

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Bloomsybox.com, LLC,

Plaintiff,

v.

Userway, Inc.; John Doe 1-5,

Defendant

C.A. No.

CLASS ACTION

DEMAND FOR JURY

CLASS ACTION COMPLAINT

Plaintiff Bloomsybox.com LLC (hereinafter “Bloomsybox” or “Plaintiff”) individually and on behalf of all other similarly situated (“Class Members”), brings this Complaint against Defendant Userway, Inc.¹ (“Userway”) and alleges the following based on personal knowledge as to its own actions, based on its counsel’s investigations, and upon information and belief as to all other matters as follows:

I. INTRODUCTION

1. Plaintiff brings this action seeking damages caused by Userway’s misleading and false representations in its advertising, its direct marketing, its standard form correspondences with customers, and in its standard form contract regarding its “overlay” products that purport to adjust any website’s underlying code to ensure that the website meets all legal and regulatory standards needed to comply with Title III of the Americans with Disabilities Act (“ADA”). Plaintiff further seeks injunctive relief that would require Userway to discontinue its deceptive practices.

2. The ADA, codified as 42 U.S.C 12101 *et seq.*, seeks to prevent discrimination

¹ Userway operates under the stylized name UserWay. This action refers to the company by the more common capitalization style and reference to Userway should be taken to include UserWay.

based on disability by requiring businesses to make their public accommodations accessible to people with disabilities. In 2010 the Department of Justice asserted that internet websites constitute public accommodations and that ADA requirements to provide access to people with disabilities apply to internet websites.

3. Neither the ADA nor its accompanying regulations set out specific criteria itemizing what makes an internet website accessible or what accommodations a website must incorporate. The World Wide Web Consortium (“W3C”) is an international organization that has published and periodically updated the Web Content Accessibility Guidelines (“WCAG”) as guidelines for website designers to improve internet accessibility to people with a range of disabilities.

4. The ADA does not explicitly incorporate the WCAG. Nevertheless, the WCAG standards and recommendations are commonly viewed as the industry standard for internet website compliance with the ADA. The WCAG is incorporated by reference in Section 508 of the Rehabilitation Act that governs Federal departments and agencies’ use of electronic and information technology. The WCAG is used as the technical standard for multiple international accessibility laws, including the European Accessibility Act (“EAA”) in a policy document known as EAA / EN 301 549.

5. Recent years have seen a dramatic increase in lawsuits alleging that a business’s website does not comply with ADA Title III. Most of these cases are filed by a small number of law firms that file hundreds of nearly identical boilerplate complaints with nearly identical factual allegations.² While such claims are rarely, if ever, tried to verdict, the legal actions are nonetheless

² See, *Martin v. Second Story Promotions, Inc.*, No. 1:22-CV-10438 (MKV), 2024 WL 775140, at *3 (S.D.N.Y. Feb. 26, 2024) (noting that the same plaintiff represented by the same counsel, initiated ten separate ADA website actions with “carbon-copy complaints” in the Southern

disruptive and expensive for the businesses that are sued.

6. The process of remediating a website to ensure ADA compliance requires significant time and effort and can cost tens of thousands of dollars. In 2016, Defendant Userway, began marketing “overlay” products that it claimed obviate the need for the labor-intensive process of manually remediating a website to comply with WCAG standards. Userway has claimed its product, that it calls a “widget” and markets as an “Accessibility Widget,” can be installed in a matter of minutes and that it ensures ADA compliance in plug-and-play fashion. Userway claims that after installation, its widget employs artificial intelligence and automation to repair a website’s underlying code to render a website consistent with WCAG standards. Userway further claims that its product, using artificial intelligence, will continue to automatically ensure ADA compliance and will thereby shield a subscriber from lawsuits alleging ADA violations.

7. Userway’s claims about the efficacy of its products are overstated and many of its specific representations are materially misleading and false—as is its guarantee that its product will ensure that a website is ADA compliant. Userway’s fundamental claim is that installing its widget will, in and of itself, ensure that a website will meet WCAG recommendations and ADA compliance. This is simply untrue. While its widget does add a line of code to a website and installs certain web accessibility tools, this is a far cry from meeting all or even most WCAG standards. Userway’s product leaves most accessibility issues unaddressed. In many cases, installing Userway’s widget actually hinders accessibility, in that Userway’s widget interferes with necessary accessibility technology tools widely used by users with disabilities who require such

District of New York on the same day using largely “identical language to state the same conclusory allegations.”)

accessibility tools to utilize the Internet.³

8. Userway advertises that its products will lower and even eliminate, the possibility that customers will be sued for ADA violations. Userway’s claims in this regard are false. In fact, businesses that use Userway’s products are more likely to be the targets of lawsuits. Use of Userway’s widget serves as a signal that a business has used a flawed shortcut to make its website accessible to people with disabilities—one that actually impedes visually impaired people from using the website.

9. As more fully described below, Userway makes specific and material claims to induce businesses to purchase its widget as an effective alternative to the work required to actually be ADA compliant. Among these inducements is the promise to provide legal support if the business ever faces legal claims that its website does not comply with the ADA. Indeed, Userway makes the illusory claim that paid subscriptions are backed by a “monetary pledge.” Userway’s “pledge” is specifically intended to mislead customers into believing a) that Userway will reimburse customers up to \$1,000,000 in the event of a website accessibility lawsuit; and b) that any customer who has installed Userway’s widget is very unlikely to be named as a defendant in such a lawsuit. In truth, Userway will only honor its “Pledge” in the event that a case is litigated to a judgment. Of course, as Userway is keenly aware, website accessibility cases are never litigated to judgment. Attorneys’ fees, settlement payments, and other costs are not covered. Moreover, Userway provides no substantive legal support at all. A business that faces a lawsuit must then spend thousands of dollars on legal fees to defend against the very lawsuit from which Userway promised to shield it.

³ See, e.g. Overlay Fact Sheet, described *infra* ¶32, section describing responses by users with disabilities to using overlay products including Userway products. Available at <https://overlayfactsheet.com/en/#in-their-own-words> accessed June 18, 2024.

10. Plaintiff and each of the members of the proposed Class purchased subscriptions to Userway's products and/or installed its overlay widget on one or more of their websites. Plaintiff and the proposed Class members did not get the product or service Userway claimed to provide and were left exposed to legal claims that, in the case of Plaintiff and at least hundreds of others, cost them thousands of dollars. Plaintiff seeks to represent itself and similarly situated individuals and entities throughout the United States who purchased subscriptions for Userway's accessibility Widget for testing, monitoring, and remediating websites. Plaintiff seeks restitution of the monies it and the putative Class spent on Defendant's service, consequential damages, injunctive relief enjoining Defendant's ongoing unlawful, unfair, and deceptive business practices, and other damages on behalf of itself and the putative Class.

II. PARTIES

11. Plaintiff is a limited liability company that operates an e-commerce website offering flowers and gifts under the name BloomsyBox.com. Plaintiff's principal office locations are in Louisville, Kentucky and Miami, Florida. It regularly does business throughout the United States, including in this District.

12. Defendant Userway is a company registered in Delaware and headquartered in Wilmington, Delaware. Userway conducts business in this judicial district and sells its products and subscription services throughout the United States. Defendant has designated the competent courts in this District as the exclusive forum for litigating any disputes regarding its products or services.

13. Defendants John Doe 1-5 refer to parents, subsidiaries, and affiliated persons or entities of Userway Inc.

III. JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over Plaintiff's claims under 28 U.S.C. § 1332(d)(2), because (a) there are 100 or more Class members, (b) at least one Class member is a citizen of a state that is diverse from Defendant's citizenship, and (c) the matter in controversy exceeds \$5,000,000, exclusive of interest and costs.

15. This Court has personal jurisdiction over Defendant Userway because it maintains an office in this District and transacted business in this district for purposes of this lawsuit.

16. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because Defendant Userway is located in this District and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District. Venue is also proper in this District as Defendant's standard form agreement with Plaintiff and with each of its subscribers provides that any legal proceeding be brought in the courts located in Delaware and governed by the laws of the State of Delaware.

IV. FACTUAL ALLEGATIONS

Background

17. Millions of Americans live with disabilities, such as vision, motor, cognitive, or hearing impairments, that affect their ability to access information and content through the internet. Many, if not most websites are not fully accessible to individuals with disabilities.

18. For example, many visually impaired people cannot view the text and images on a webpage but still want and need to use the Internet. To browse the Internet, these users rely on screen reader technology that presents an audible description of the text and images and enables the user to navigate through the website. Screen readers function by examining the code the computer browser uses to render text and images on a webpage. This code is often in the form of

hypertext markup language (HTML) or document object model (DOM). The screen reader reads the code and interprets it. This includes reading and announcing a description of the images that appear on a webpage.

19. Several website shortcomings and issues can render a webpage less accessible to individuals with disabilities. In an effort to address these issues, domestic and international organizations have promulgated rules and guidelines for website designers to implement to improve accessibility. Chief among these is the WCAG, that sets out specific guidelines to make websites accessible to people with various disabilities including blindness and low vision, deafness and hearing loss, limited movement, speech disabilities, photosensitivity, and learning disabilities. W3C published the most recent version, WCAG 2.2 in October 2023.⁴ The previous version, WCAG 2.1, was issued in 2018.

20. WCAG 2.1 presents 13 broadly worded guidelines for creating accessible content. Those guidelines are further broken down into 73 “Success Criteria” that are written as testable statements that a particular website may either satisfy or not satisfy. The normative portion of the WCAG standard spans 105 pages, when printed.

21. Conformance with the WCAG is broken into three levels: level A, level AA, and level AAA. A website’s “conformance” to a standard is defined as an entire website meeting or satisfying the itemized Success Criteria for each standard. That is, there is no content on any portion of the website that violates the Success Criteria. And for a website to be considered conforming to WCAG level AA, the website must meet all Level AA Success Criteria on each page of the site.⁵

⁴ WCAG 2.2 is available at <https://www.w3.org/TR/WCAG22/#conformance-to-wcag-2-2>

⁵ See <https://www.w3.org/TR/WCAG21/#conformance>

22. Experts in the accessibility field recommend first auditing a website for errors both with automated tools as well as with manual testing, followed by remediating the underlying code. Finally, they recommend additional manual testing that reviews a website's accessibility to people with different kinds of disabilities. A full audit and remediation can take weeks or even several months and the cost is a minimum of several thousand dollars, depending on the number of unique pages on the website.

Userway falsely claims to automatically make websites conform to WCAG standards

23. In 2016, Userway began selling a software product in the United States on a subscription basis. Userway currently offers annual subscriptions for \$490 for its "Small Website" package for websites with under 100,000 page views per month, \$1,490 for its "Medium Website" package for websites with up to 1,000,000 page views per month, and custom packages for larger websites. Userway offers monthly subscriptions where the current monthly rates are \$49 and \$149 for the respective tier packages.

24. Userway claims its product is an effective, quick, and cost-effective alternative to manually remediating a website to meet WCAG standards and to guarantee full compliance with the ADA. Indeed, Userway has guaranteed that installing its widget on a website will make that site fully ADA compliant from day 1, and every single day thereafter.

25. Userway offers potential customers a free "scan" of their websites. This automated scan generates a report that invariably itemizes multiple failures in accessibility and a lack of WCAG compliance.

26. Userway claims that by adding a single line of code to a website, and installing its accessibility Widget will automatically cure accessibility problems, and that its artificial intelligence will continue to scour the website and repair accessibility issues such that the website

will be fully compliant according to WCAG 2.1 success criteria at the ADA level.

27. According to Userway, its Terms of Service constitutes a binding contract with each user that govern each subscriber's access and use of Userway's services. The Terms of Service describes the services to which customers subscribe as follows:

UserWay exerts commercial efforts to ensure that its Products enable Licensee's Website to become compliant with the WCAG 2.1 level AA success criteria (the "WCAG Standard").

28. Userway's public website has at various times included representations claiming that use of its product will render a website fully compliant with WCAG standards from day one, and every single day thereafter, following a two-minute installation process for a fraction of the cost of undertaking a manual website remediation. Such representations have included, but are not limited to the following:

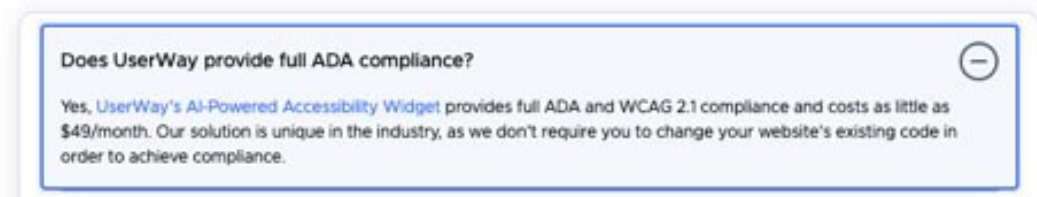
- a) "UserWay's solutions provide full WCAG & ADA compliance from day one, and every single day thereafter."⁶
- b) On Userway's Frequently Asked Questions page, the first question listed is "Does UserWay provide full ADA Compliance? As of October 2021, Userway gave the answer "Yes. UserWay's AI-Powered Accessibility Widget provides **full** ADA and WCAG 2.1 compliance for as little as \$49/month. Our solution is unique in the industry as we don't require you to change your website's existing code in order to

⁶ <https://userway.org>, captured October 20, 2021.

achieve compliance.” (emphasis added)⁷

Frequently Asked Questions

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- c) As of December 2023, Userway amended its FAQ to state: “Yes. UserWay's solutions ensure ADA, WAG 2.1 and 2.2 compliance through our AI-Powered Accessibility Widget.”⁸ This amended answer remains false.
- d) Userway’s website currently represents that Userway’s Accessibility Widget will make websites “conform to WCAG 2.1 & 2.2 and boost performance along the way.”⁹
- e) Under its pricing summary, Userway’s website currently represents that in addition to a suite of AI-powered accessibility functions and customer support, all paid plans include “WCAG 2.1 AA, ADA, Section 508 compliance” and “Litigation protection + \$10,000 commitment.”¹⁰

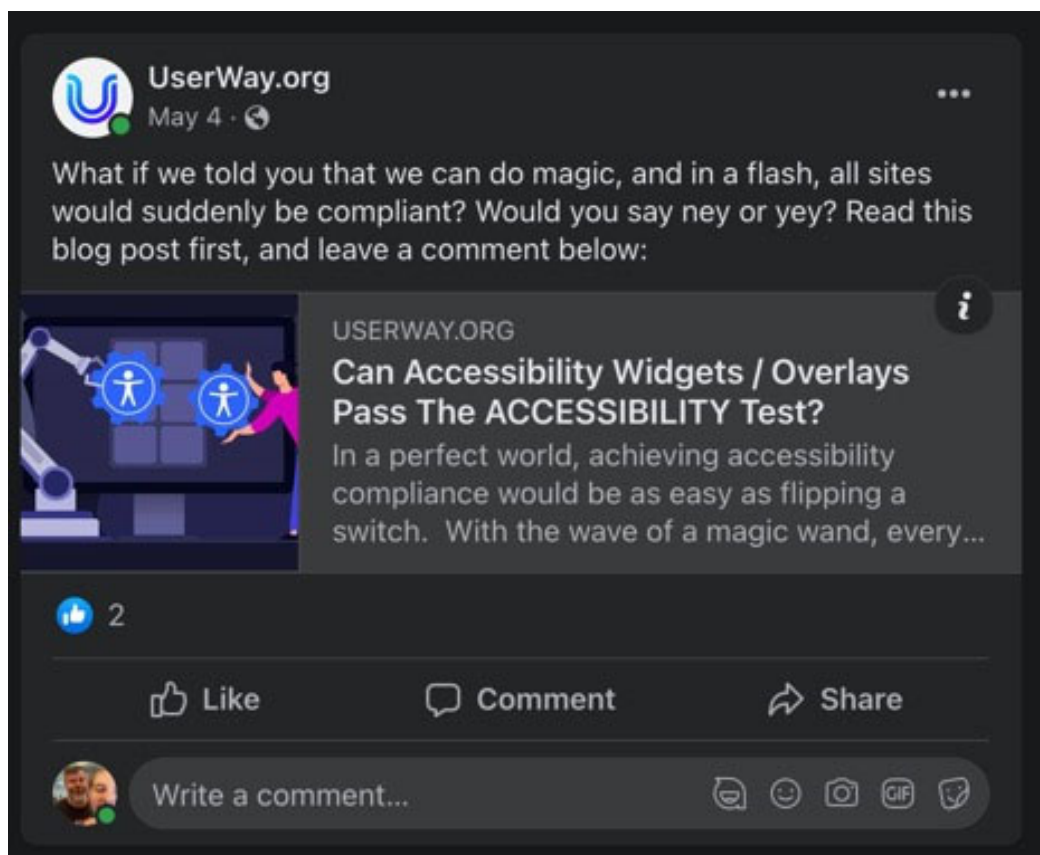
⁷ (<https://userway.org/faq/>) captured October 24, 2021

⁸ *Id.* Captured December 18, 2023.

⁹ <https://userway.org/widget/> last viewed, July 3, 2024.

¹⁰ <https://userway.org/l/free-web-accessibility-tool/> (viewed July 1, 2024)

29. On Facebook, Userway claimed that it could “do magic” and make all sites “suddenly” compliant “in a flash.”¹¹



30. Userway represented to Shopify site owners on Facebook that its Widget would “ensure their sites are inclusive of more than one billion people living with disabilities worldwide by embedding the AI-powered UserWay widget in their sites.”

¹¹ <https://www.facebook.com/UserWay/posts/2906487569592368> (captured October 24, 2021)

31. In August 2021, Userway placed a Google advertisement claiming ADA & WCAG Compliance with “[n]o changes to Your Website’s Code.” It claimed to be supported “by the top website creation platforms and trusted by over 60M users.”

32. In direct marketing email advertisements, Userway touted that “[a]dding UserWay’s comprehensive AI-Powered Widget to your website gets you **full** WCAG coverage” (emphasis in original) and “can make a site completely ADA-compliant.”

33. The above summarized examples are false. Leading experts in the field of internet accessibility overwhelmingly recognize that conforming any website to WCAG standards requires manual remediation that includes manual testing, which must continue as websites change over time. There are currently no shortcuts that are effective to meet WCAG standards and achieve ADA compliance.

34. In 2021 a group of professionals in the Internet accessibility community issued an “Overlay Fact Sheet” that evaluated what automated overlays, including Defendant’s products, can and cannot do. This document has been endorsed by more than 850 signatories that include accessibility experts, disability rights advocates, editors of the WCAG, and end users with disabilities. Among other things, the fact sheet concludes that no existing overlay product on the market can cause a website to become fully compliant with any existing accessibility standard. Moreover, the Fact Sheet notes that using an automated overlay often runs counter to and interferes with accessibility tools on which people with disabilities commonly rely and has a tendency to hinder many disabled persons’ ability to navigate internet websites.¹² The Fact Sheet concludes that overlay products like Userway’s do not help visually impaired people access the web, but instead actually hinder their access.

¹² Overlay Fact Sheet available at <https://overlayfactsheet.com/en/> (accessed June 3, 2024).

35. At present, practitioners in the field of website accessibility recognize that even the best automated software can only detect 30% of WCAG guidelines and the remaining 70% cannot be assessed — let alone remediated — with artificial intelligence but requires human manual testing.¹³

36. For the following reasons, among others, Userway’s product cannot provide full ADA compliance for all users:

a) Many websites are dynamic and WCAG success criteria relate to things that change on a web page during user-triggered action that cannot be reliably detected by an overlay as it requires predicting the actions a user will take.

b) While the WCAG is referenced by Section 508, it is not codified by law. Legal requirements in Section 508 and EAA/EN 301 549 contain additional items called “Functional Performance Criteria” that are often subjective, context dependent, and not amenable to machine testing.

c) The range of potential disabilities is vast. Some accessibility changes tend to benefit one population while decreasing usability for others. Thus, the more effective usability tools are customized to the user, not to the website.

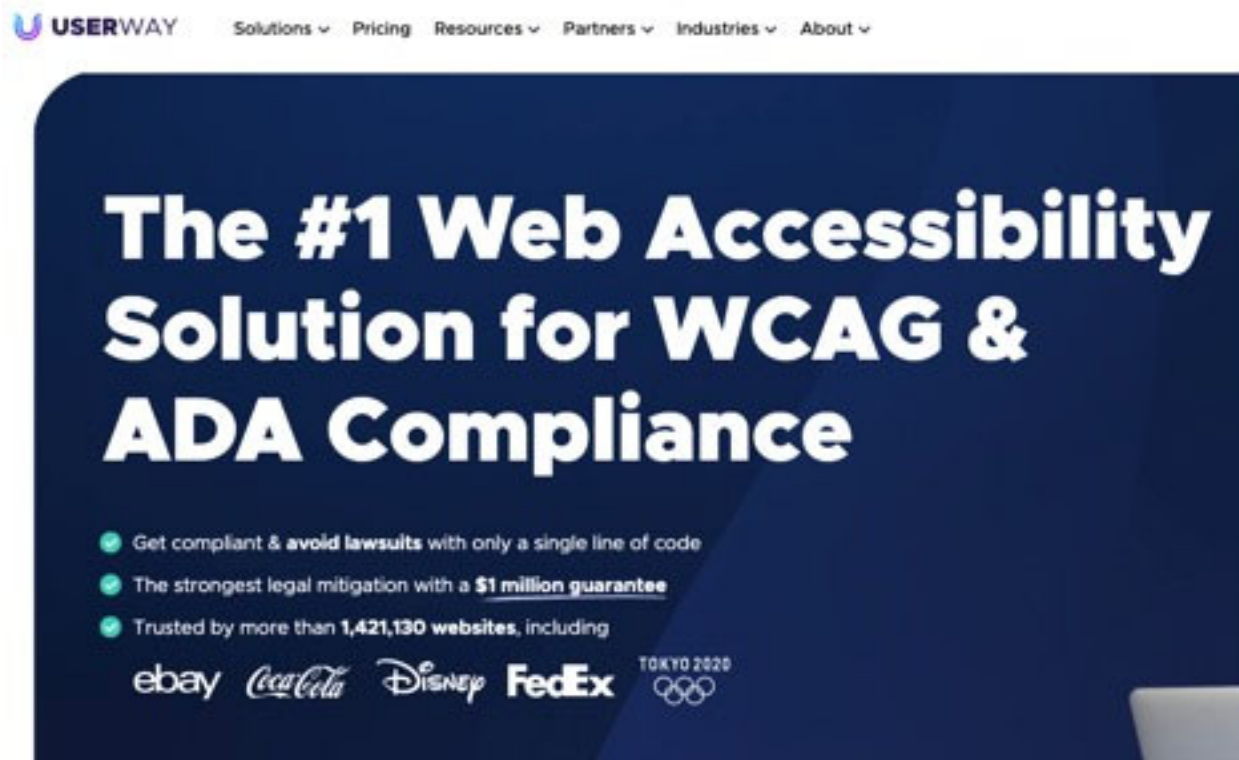
Userway falsely claims to avoid website accessibility lawsuits for its customers

37. Userway has sought to leverage the rise in lawsuits to market its automated widget by claiming its widget will prevent and/or defeat lawsuits alleging ADA violations when the opposite is true. Userway has actively advertised its products as a means to mitigate legal risk and

¹³ See, David Gibson, *Why Website Accessibility Overlay Widgets & Plugins Fail Compliance* available at <https://www.accessibility.works/blog/avoid-accessibility-overlay-tools-toolbar-plugins/#:~:text=A%20key%20claim%20is%20that,overlay%20widgets,%20toolbars%20or%20code>. Accessed June 4, 2024.

protect against accessibility-related lawsuits.

38. Userway claims that its customers can “avoid lawsuits with only a single line of code” and that its solution is “[t]rusted by more than 1,421,130 websites” and offers “legal mitigation with a \$1 million guarantee.”



39. Userway has exploited the uptick in accessibility lawsuits by seizing on the opportunity to falsely claim that its products will protect against the risk of being sued.¹⁴

¹⁴ <https://userway.org/l/free-web-accessibility-tool/> (captured July 1, 2024)

Websites of All Sizes Are Being Targeted by ADA Lawsuits

After More Than 11,000 Lawsuits, The Trend Is Going Parabolic

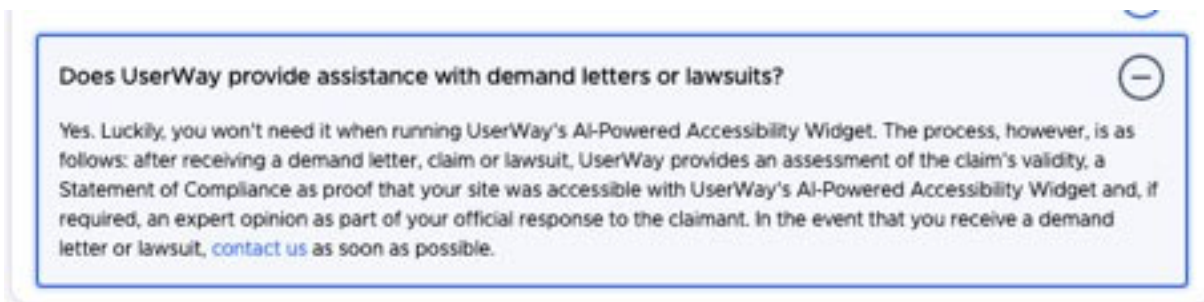
There was a time when it was possible to get away with having a website that didn't work for people with disabilities. But those days are long gone, and ADA regulations for web accessibility are being enforced in court. The easiest way to avoid lawsuits is to automate your code's remediation with UserWay AI-powered solutions.

Year	Number of Lawsuits
2014	15
2015	19
2016	47
2017	261
2018	704
2019	2258
2020	3392
2021	10014

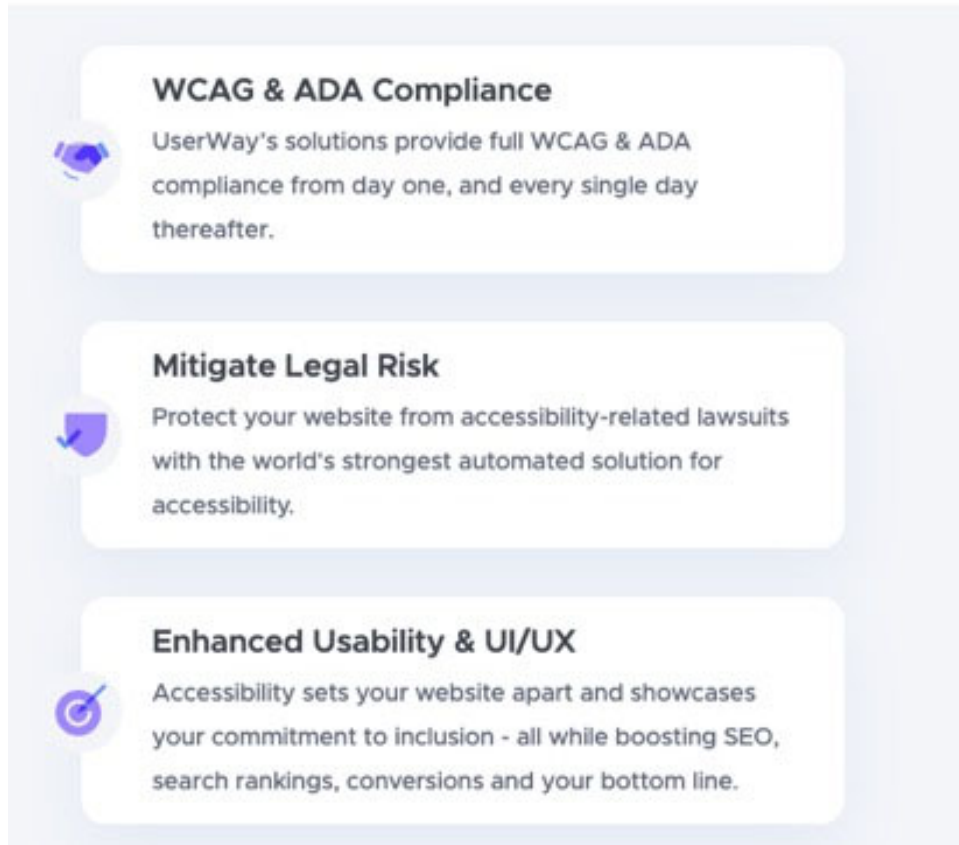
[Book a meeting](#) - [Protect your website now](#)

40. Userway’s website currently advertises that “[t]he easiest way to avoid lawsuits is to automate your code’s remediation with UserWay AI-powered solutions.”

41. In response to a question “Does UserWay provide assistance with demand letters or lawsuits?” Userway unequivocally states “you won’t need it when running UserWay’s AI-Powered Accessibility Widget” and goes on to state the following:



42. Userway has continually claimed that its products will “protect your business from lawsuit[s],” and make a website “Lawsuit-Free” all with no changes to a website’s code. Its public representations are typified by the following:



43. Userway's claims that its products prevent lawsuits are false. A survey of cases filed in 2021 in nine federal districts shows at least 40 lawsuits filed in those District Courts alleging that a defendant's website violated the ADA at a time when the Userway product was present on the defendant's website on the day the lawsuit was filed. A list of such cases is attached as Appendix A.¹⁵

44. The number of lawsuits alleging ADA violations by defendants' websites have risen dramatically since 2021. Between June 1, 2023 and June 1, 2024 1,041 such cases were filed in the Southern District of New York alone. A disproportionate number of those cases were filed

¹⁵ District courts surveyed were: Eastern, Central and Northern Districts of California, Eastern, Southern, and Northern Districts of New York, Western District of Pennsylvania, Southern District of Florida, and District of Massachusetts.

against businesses that had Userway’s product installed on their websites.

45. Accessibility industry watchdog UsableNet publishes biannual reports tracking accessibility related lawsuits. Among other things, its reports quantify the number of lawsuits filed against defendants who already had accessibility overlay widgets already installed on their websites. According to the 2023 UsableNet year-end report, “over 900 businesses with an accessibility widget or overlay on their website received a lawsuit in 2023.” The 2021 year-end report explicitly concluded that “the promise to prevent ADA lawsuits by using an accessibility widget or overlay isn’t real.”¹⁶

46. A defendant showing that it had the Userway widget installed at the time the alleged violation occurred does not avoid litigation as Userway claimed it would. Indeed, many courts have denied motions to dismiss that claim mootness based on having an accessibility widget already installed.¹⁷

47. Userway’s promise of legal support is also misleading. Rather than defending the claim, providing actual legal advice, or providing material support, Userway’s “Legal Support Package” consists only of naked claims that Userway’s products cause all websites to meet WCAG requirements and thus ensure ADA compliance and a copy of Userway’s automated website audit report. To add insult to injury, instead of providing the “legal support” that Userway promises in the event that a customer is sued, Userway instead seeks to upsell customers with expensive remediation services. These self-serving materials are essentially useless and are easily rebutted with a declaration from one of the many purported experts utilized by accessibility plaintiff law

¹⁶ Copies of UsableNet reports available, with registration, at <https://usablenet.com/resources?contentType=Reports>

¹⁷ See, e.g., *Paguada v. Yieldstreet Inc.*, No. 20 CIV. 9254 (LGS), 2021 WL 4896278, at *3 (S.D.N.Y. Oct. 20, 2021).

firms who detail some of the ways in which a website with an Userway product installed remains non-compliant.¹⁸

Plaintiff Bloomsybox's experience

48. Bloomsybox is an online flower delivery service that delivers flower bouquets to at least fifteen cities throughout the United States and to cities in five other countries. It has been in operation since 2015. It operates entirely online and, throughout its existence, has maintained an internet website at www.bloomsybox.com.

49. In or about the spring of 2023, Plaintiff's CEO in consultation with the company's web design and development team, decided to upgrade the company's website, including its accessibility overlay.

50. Plaintiff's design and development team researched accessibility providers online. They viewed Userway's website and decided to purchase a subscription to Userway's product based on its claims that it was a one-stop solution that would ensure ADA compliance and avoid the prospect of lawsuits based on ADA compliance. Plaintiff's CEO was particularly drawn by Userway's representations that Userway would provide legal support in the event the company did face such a lawsuit.

51. Plaintiff, through its CEO and website design and development team, relied on the representations that the Accessibility Widget would effectively bring a website into compliance with all applicable laws and regulations, would thereby protect the company against the risk of a lawsuit, and that the subscription fee included legal support in the unlikely event of litigation.

52. At the time of the purchase, Userway's representations regarding the efficacy of its product were false. At the time of the purchase Userway did not inform Plaintiff of the existence

¹⁸ See *id.*

of lawsuits against companies that already had its Accessibility Widget installed, nor did it inform Plaintiff of the number of industry insiders who maintain that conforming to WCAG standards cannot be achieved on an automated basis.

53. Plaintiff was convinced by Userway's representations that its Accessibility Widget would effectively render its website ADA compliant and would be continually maintained as such. Plaintiff also believed Userway's representations that the product would shield the company from the rising wave of ADA lawsuits and that Userway would stand behind its product in the form of material legal support. In July 2023, Plaintiff purchased a monthly subscription for use of Userway's Accessibility Widget at a price of \$129 per month. But for Userway's misrepresentations that its product would make Plaintiff's website WCAG compliant, Plaintiff would not have purchased or renewed a subscription.

54. Upon paying the initial monthly fee, Plaintiff received an emailed welcome packet that included a statement representing that once installed, the Accessibility Widget will ensure that Plaintiff's website will become and remain ADA compliant and will meet WCAG success criteria. Plaintiff also received a document entitled "Userway Monetary Pledge" that represented that Userway provides up to one million dollars of coverage in the event of a lawsuit alleging a lack of ADA compliance.

55. Plaintiff paid the monthly subscription fee for each month from July until December, 2023.

56. On December 11, 2023, Plaintiff was served a summons and complaint of a class action lawsuit alleging that its website did not comply with ADA requirements. Plaintiff contacted Userway on the same day, notified it of the lawsuit, provided a copy of the complaint, and requested the promised legal coverage. Userway's representative informed Plaintiff that legal

support is not included at the monthly subscription level and that he must purchase an annual subscription in order to obtain the promised legal support.

57. Plaintiff purchased an annual subscription to Userway's service on December 11, 2023, at a cost of \$1,490. Userway informed Bloomsybox's CEO that it had opened a "ticket" regarding the legal action and, within hours, sent a document entitled "Legal Action Guide." This document included generic information about the ADA and a cursory summary of the claims leveled in the lawsuit. The document merely restated the claim that Userway's product had rendered Plaintiff's website ADA compliant and recited generic criticisms of "cookie-cutter" ADA lawsuits. The document provided no specific legal analysis and was essentially valueless in defending against the filed action.

58. On December 15, 2023 Usverway informed Bloomsybox that it had "closed" the case. The action filed against Bloomsybox was still pending at the time Userway closed its case and continued beyond that time.

59. Bloomsybox retained a different attorney who provided a defense for a fee of \$4,000 and ultimately settled the claim with a monetary payment several months later.

60. Had the Usverway product accomplished what Userway represented it would, Plaintiff would have been satisfied with its purchase of a subscription. Plaintiff would not have purchased Userway's Accessibility Widget had it known it would not be effective in making its website conform with WCAG standards and comply with the ADA. Nor would Plaintiff have purchased a subscription had Plaintiff known of the frequency of lawsuits against businesses that had installed Userway's Accessibility Widget.

61. Plaintiff has suffered injury and damages as a result of Userway's misrepresentations and omissions in amounts that include the price of the subscriptions, the cost

of installing the Accessibility Widget, the cost of defending against and resolving the resulting litigation, and the cost of subsequently properly remediating the website.

V. CLASS ALLEGATIONS

62. Plaintiff brings this action as a class action on its own behalf and on behalf of all other persons or entities similarly situated as members of the proposed Class, under CR 23(a) and (b)3.

63. The proposed Class is defined as:

All persons or entities who purchased a subscription to Defendant's "Accessibility Widget" during the applicable limitations period.

Plaintiff reserves the right to modify, change, or expand the Class definition, including proposing subclasses, based on discovery and further investigation.

64. Excluded from the Class are Defendant and Defendant's parents, subsidiaries, affiliates, officers and directors, and any entity in which Defendants have a controlling interest; all individuals who make a timely election to be excluded from this proceeding using the correct protocol for opting out; any and all federal, state or local governments, including but not limited to their departments, agencies, divisions, bureaus, boards, sections, groups, counsels and/or subdivisions; and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

65. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of its claims on a class-wide basis using the same evidence that would be used to prove those elements in individual actions alleging the same claims.

66. Numerosity. The members of the Class are so numerous that a joinder of all members would be impracticable. Defendant Userway claims to have been installed on over

247,000 websites worldwide. While the exact number of members in the Class is unknown at this time, it is reasonable to assume the Class includes thousands of members. Additionally, it appears hundreds of putative class members have been sued for ADA violations at a time when the Userway product was present on the defendant's website on the day the lawsuit was filed.

67. Plaintiff reasonably believes the amount in controversy exceeds \$5 million.

68. Commonality and Predominance (CR 23(a)(2) and CR 23(b)(3)). There are numerous questions of law and fact common to Plaintiff and members of the Class. Those common questions of law or fact predominate over questions that may affect only individual Class members. The common issues arising from Userway's conduct predominate over any individual issues. Adjudication of these common issues in a single action has important and desirable advantages of judicial economy. The questions of law and fact common to Plaintiff and members of the Class include, among others, the following:

- a. Whether Userway's Terms and Conditions constitute a valid contract;
- b. Whether Userway breached the promises in its Terms and Conditions;
- c. Whether Userway created and breached implied contracts with Class members;
- d. Whether Userway made representations on its website and in advertisements that use of its products would ensure that a website complies with WCAG standards and ensure ADA compliance;
- e. Whether Userway's representations regarding compliance with the WCAG and the ADA are false or misleading;
- f. Whether Userway's representations that the use of its products will enable a class member to avoid litigation were false or misleading;

- g. Whether Userway's statements and representations regarding legal support a Class Member could expect in the event of litigation were false or misleading;
- h. Whether Userway concealed and omitted material facts from its advertisements and its disclosures to all Class members regarding its products ability to render websites ADA and WCAG compliant;
- i. Whether Userway's misrepresentations or omissions constitute unfair or deceptive practices under New York General Business Law § 349;
- j. Whether the Userway's conduct caused Class members to suffer injury/damages; and
- j. The proper measure of damages and the appropriate injunctive relief.

69. Typicality. Plaintiff's claims are typical of the claims of all Class members because Plaintiff is a class member and was subject to the same standardized contract, same representations, and received the same product as other members of the Class. Plaintiff's interests do not conflict with the interests of any other members of the proposed Class.

70. Adequacy. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has retained capable and competent attorneys who have significant experience in complex and class action litigation, including consumer rights litigation. Plaintiff and its counsel are committed to prosecuting this action vigorously on behalf of the Class and have the financial resources to do so. Neither Plaintiff nor its counsel have interests that are contrary to or that conflict with those of the Class.

71. Superiority. Plaintiff and Class members have suffered and will continue to suffer harm and damages as a result of Defendant's conduct. Absent a class action, most Class members would likely find the cost of litigating their claims prohibitive. Class treatment is superior to

multiple individual suits or piecemeal litigation because it conserves judicial resources, promotes consistency and efficiency of adjudication, provides a forum for small claimants, and deters illegal activities. There will be no significant difficulty in the management of this case as a class action. The members of the Class are readily identifiable from Userway's records.

72. This putative class action meets the requirements of Fed. R. Civ. P. 23(b)(2) and (b)(3).

VI. CHOICE OF LAW

73. Userway's Terms of Service provide that they are governed and construed in accordance with the laws of the State of Delaware, without regard to its conflict of law provisions, and that the competent courts in Delaware shall have sole and exclusive jurisdiction over any dispute arising from or in connection with the Terms and Conditions.

VII. CLAIMS

First Cause of Action

Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing

74. Plaintiff incorporates the above allegations as if fully set forth here.

75. Plaintiff and each Class member subscribed to Userway services which, Userway states, are governed by the Terms of Service it drafted as a binding contract.

76. The stated consideration that Userway provides is providing a product that will enable the customer's website to become compliant with the WCAG 2.1 level AA success criteria and thus be compliant with the Americans with Disabilities Act.

77. Userway's Terms and Conditions further state that the installation of its Widget will cause the Licensee's (i.e. the customer's) website to become "substantially more accessible in accordance with the provisions of the WCAG Standard with little-to-no intervention required by the Licensee's Website administrator(s), developer(s) and/or end

users.”

78. Userway further promises that it will provide litigation support to customers who face litigation based on allegations that the customer’s website does not comply with ADA requirements. Userway does not define what it means by litigation support and retains discretion as to what constitutes such support.

79. Under Delaware law, parties to a contract are required not only to adhere to the express terms of a governing contract, but to also act in good faith when they are vested with discretionary power. Where a party drafts a contract and reserves discretionary power for itself, the party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with all parties’ reasonable expectations.

80. Userway’s software solutions, including its Accessibility Widget do not address and resolve website accessibility issues in accordance with WCAG at the AA level success criteria and do not result in compliance with the ADA.

81. Userway has breached the terms of its contract with each class member by not providing the fundamental service it promised.

82. Userway breached its duty of good faith and fair dealing by giving itself discretionary power as to what constitutes litigation support and by not exercising that discretion in good faith and in a manner consistent with its customers’ reasonable expectations.

83. As a direct and proximate result of Userway’s breaches, Plaintiff and the Class have been deprived of money in amounts to be determined at trial and are entitled to recovery of such damages, including prejudgment interest thereon.

84. Class members who have not already been sued for lack of ADA compliance continue to incur ongoing, imminent, and impending threat of litigation by continuing to use

Userway's service rather than remediating their websites in an effective manner. The Class is therefore entitled to injunctive relief that will, at a minimum, make them aware that the Userway subscription on which they have been relying is ineffective and that will provide effective solutions in a manner to be determined at trial.

Second Cause of Action

Violation of the Delaware Consumer Fraud Act ("DCFA")

85. Plaintiff incorporates the above allegations as if fully set forth herein.

86. The DCFA states: "The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice." 6 Del. C. § 2513. The DCFA's purpose is "to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce in part or wholly within this State." 6 Del. C. § 2512. Moreover, the DCFA "shall be liberally construed and applied to promote its underlying purposes and policies." *Id.* "Any victim" of an unlawful practice shall be entitled to bring a private action under the DCFA. 6 Del. C. § 2525. 87.

87. As alleged herein, Defendant engaged in deceptive acts and practices in the form of material misrepresentations and misleading statements in its Terms of Service agreement, in its advertising, marketing, and public representations, and in its standard-form welcome packet sent to each customer who subscribed to its service. The deceptive acts, practices, misrepresentations, and omissions alleged herein occurred in part, or were furthered, in the State of Delaware.

88. Defendant's misleading and false statements include representing that installing its widget will ensure that a website immediately satisfies the WCAG AA level success criteria and

that the website will therefore be ADA compliant. False statements further include the representations that installing its product will be an effective way to avoid ADA related litigation and that in the event of litigation, a subscriber will receive substantive legal support.

89. The ability of Userway's products to effectively and automatically adjust underlying code to cause a website to meet WCAG AA level success criteria, to thereby comply with ADA title III, and to effectively safeguard against ADA related litigation were fundamental purposes of Class members' subscription to Userway's services.

90. Defendant failed to inform consumers that its products would not cause websites to meet WCAG success criteria; and that its product would not render websites ADA compliant. Defendant also failed to inform consumers of the volume of website accessibility lawsuits against Userway subscribers. Defendant's failure to so inform consumers was and still is likely to deceive reasonable consumers.

91. Defendant knew or should have known that its acts, practices, statements, policies, correspondences and representations, and omissions as discussed above, were false and likely to deceive and mislead Plaintiff and the Class Members.

92. Plaintiff and the Class Members have been injured as a result of Defendant's violations of the DCFA as they paid for products and services that did not perform as represented and because installing Defendant's products exposed them to increased risk of litigation.

93. As a direct, proximate, and foreseeable result of Defendant's deceptive practices, Plaintiff and the Class suffered injury by lost money or property.

94. Defendant's conduct alleged above has had a broader impact on consumers and the public at large.

95. Plaintiff and the Class are entitled to pursue claims against Defendant under the

DCFA to redress Defendant's violations of the DCFA.

96. Accordingly, Plaintiff seeks on behalf of itself and for all those similarly situated, compensatory and consequential damages, equitable and injunctive relief, civil penalties, punitive damages, costs and reasonable attorneys' fees, and all other relief as appropriate.

Third Cause of Action

Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. ("MMWA")

97. Plaintiff incorporates the above allegations as if fully set forth herein.

98. Userway's Accessibility Widgets are consumer products as defined in 15 U.S.C. § 2301(1).

99. Userway is a supplier and a warrantor as defined in 15 U.S.C. § 2301(4) & (5).

100. The warranty that accompanied the products constitutes a "written warranty" under 15 U.S.C. § 2301(6)(A) and/or (B).

101. Plaintiff and the other Class members are "consumers" as defined in 15 U.S.C. § 2301(3). They are consumers because: (a) they are buyers of a consumer product; (b) they are persons entitled under Delaware law to enforce against the warrantor the obligations of its implied warranty; and (c) they are entitled to enforce a written warranty.

102. Pursuant to 15 U.S.C. § 2310(e), the Plaintiff and the other Class members are entitled to bring this class action and are not required to give Userway notice and opportunity to cure until such time as the Court determines the representative capacity of the Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure.

103. Userway is liable to the Plaintiff and the other Class members pursuant to 15 U.S.C. § 2310(d)(1), because it breached its written warranty. Specifically, it refused to honor the written warranty by refusing to properly repair or replace the products in a manner that would render them effective for their stated purposes.

104. In connection with its sales of Accessibility Widget subscriptions, Userway gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. As a part of the implied warranty of merchantability, Userway warranted that its accessibility products were fit for their purpose as effective website remediation tools that would repair websites to make them meet WCAG success criteria and render websites ADA compliant and conformed to the promises and affirmations of fact set forth in its documents that accompanied the start of a customer's subscription, which constitutes packaging and labeling. Userway is liable to Plaintiff and the Class pursuant to 15 U.S.C. § 2310(d)(1), because it breached the implied warranty of merchantability, as set forth above.

105. Pursuant to 15 U.S.C. § 2310(d)(1), Plaintiff and the other Class members are entitled to recover the following damages proximately caused by Userway's breaches of its written warranty and the implied warranty of merchantability: (1) direct economic damages at the point of sale in the amount of the difference in value between the value of the products flooring as warranted (the full purchase price) and the value of the products as delivered (\$0), and (2) consequential economic damages including without limitation costs incurred in defending and resolving ADA compliance lawsuits and remediating their websites to meet WCAG standards and comply with the ADA.

106. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiff and the other Class members are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by Plaintiff and the other Class members in connection with the commencement and prosecution of this action.

Fourth Cause of Action

Negligent Misrepresentation

107. Plaintiff incorporates the above allegations as if fully set forth herein.

108. Defendant made representations about its products that it did not have reasonable grounds to believe were true. These statements include, inter alia, that their products would cause any website onto which its Accessibility Widget was installed to meet WCAG 2.1 success criteria at the AA level, to render any website ADA compliant, and to decrease the likelihood that a customer would face ADA related litigation once installing Userway products.

109. Defendant's statements regarding the efficacy of its products were false.

110. Defendant had control over the efficacy of its products and had a duty to ensure that its products were consistent with the performance that Defendant had represented to its customers.

111. Plaintiff and the Class were induced to purchase subscriptions for Defendant's products as a result of Defendant's negligent misrepresentations, and thereby suffered injury.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for an order:

- a. Certifying this case as a class action, appointing Plaintiff as Class representative, and appointing Plaintiff's counsel to represent the Class;
- b. Entering judgment for Plaintiff and the Class;
- c. Awarding Plaintiff and Class Members monetary relief;
- d. Ordering appropriate injunctive relief;
- e. Awarding pre and post judgment interest as prescribed by law;
- f. Awarding reasonable attorneys' fees and costs as permitted by law; and
- g. Granting such further relief as may be just and proper.

Plaintiff further demands trial by jury.

Dated: July 19, 2024

Respectfully submitted,

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