UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-22397-CIV-WILLIAMS/MCALILEY

WINDY LUCIUS and
JAMES WATSON,

Plaintiffs,

vs.

FORT TACO, LLC,

Defendant.
_____/

REPORT AND RECOMMENDATION

Defendant, Fort Taco, LLC, filed a Motion to Dismiss, which the Honorable Kathleen M. Williams referred to me for a report and recommendation. (ECF Nos. 10, 12). Plaintiffs, Windy Lucius, and James Watson filed a response. (ECF No. 11). Defendant filed a reply, and Plaintiffs filed two Notices of Supplemental Authority. (ECF Nos. 13, 14, 17). Having carefully reviewed the parties' memoranda, the pertinent portions of the record and the applicable law, for the reasons explained below, I recommend that the Court grant the Motion to Dismiss.

I. BACKGROUND

This is an action pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiffs, who are blind, allege that they were denied access to, and the benefits of, Defendant's website because numerous portions of the website cannot be read by Screen

Reader Software, which is designed to assist persons who are visually impaired. (ECF No. 1 at ¶¶ 2, 9). Plaintiffs claim that Defendant's website is an extension of its physical restaurant, and that it allows customers to make reservations, purchase gift cards, explore menu items and take advantage of specials. (*Id*.). Plaintiffs allege that they attempted to access Defendant's website, but many features were inaccessible to them because those features do not interface with and are not readable by Screen Reader Software. (*Id*.). Plaintiffs acknowledge that Defendant's website contains an accessibility widget but allege that this tool does not function properly. (*Id*.). Plaintiffs assert that they continue to attempt to utilize Defendant's website because they wish to patronize Defendant's brick and mortar restaurant and would like to know in advance about new products, items available for purchase, and promotions. (*Id*. at ¶¶ 10, 13).

Plaintiffs bring one claim for violation of Section 504 of the Rehabilitation Act. They allege that Defendant is subject to the Rehabilitation Act because it received federal financial assistance in the form of loans under the Paycheck Protection Program ("PPP"). (*Id*. at ¶¶ 7, 1-1). On its PPP applications, Defendant reported that it intended to use the loan proceeds for payroll expenses. (ECF No. 1-1 at pp. 2, 6). Plaintiffs allege that Defendant's website is a "program or activity" within the meaning of the Act, and that Plaintiffs were denied access to the website solely because of their disability. (ECF No. 1 at ¶¶ 11(f)). Plaintiffs further allege that Defendant acted with deliberate indifference because it is aware of the inaccessible features of its website and failed to remedy them. (*Id*. at ¶ 12).

Defendant moves to dismiss the Complaint for failure to state a claim upon which relief can be granted and raises three arguments: (1) any alleged deficiencies in its website cannot constitute disability discrimination because Defendant operates a physical restaurant and thus, its website is not the sole means of accessing its goods and services, relying upon the Eleventh Circuit's recent decision in *Gil v. Winn Dixie*, 993 F.3d 1266 (11th Cir. 2021); (2) the Rehabilitation Act is inapplicable because the PPP loans that Defendant received are not federal financial assistance within the meaning of the Rehabilitation Act; and (3) Plaintiffs have not alleged sufficient facts to show that Defendant acted with deliberate indifference. (ECF No. 10 at 3-9).

Plaintiffs oppose the Motion to Dismiss and contend that (1) *Gil* is inapplicable because the decision is limited to whether a website is considered a place of public accommodation, which is not an issue here, and *Gil* does not bind this Court because the Eleventh Circuit has not issued a mandate and has before it a petition for rehearing;[1] (2) whether the PPP loans that Defendant received constitute federal financial assistance is a question of fact that cannot be decided on a motion to dismiss and (3) the deliberate indifference inquiry cannot be decided on a motion to dismiss because it is a fact intensive inquiry that requires discovery. (ECF No. 11 at 6-12).

The Court must first address the threshold issue of the applicability of the Rehabilitation Act. As explained below, the Court concludes, as a matter of law, that

[1] On December 28, 2021, after Plaintiffs filed their response memorandum, the Eleventh Circuit granted the petition for panel rehearing, dismissed the appeal as moot, and vacated its opinion. *Gil v. Winn-Dixie Stores, Inc.*, No. 17-13467, 2021 WL 6129128, at *1 (11th Cir. Dec. 28, 2021).

Defendant's receipt of PPP loans does not constitute federal financial assistance within the meaning of the Rehabilitation Act.[2] Accordingly, the Complaint fails to state a claim upon which relief can be granted.

II. ANALYSIS

A. The Rehabilitation Act

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance* …." 29 U.S.C. § 794(a) (emphasis added). The statute defines "program or activity" to include "an entire corporation, partnership, or other private organization, or an entire sole proprietorship if assistance is extended to such corporation, partnership, private organization, or sole proprietorship *as a whole* …." *Id*. at § 794(b)(3)(A)(i) (emphasis added).

While Section 504 does not define the term "Federal financial assistance," the legislative history provides guidance. The Senate Report gives this explanation of "federal financial assistance" within the meaning of Section 504:

> Federal financial assistance extended to a corporation or other entity "as a whole" refers to situations where the corporation receives *general assistance that is not designated for a particular purpose*. Federal financial assistance to the Chrysler Company for the purpose of preventing the company from going bankrupt would be an example of assistance to a

[2] In light of this conclusion, the Court does not address Defendant's remaining arguments for dismissal.

> corporation "as a whole." Federal aid which is limited in purpose, e.g., Job Training Partnership Act (JPTA) [*sic*] funds, is not considered aid to the corporation as a whole, even if it is used at several facilities and the corporation has discretion to determine which of its facilities participates in the program. A grant to a religious organization to enable it to extend assistance to refugees would not be assistance to the religious organization as a whole if that is only one among a number of activities of the organization.

S. REP. 100-64 at *17 (1987) (emphasis supplied).

B. The Paycheck Protection Program

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") created the Paycheck Protection Program ("PPP"), which authorizes the Small Business Administration ("SBA") to guarantee loans to small businesses affected by the COVID-19 pandemic. 15 U.S.C. § 636(a)(36)(B), (F). "The [CARES] Act is in large part aimed at helping businesses make payroll and pay operating expenses in order to keep people employed through the economic downturn." *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1247 (11th Cir. 2020). The PPP is one of the programs "designed to accomplish that goal." *Id*. at 1247.

The SBA administers PPP loans under section 7(a) of the Small Business Act, which is the SBA's primary program for providing financial assistance to small businesses.[3] 15 U.S.C. § 636(a)(36)(B). The PPP allows eligible small businesses to obtain guaranteed

[3] Congress created the PPP by adding subparagraph (36) to the SBA's existing Section 7(a) loan program, which is codified in 15 U.S.C. § 636(a). *See* 15 U.S.C. § 636(a)(36).

loans to cover certain expenses, and those loans may be forgiven if the recipient uses the proceeds in a specified manner.[4] Several provisions of the PPP are relevant here.

First, subparagraph 36(F) sets forth the following "[a]llowable uses of covered loans":

> During the covered period, an eligible recipient may, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for --
>
> (I) payroll costs;
>
> (II) costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums;
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> (III) employee salaries, commissions, or similar compensations;
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> (IV) payments of interest on any mortgage obligation …;
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> (V) rent (including rent under a lease agreement);
>
> (VI) utilities;
>
> (VII) interest on any other debt obligations that were incurred before the covered period;
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> (VIII) covered operations expenditures, as defined in section 636m(a) of this title;
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> (IX) covered property damage costs, as defined in section 636m(a) of this title;
>
> (X) covered supplier costs, as defined in section 636m(a) of this title; and
>
> (XI) covered worker protection expenditures, as defined in section 636m(a) of this title.

[4] To be clear, as summarized below, the statute and regulation establish criteria for receipt of a PPP loan and criteria for forgiveness of that loan.

Id. at § 636(a)(36)(F)(i).

Second, 15 U.S.C § 636m(b) limits the allowable uses for loan proceeds which are eligible for loan forgiveness.[5] An eligible borrower may receive loan forgiveness equal to the amount of PPP loan proceeds used for (i) payroll costs, (ii) mortgage interest, (iii) rent, (iv) utilities, (v) covered operations expenditures, (vi) covered property damage costs, (vii) covered supplier costs, and (viii) covered worker protection costs. *See* 15 U.S.C. § 636m(b). The statute further limits eligibility for loan forgiveness to eligible recipients who use "at least 60 percent of the covered loan amount for payroll costs" noting that they may use up to 40 percent of the covered loan amount for the remaining uses specified in section 636m(b). *Id*. at 636m(d)(8).

The CARES Act delegates authority to the SBA Administrator "to issue regulations to carry out" the PPP. *See* 15 U.S.C. § 9012. Pursuant to this authority, the SBA issued an interim final rule on April 15, 2020 (the "Interim Final Rule"), which further narrows the permissible uses of a PPP loan. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (Apr. 15, 2020).

Specifically, the Interim Final Rule instructs that proceeds of a PPP loan "are to be used for" (i) payroll costs, (ii) costs of group health insurance benefits, (iii) mortgage interest payments, (iv) rent, (v) utilities, (vi) interest payments on debt obligations incurred

[5] The Complaint alleges that Defendant obtained PPP loans but does not indicate whether Defendant sought forgiveness of those loans. (ECF No. 1-1 at 1, 5). For the sake of completeness, the Court addresses the limitations applicable to forgiveness of PPP loans. Even if Defendant has not sought loan forgiveness, the other limitations applicable to an award and use of PPP loans discussed here demonstrate that receipt of a PPP loan does not constitute federal financial assistance to the company as a whole, as intended by the Rehabilitation Act.

before February 15, 2021 and/or (vii) refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. *Id*. at 20,814. It also requires that "at least 75 percent of the PPP loan proceeds *shall* be used for payroll costs."[6] *Id*. (emphasis added). The SBA justified these more stringent limitations on a borrower's ability to use PPP loan proceeds this way:

> While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Act (15 U.S.C. 636(a)), the Administrator believes that finite appropriations and the structure of the Act warrant a *requirement that borrowers use a substantial portion of the loan proceeds for payroll costs*, consistent with Congress' overarching goal of keeping workers paid and employed.
>
> *****
>
> This *limitation on the use of the loan funds* will help to ensure that the finite appropriations available for these loans are directed toward payroll protection, as each loan that is issued depletes the appropriation, regardless of whether portions of the loan are later forgiven.

Id. (emphasis added).

The Interim Final Rule thus make clear that the restrictions contained therein are not confined to only those borrowers who seek loan forgiveness but, rather, apply to all borrowers that receive PPP loans. The Interim Final Rule also makes clear that noncompliance will result in serious consequences. A borrower who uses PPP funds for "unauthorized purposes" will be "direct[ed] to repay those amounts" and a borrower who

[6] Congress, in the Paycheck Protection Flexibility Act of 2020, later lowered the 75% threshold that the SBA had set by mandating that at least 60% of PPP loan proceeds be used for payroll costs. Pub. L. No. 116-142 (June 5, 2020).

"knowingly use[s] the funds for unauthorized purposes … will be subject to additional liability such as charges for fraud." *Id*.

Finally, subparagraph 36(G) requires that PPP loan applicants submit a good faith certification with their application. 15 U.S.C. § 636(a)(36)(G)(i). The statute provides that an "eligible recipient" applying for a PPP loan "shall make a good faith certification" that, among other things, "the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient" and "the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments …." *Id*. at § 636(a)(36)(G)(i)(I), (II). The Interim Final Rule also requires the applicant to certify that "I understand that if the funds are knowingly used for unauthorized purposes, the Federal Government may hold me legally liable such as for charges of fraud." 85 Fed. Reg. at 20,814.

C. Section 504 is Inapplicable

Plaintiffs allege that Defendant is subject to Section 504 of the Rehabilitation Act because it received PPP loans. (ECF No. 1 at ¶ 7; ECF No. 1-1). As mentioned, Section 504 is applicable to private entities that receive federal financial assistance "as a whole." 29 U.S.C. § 794(b)(3)(A)(i). The legislative history of the Rehabilitation Act clarifies that federal financial assistance is extended to a private entity "as a whole" when the entity "receives general assistance that is not designated for a particular purpose." S. REP. 100-64 at *17. The Court concludes that the plain language of Title 15 U.S.C. § 636(a)(36) and the SBA's Interim Final Rule demonstrates that a PPP loan is not general assistance but, rather, is designated for a particular purpose.

A PPP loan recipient's use of PPP funds, regardless of whether loan forgiveness is sought or received, is constrained by the statute and regulation. Recipients are not free to use PPP loan proceeds as they see fit to maintain their operations. Rather, the statute sets out a list of "allowable uses" and the PPP loan applicant must certify that the funds will be used for specified purposes, namely "to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments." 15 U.S.C. § 636(a)(36)(G). The Interim Final Rule reduces the list of allowable uses even further and mandates that PPP loan proceeds be used to pay particular costs. 85 Fed. Reg. at 20,814.

Significantly, the statute and regulation mandate that recipients use a specified percentage of PPP loan proceeds for payroll costs.[7] *Id*; 15 U.S.C. § 636m(b). Moreover, PPP loan recipients are subject to harsh consequences for misuse of PPP funds, including repayment of the loan and, for knowingly misusing the funds, federal fraud charges. 85 Fed. Reg. at 20,814.

Plaintiffs argue that the PPP constitutes general assistance because Defendant "already certified that it was going to use the loan for ongoing operations, not a particular purpose." (ECF No. 11 at 11). Plaintiffs rely upon Defendant's certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." (ECF No. 11 at 10). This certification does not support Plaintiffs' argument because it addresses why Defendant needs a PPP loan, not how it intends to use the loan proceeds. In fact, in its PPP applications, Defendant was clear that it intends to use

[7] This priority is reflected in the title of the aid program, the *Paycheck* Protection Program.

all of the loan proceeds for payroll costs. (ECF No. 1-1 at 2, 6). Moreover, a different certification addresses use of PPP funds. Specifically, Defendant, like all borrowers who apply for a PPP loan, must also certify that it will use the funds for limited purposes (i.e., to retain workers, maintain payroll, or make mortgage, lease, and utility payments). 85 Fed. Reg. at 20,814. This certification, coupled with the statutory and regulatory limitations of PPP funds, reinforce the Court's conclusion that a PPP loan is designated for a particular purpose.

Plaintiffs also argue that they "should be allowed to conduct discovery to determine how the PPP funds were used and to review loan documents." (ECF No. 11 at 8). The Court disagrees. "[T]he inquiry of whether Defendants received 'federal financial assistance' within the meaning of the [statute at issue] focuses on the intent of Congress when enacting the [statute], and not on the acts of the recipient of the funds." *Shotz v. American Airlines, Inc.*, 323 F.Supp.2d 1315, 1319 (S.D. Fla. 2004) (citations omitted).

The Court has considered the decision of the Eleventh Circuit Court of Appeals in *Moore v. Sun Bank of North Florida, N.A.*, 923 F.2d 1423 (11th Cir. 1991). In *Moore*, the Eleventh Circuit, in a split decision, concluded that a national bank's participation in the SBA's guaranteed loan program constitutes receipt of federal financial assistance pursuant to Section 504. The *Moore* decision is distinguishable for several reasons. First, *Moore* preceded the creation of the PPP by many years, and it considered the SBA's guaranteed loan program more broadly. This distinction is important because, unlike traditional SBA loans which can be used for a variety of general business purposes, the PPP and implementing regulations significantly limit how the borrower can utilize PPP loan

proceeds; they also dictate how the borrower must apportion loan proceeds among the allowable uses. *See* 15 U.S.C. § 636(a)(36)(F), (G); 85 Fed. Reg. at 20,814; 15 U.S.C. § 636m(b).

Second, the *Moore* Court did not address the legislative history discussed above, nor did it examine whether the assistance was provided to the entity "as a whole." Instead, the Court examined whether contracts of insurance or guaranty are excluded from the definition of federal financial assistance (they are not), and whether the bank was a "mere beneficiary of federal funds" or a "recipient" (it was a recipient). *Id*. at 1425-32. Neither of those issues are relevant here. For these reasons, *Moore* does not cause this Court to conclude that Defendant's PPP loans bring it within the scope of the Rehabilitation Act.

I also recognize that another division of this Court recently denied a motion to dismiss a Section 504 claim where the plaintiff, as here, alleged that the defendant's receipt of PPP loans subjected it to the Rehabilitation Act. In *Fernandez v. Bruno Northfleet, Inc.*, the Honorable William P. Dimitrouleas found that allegations that the defendant "owns or operates a business that is the recipient of federal financial assistance" and "as a recipient of financial assistance, Defendant has subjected itself and all of its operations … including its website, to the provisions of the Rehab Act" were "sufficient at the pleading stage." No. 21-cv-80609, 2021 WL 4851378, at *4 (S.D. Fla. Oct. 18, 2021).

The *Fernandez* Court relied upon the *Moore* decision, without further analysis, along with a decision from a district court in Maryland, *Husbands v. Financial Management Solutions, LLC*, No. GJH-20-3618, 2021 WL 4339436, at *8 (D. Md. Sept. 23, 2021). The defendant in *Husbands* raised a different argument: that the Rehabilitation

Act was inapplicable because the Defendant received its PPP loans *after* the acts alleged in the amended complaint. *Id*. Without further analysis, that Court concluded that the allegations were sufficient to state a claim. *Id.*

Plaintiffs also rely upon a district court decision from the Eastern District of Louisiana, *Beverly R. v. Mt. Carmel Academy of New Orleans, Inc.*, 528 F.Supp.3d 451 (E.D. La. 2021). That case too is distinguishable because the defendant argued it was no longer subject to the Rehabilitation Act because its PPP loan had been forgiven. *Id*. at 461. In sum, Plaintiffs do not cite any decisions which analyze whether PPP loans constitute "federal financial assistance" within the meaning of Section 504.[8]

III. CONCLUSION

For the reasons set forth above, the Court concludes that a PPP loan is not financial assistance extended to a company "as a whole" because it is not general assistance but, rather, is designated for a particular purpose. As such, Defendant's receipt of PPP loans does not constitute federal financial assistance within the meaning of the Rehabilitation Act. Accordingly, the Court concludes, as a matter of law, that the Rehabilitation Act does not apply to Defendant. I therefore **RESPECTFULLY RECOMMEND** that the Court

[8] Without offering any analysis, Plaintiffs attach to their Response an excerpt from an SBA "FAQ" page for "Faith-Based Organizations" regarding PPP loans which states that "[r]eceipt of a loan through any SBA program constitutes Federal financial assistance and carries with it the application of certain nondiscrimination obligations." (ECF No. 11-1). While this conclusory sentence supports Plaintiffs' argument, it does not change the Court's analysis. First, Defendant is not a faith-based organization. Second, the FAQ generically uses the term "Federal financial assistance." As explained in this Report and Recommendation, the legislative history of Section 504, by contrast, explains the meaning of the term for purposes of the Rehabilitation Act. Third, the Court notes that an informal FAQ sheet from the SBA is not binding authority, and Plaintiffs have provided no authority for this Court to give it deference.

GRANT Defendant's Motion to Dismiss, (ECF No. 10), and dismiss the Complaint with prejudice.

IV. OBJECTIONS

No later than fourteen days from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable Kathleen M. Williams, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v.* Johnson, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULY RECOMMENDED in chambers at Miami, Florida, this 5th day of January 2022.

CHRIS MCALILEY
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Kathleen M. Williams
Counsel of Record