BRYAN CAVE

BRYAN CAVE LLP Three Embarcadero Center, 7th Floor, San Francisco, CA 94111-4070
T: 415 675 3400 F: 415 675 3434 bryancave.com

Daniel Wheeler
Direct: 415/675-3472
Fax: 415/675-3672
daniel.wheeler@bryancave.com

April 27, 2017

Mr. R. Bruce Carlson, Esq.
Mr. Benjamin J. Sweet, Esq.
Carlson, Lynch, Sweet, Kilpela & Carpenter LLP
1133 Penn Avenue 5th Floor
Pittsburgh, PA 15222

Mr. Scott Kamber
KamberLaw LLC
100 Wall Street, 23rd Floor
New York, NY 10005

Re: Your Demand Letters to California Banks

Messrs. Carlson, Sweet and Kamber:

We represent the California Bankers Association, whose members include banks doing business in the state of California. Your firms have sent legally questionable demand letters to several CBA member banks alleging violations of the Americans With Disabilities Act. The CBA and its member banks have serious concerns about your firms' allegations and tactics.

CBA's member banks are committed to ensuring access to all customers in accordance with the aims of the ADA. Banks across California over the years have made and continue to make extensive modifications to their facilities, teller counters, automated teller machines, restrooms and parking lots to ensure accessibility. These ongoing investments of time and money include efforts to ensure that their disabled customers can access bank services in digital formats.

Your demand letters are essentially forms that share several problematic features:

1. You assert that you represent disabled individuals who access or attempt to access internet-based banking services and whose rights to such access are protected under the ADA. However, your "clients" are essentially testers, generally are not customers or account holders at the bank being targeted, have no genuine need to access that bank's services, and are unlikely to ever return to the bank's website to access its services in the future.

2. You allege that the target bank's website fails to comply with the World Wide Web Consortium's Web Content Accessibility Guidelines, version 2.0 ("WCAG 2.0") and that such a failure is legally actionable even though the U.S. Department of Justice has not promulgated a final

rule adopting those website accessibility standards. In short, you allege a violation of a legal standard that is far from settled.

3. You propose that the bank undertake a comprehensive list of measures to achieve what you assert is the legally required compliance standard. You also include a proposed "Confidential Settlement Agreement" and offer to release the bank from liability in exchange for undertaking the listed measures and paying your legal fees. Then, you offer to assist the bank if other claimants assert claims against the bank for alleged inaccessibility to its website. You should not be surprised to learn that community banks are offended by your offer to assist the bank immediately after extracting a settlement from them.

CBA's members, most of whom are small community banks, are understandably frustrated by the tactics embodied in your demand letters. These community banks take great pains to meet their customers' needs and would gladly work with them individually if actual desires to obtain services were not being met. But when they receive aggressive demand letters from out-of-state law firms representing questionable plaintiffs who are not bank customers, it feels like extortion to these banks. They (and we) believe you are exploiting an undefined area of the law to extract settlements that primarily benefit you, the lawyers.

CBA vigorously disagrees with the legal conclusions presented in your demand letters. Contrary to your assertion that "there is little doubt that the Title III accessibility requirements apply to websites," the U.S. Department of Justice still has not promulgated rules regarding website accessibility under the ADA, and does not anticipate issuing its notice of proposed rulemaking in the matter until 2018. It is far from clear that, with the dramatic change in administrations and a very different Attorney General in charge, anything resembling the standards proposed by the Obama administration will ever be adopted. Moreover, if and when the DOJ does eventually issue its regulations, it is highly likely that banks and other businesses subject to the rules will be given a reasonable amount of time to come into compliance. Therefore, your allegations of noncompliance and intimations of liability with respect to possible DOJ regulations that have not even been promulgated are certainly overreaching, if not outright deceptive.

Your assertions are also contradicted by a California federal district court just last month in *Robles v. Domino's Pizza LLC,* in which the U.S. District Court for the Central District of California dismissed a suit for similar claims based on Domino's Pizza's consumer-facing website on grounds that the DOJ has not issued clear guidance on accessibility standards for websites or mobile applications. As the *Domino's Pizza* court describes, the DOJ in its 2010 notice of proposed rulemaking invited the public to respond to questions about what the appropriate standards for website accessibility should be, citing the WCAG 2.0 model as just one option. It is evident, the court stated, that the DOJ is far from settled in the standards that it expects entities to follow, and the DOJ in fact has not followed through with a formal rulemaking. Therefore, the court held that it would violate Domino's Pizza's rights of constitutional due process to hold it responsible for complying with "standards" that the DOJ has not yet promulgated.

On this point the court relied on *United States v. AMC Entertainment, Inc.* in which the Ninth Circuit Court of Appeals held that it was a violation of theater owners' due process rights to require

them to modify multiplexes that had been designed or built before the government gave fair notice of its interpretation of Section 4.33.3 of the ADA Accessibility Guidelines ("ADAAG") related to viewing angle. The text of Section 4.33.3 does not specify what is prohibited, and the government could have, but did not, remedy the vagueness by officially amending Section 4.33.3.

The *Domino's Pizza* court held that the *AMC* decision controls here, and stated: "Here, too, Plaintiff seeks to impose on all regulated persons and entities a requirement that they 'compl[y] with the WCAG 2.0 Guidelines' without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic. [Ref. omitted] This request flies in the face of due process."

The court also declined to give weight to the DOJ's prior issuances of "Statements of Interest," consent decrees, and settlements where it has required entities to comply with particular WCAG 2.0 criteria, noting that these have often applied inconsistent standards. In doing so, the court again followed the lead of the Ninth Circuit, which has "declined to give deference to [ADAAG] guidelines that have not yet been adopted by the DOJ" and has "refused to defer to a proposed [as opposed to final] regulation published by the DOJ itself." *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010).

The court thus dismissed the case under the primary jurisdiction doctrine, pending resolution of an issue that is within the special competence of an administrative agency, in this case the DOJ or possibly ADAAG. The court "[called on] Congress, the Attorney General, and the DOJ to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary." Other courts in California confronted with this issue are likely to do the same.

Your letters therefore advocate for a position squarely in conflict with binding case law in California. The fact that you gentlemen are not licensed to practice law in California is certainly no excuse for misrepresenting the law. Our client is taking a stand against your firms' misleading demands and those made by similar bad faith claimants. Settling or even discussing your demands would only encourage additional frivolous litigation demands from other opportunistic out-of-state lawyers. Accordingly, CBA demands that Carlson Lynch and Kamber Law retract the threats of legal action made via correspondence to CBA member banks to date, and cease and desist from further such threats or demands until such time as the DOJ promulgates rules concerning website accessibility.

Very truly yours,

Daniel Wheeler
Partner

Merrit Jones
Associate

cc: *via electronic mail: LChan@CalBankers.com*
Leland Chan, California Bankers Association