raised before a magistrate judge or addressed

in the R&R. The Fourth Circuit's approach is based on the concept of *de novo* review. The language of the FMA is clear: "A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C.A. § 636. Since *de novo* review requires the district court to reconsider the issue from the ground up, the Fourth Circuit reasons that district courts are required to hear all arguments brought forth for consideration by the parties. *United States v. George*, 971 F.2d 1113, 1118 (4th Cir. 1992), *as amended* (Aug. 12, 1992). The Fourth Circuit's interpretation of the FMA does not force parties to waive their right to raise new legal arguments so long as the parties properly present the legal arguments before the reviewing district court. *United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985). Once *de novo* review is triggered, the Fourth Circuit holds that a court is required to hear any new arguments in order to comply with the *de novo* standard. *George*, 971 F.2d at 1118.

An irreconcilable tension rests at the heart of the FMA between the need for judicial efficiency and the procedural safeguards established by the Constitution. While it is incontrovertible that the FMA is intended to promote efficiency in the court systems, the need for efficiency does not outweigh the potential risk of constitutional deficiencies. It is the very nature of *de novo* review that compels this Court to hear all legal arguments regardless of whether they have been raised before. Under this analysis, a party should be able to raise a legal argument before the district court if it could have properly raised the legal argument before the magistrate court. A party's failure to raise an argument before the magistrate judge has no impact on its ability to raise a good-faith argument before the district court judge who actually decides the case. This approach is less punishing to parties who do not perfectly comply with the procedural requirements of our

legal system, while still requiring the parties to properly raise an objection before the district court in order to obtain *de novo* review.

While Fauci's objection was not properly filed on time, it was this Court's own clerical failure that caused Fauci's objection to go unnoticed. Fauci properly (and timely) objected to the R&R and now seeks to raise a new legal argument in support of his opinion. Because Fauci has properly raised an objection before this Court, he is entitled to *de novo* review. It is the opinion of this Court that Fauci's right to *de novo* review also affords him the right to raise any new legal argument that could have been raised before the magistrate judge.

The importance of this Court hearing Fauci's new legal argument is particularly potent given the facts of this case. While Fauci's initial failures stemmed from his *pro se* representation, Fauci is now represented by competent counsel who is attempting to tailor arguments to the rapidly evolving legal questions and theories around ADA accommodation in an increasingly digital age. Spicy Peach, Inc. urges this Court to completely foreclose Fauci's ability to raise a relevant argument merely because Fauci failed to raise the argument at the first opportunity he could have done so. However, this Court cannot refuse, and indeed must hear, Fauci's new argument for two reasons. First, outright refusing to hear the new argument is constitutionally suspect in light of the text of the FMA and the procedural protections afforded to litigants by the Constitution. This is especially true insofar as the Constitution is silent in the realm of judicial efficiency. While the FMA aspires to speeding up the judicial process, this necessarily conflicts with the system set up by Congress shortly after the Constitution's ratification. Second, refusing to hear the new argument is likely to mislead this Court when deciding the second issue of today's case by presenting this Court with only a partial analysis of the burgeoning legal landscape.

Because this is an issue of first impression for the Thirteenth Circuit, this Court would be remiss to not analyze all viable approaches to the legal question. Even though this Court today chooses to follow the path set by the Fourth Circuit, it does so recognizing that the Fourth Circuit stands as a minority amongst its brethren. The other approach followed in the First, Second and Eleventh Circuits vests district courts with the discretion to entertain new legal arguments not raised before the magistrate judge. The discretion is grounded in the understanding that district courts are vested with "ultimate adjudicatory power over dispositive motions." *Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009). The First, Second and Eleventh Circuits reason that giving the district court flexibility to choose which new arguments to hear honors the original intent of 28 U.S.C. § 636. On a more basic level, federal courts receive their grants of jurisdiction and authority directly from Congress, which imbued district courts with broad discretion in areas of fact. *Williams*, 557 F.3d at 1291.

Discretion is a broad brush, and various circuits have adopted differing approaches for how and when that discretion should be applied. The most stringent standards are typified by the district courts of the First Circuit, which virtually never hear novel legal arguments not raised before the magistrate judge. *See Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988) ("We hold categorically that an unsuccessful party is not entitled as of right to *de novo* review by the judge of an argument never seasonably raised before the magistrate"). The First Circuit's approach to discretion is predicated on the idea that the FMA was intended to increase efficiency and streamline the judicial process. 28 U.S.C. § 636. A magistrate judge's R&R is designed to help district court judges analyze and decide legal issues without having to fully preside over the matter themselves. The First Circuit does not want new legal arguments that have not been considered and analyzed by a magistrate judge. *Paterson-Leitch*, 840 F.2d at 991.

The First Circuit's view of discretion is focused on promoting judicial efficiency. However, this Court worries that such a focus on efficiency may come at the cost of depriving litigants of too much process. Additionally, this Court is worried about placing an undue burden on parties to fully litigate their cases, regardless of the circumstances, in front of a magistrate judge. While the magistrate judges of this district, and indeed across the country, are capable and impartial arbiters of the law, denying parties the ability to fully litigate an issue which only a district court judge may make the final decision on (such as the injunction in this case) too strongly implicates the constitutional question that lies at the heart of the FMA. It is district judges, not magistrate judges, who Congress anointed as the ultimate arbiters in the federal court system. The First Circuit's approach seems counterintuitive in completely taking from plaintiffs any chance of raising new legal arguments in front of a district court judge.

Alternatively, the Second Circuit employs a balancing test to determine whether discretion should be exercised to hear a novel legal argument. The Second Circuit realizes that imbuing district courts with ultimate adjudicatory power runs the risk of leading to inconsistent results because there is no bright line rule for when a district court should hear novel arguments not addressed in the R&R. Other districts offset the issue by balancing different factors. *See Wells Fargo Bank N.A. v. Sinnott*, No.2:07-CV-169, 2010 WL 297830, at *4 (D. Vt. Jan. 19, 2010). The District of Vermont went as far as to lay out a 6-factor test to be employed. The test looks to: (1) the reason for the litigant's previous failure to raise the new legal argument; (2) whether an intervening case or statute has changed the state of the law; (3) whether the new issue is a pure issue of law for which no additional fact-finding is required; (4) whether the resolution of the new legal issue is not open to serious question; (5) whether efficiency and fairness militate in favor or against consideration of the new argument; and (6) whether manifest injustice will result if the

new argument is not considered. *Id.* None of the factors are dispositive, but rather serve as guideposts for analyzing what caused the plaintiff's failure in the first place. While this Court does not believe discretion is the appropriate standard for the Thirteenth Circuit, this Court considers the balancing test employed by the Second Circuit to be the cleanest approach to determining whether discretion should be employed and the most representative of striking a balance between the tensions at the heart of the FMA.

This Court would reach the same result applying the Second Circuit's balancing test that it reaches applying the Fourth Circuit's approach. The fourth factor is implicated in today's case. Here, Fauci brings forward a novel issue of the law - whether pornography distributed on the internet is subject to the ADA. This issue has not been decided before this Court, or any other Court within the federal judicial system. This Court has reservations about deciding novel legal issues without conducting the full range of proceedings and fact finding available to this Court. However, the fact that this is a novel legal issue is not dispositive, and ultimately does not weigh heavily in this Court's analysis.

Moreover, to the third factor, the matter will not require any additional fact finding in order to resolve. Today's case has no material question of fact, and thus no additional fact finding is required. This Court only needs to address a burgeoning legal question in a rapidly evolving area of the law. Not having to act as a full fact finder and being able to rely on the fact finding already conducted by the magistrate court is fully within the spirit of the FMA and makes this Court's job easier and quicker to perform. A sizable portion of cases applying the Wells Fargo test involve a *pro se* litigant advancing burdensome and unnecessary legal practices. See *Amadasu v. Ngati*, No. 05-CV-2585 RRM LB, 2012 WL 3930386, at *2 (E.D.N.Y. Sept. 9, 2012). Here, Fauci is no longer *pro se*, and is not submitting a lay person's inarticulate attempts at legal writing. Rather, Fauci's

counsel has timely submitted carefully researched and argued legal positions that are applicable to a new and important area of the law.

Even if this Court were to apply the *Wells Fargo* balancing test, this Court would rule in favor of hearing Fauci's new argument. Although this Court holds unequivocally that the *de novo* approach outlined by the Fourth Circuit is the appropriate path to take, this Court's analysis is further bolstered by the knowledge that the outcome would be the same under the majority approach. Our adversarial system often has the consequence of awarding victory to the side that is best prepared; the deck is stacked against lay persons representing themselves.

Applying the approach pioneered in the Fourth Circuit in the interest of safeguarding procedural protections grounded in constitutional rights, this Court determines that the *de novo* review required by the FMA compels it to hear Fauci's novel legal argument even though he failed to raise the argument in front of Magistrate Judge Cuomo. This approach affords plaintiffs, such as Fauci, the broadest opportunity to raise their arguments in front of an Article III judge and ensure that they can fully avail themselves of the American legal system. Even if this Court were to opt for a discretionary approach by applying the balancing test laid out in *Wells Fargo*, this Court would arrive at the same conclusion; the damage to efficiency from hearing Fauci's new legal argument would be outweighed by the injustice that would occur if this Court chose to ignore the new argument. This is especially true in light of the significant impact this will have on citizens like Fauci who are supposed to be protected under the auspices of the ADA. Accordingly, this Court must hear Fauci's novel legal argument and will do so now.

II. Whether Spicy Peach's Website is a Place of Public Accommodation Under the ADA.

Whether a website is considered a place of public accommodation under the Americans with Disabilities Act of 1990 (the "ADA") is yet another issue that has not been decided in this Circuit. Title III of the ADA prohibits discrimination on the basis of disability in public accommodations and commercial facilities. 42 U.S.C.S. § 12182. There is no question in today's case whether Fauci's deafness is considered a disability under the ADA. 42 U.S.C.S. § 12102.[7] The question arises however whether Spicy Peach's website is considered a "public accommodation," subject to the accessibility requirements of the ADA. Similar to the magistrate issue, this Court can look to sister courts to determine the appropriate reading. There is currently a circuit split regarding websites as a place of public accommodation. This Court elects to adopt the minority approach, followed by the First and Seventh Circuits, in the Thirteenth Circuit. In light of the purpose of Title III to promote "the full and equal enjoyment" of goods and services enjoyed by those without disability, this Court holds that Spicy Peach's website is a place of public accommodation under the ADA. 42 U.S.C.S. § 12182(a).

A. Arguments Presented to the Magistrate Judge

Fauci first urges this Court to re-evaluate the magistrate's recommendations regarding the majority, nexus, approach. Fauci argued in front of the magistrate, and again in front of this Court on *de novo* review, that Spicy Peach's online video service has a sufficient nexus to Spicy Peach's physical video stores so to render Spicy Peach's online video service a "public accommodation" under the ADA. This majority approach, followed by the Sixth, Nineth, and Eleventh Circuits, looks to a nexus between the website and a physical space. See *Haynes v. Dunkin' Donuts LLC et*

[7] "Physical or mental impairment" includes hearing impairments.

al, 741 Fed. App'x 752 (11th Cir. 2018); *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946 (N.D. Cal. 2006); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000).

Fauci argues that since Spicy Peach's online video service provides some of the same video content available at Spicy Peach's physical video store, that a sufficient nexus exists. The magistrate's recommendation explains in detail why this argument was rejected, and this Court agrees with the magistrate. While it is unclear that the ability to purchase the same items is sufficient to create a nexus, is it abundantly clear that both the ability to purchase gift cards for use in store and store location information alone *are* sufficient. *See Haynes*, 741 Fed. App'x at 754. Thus, it is unclear the weight this Court should give Fauci's argument in the absence of such other defining website features. However, this Court need not decide today whether the same item available for purchase online and in-store is sufficient. This Court is not persuaded that the majority approach is appropriate for both policy reasons and in light of the legislative history surrounding the ADA.

Spicy Peach argues that this Court should apply the Fifth Circuit's approach, which was rejected by the magistrate. The Fifth Circuit requires a physical place in order to be considered a place of public accommodation. *See Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530 (5th Cir. 2016). Under this approach, a website is *never* a place of public accommodation. Spicy Peach supports this with a textualist interpretation of the ADA, which it presented to the magistrate. For both policy reasons and a view of the legislative history surrounding the creation of the ADA, this Court declines to adopt the Fifth Circuit's approach. Although the ADA's examples of public accommodations only include actual physical spaces open to the public, this Court finds that the legislative history of the ADA and the language of the statute itself makes it clear that the ADA was intended to adapt to new technology.

B. Plaintiff's New Argument

Fauci's new argument alleges that online services which otherwise meet the requirements of public accommodations (*i.e.* number of employees) are always subject to the ADA, regardless of whether there is a nexus to a physical storefront. As previously discussed, Fauci did not bring this legal argument before magistrate judge Cuomo. However, because a review of a magistrate judge's recommendation is *de novo*, this Court is required to hear all new arguments, even ones not presented before the magistrate. 28 U.S.C.S. § 636(b)(1)(b). The minority approach is followed by the First and Seventh Circuit. *See Nat'l Ass'n of the Deaf v. Netflix*, 869 F.Supp.2d 196 (D. Mass. 2012); *Morgan v. Joint Admin Bd*, 268 F.3d 456 (7th Cir. 2001). Under this approach, Spicy Peach is subject to the ADA by virtue of its function, rather than by virtue of its form (*i.e.* Spicy Peach's function of video streaming is relevant, rather than whether the video is accessible by an in-store or online purchase). The ADA lists 12 categories of public accommodation. 42 U.S.C.S. § 12181(7). Fauci contends, and both Judge Cuomo and this Court agree, that Spicy Peach's website could fall under at least 3 of these: "place of exhibition and entertainment," "place of recreation," and "sales or rental establishment." 42 U.S.C.S. § 12181(7).

This Court today adopts the minority approach for the Thirteenth Circuit. Legislative history indicates that while the ADA did not contemplate websites due to the technology existing at the time, Congress intended the ADA to adjust to changing technology.[8] The minority approach is additionally supported by a textualist reading of the statute. Utilizing the doctrine of *ejusdem generis*, video services like Spicy Peach's are of the same general class as those listed in the

[8] H.R. Rep. 101-485, 108, 1990, U.S.C.C.A.N. 303, 391 ("The Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace w/ the rapidly changing technology of the times").

definition section of the ADA. 42 U.S.C.S. § 12181(7). Fauci also rests much of the argument on the language of the ADA itself which covers services "of" public accommodation, not services "at" or "in" a public accommodation.[9] 42 U.S.C.S § 12182(a). It is also relevant that the Department of Justice, the body tasked with enforcing ADA compliance, is of the view that the ADA applies to public accommodations' websites.[10]

Although there may be some public policy implications when considering pornography to be a place of recreation, these considerations amount to nothing more than a normative moral evaluation on the types of services Spicy Peach provides. Normative evaluations are not sufficient to override the purpose of the ADA. Disabled adults have the same right as any other person to enjoy pornography and other adult content in the sanctity of their homes. Spicy Peach's failure to provide adequate closed captioning on its videos has deprived the deaf of the "full and equal enjoyment" enjoyed by hearing individuals. In essence, Spicy Peach deprived Fauci, and other deaf individuals, of access to Spicy Peach's services, in violation of the ADA. Fauci's request for injunctive relief is hereby granted. Spicy Peach must provide closed captioning on all of its videos available on the video streaming service.

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[9] *See Nat'l Fed'n of the Blind*, 452 F.Supp.2d at 953 ("The statute applies to the services of a place of public accommodation, not services in a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute"); *Nat'l Ass'n of the Deaf*, 869 F.Supp.2d at 201 ("The ADA covers the services "of" a public accommodation, not services "at" or "in" a public accommodation").

[10] Letter from Stephen E. Boyd, Assistant Attorney General, DOJ (Sept. 25, 2018), https://images.cutimes.com/contrib/content/uploads/documents/413/152136/adaletter.pdf.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgement is hereby **GRANTED**, and this Plaintiff is hereby awarded **declaratory relief** and an **injunction** against Defendant.

/s/ Judge C.D. Seek_____
Chester D. Seek
United States District Judge