UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

SPRINGFIELD DIVISION

NATIONAL ASSOCIATION OF THE DEAF, WESTERN MASSACHUSETTS ASSOCIATION OF THE DEAF AND HEARING IMPAIRED, and LEE NETTLES,

Plaintiffs,

v.

NETFLIX, INC.,

Defendant.

Civil Action No. 3:11-cv-30168

[Leave to file granted September 12, 2011]

NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT (OR, IN THE ALTERNATIVE, TRANSFER TO THE NORTHERN DISTRICT OF CALIFORNIA);
MEMORANDUM OF POINTS AND AUTHORITIES

[ORAL ARGUMENT REQUESTED]

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on October 17, 2011, at 8:30 a.m., or as soon thereafter as this matter may be heard before The Honorable Michael A. Ponsor in the Hampden Courtroom, located at 300 State Street, Springfield, Massachusetts 01105, defendant Netflix, Inc. ("Netflix") will, and hereby does, move for an order dismissing with prejudice the entire First Amended Complaint ("FAC") in this action (the "*NAD* Action") on the following three independent grounds:

First, pursuant to Federal Rule of Civil Procedure 12(b)(1), the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, §§ 201 & 202, 124 Stat. 2751, codified in part at 47 USC § 613 (2010) gives the Federal Communications Commission ("FCC") exclusive primary jurisdiction over the main issues in this matter, and the Court's adjudication of the matter at this time would conflict with and undermine both the FCC's jurisdiction and the 21st Century Act's mandates;

Second, pursuant to Federal Rule of Civil Procedure 12(b)(1), plaintiffs lack standing to bring this action because they have not suffered — and cannot have suffered — any injury resulting from the conduct alleged; and plaintiffs cannot avoid standing requirements by invoking the "futile gesture" rule of the Americans with Disabilities Act, 42 USC § 12101 *et seq.*; and

Third, pursuant to Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6), the *NAD* Action is duplicative of a virtually identical case, *Cullen v. Netflix, Inc.*, No. 5:11-cv-01199, filed three months before this case in the United States District Court for the Northern District of California, and should be dismissed under the first-filed rule. (In the alternative, Netflix will, and hereby does, move for an order pursuant to Federal Rule of Civil Procedure 12(b)(3) and

28 USC § 1404(a) transferring this action to the Northern District of California for the convenience of the parties.)

This motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of David F. McDowell and Neil Hunt, all other pleadings and papers on file herein, and such other argument and evidence as may be presented.

September 12, 2011

NETFLIX, INC., by its counsel,

By: /s/ David F. McDowell
David F. McDowell (*pro hac vice*)

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

Pursuant to Local Rule 7.1(a)(2), counsel met and conferred on September 9, 2011, in a good faith attempt to resolve or narrow the issues raised in this Motion.

September 12, 2011 NETFLIX, INC., by its counsel,

By: /s/ David F. McDowell
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REQUEST FOR ORAL ARGUMENT

Netflix hereby requests oral argument on the Motion submitted herewith.

September 12, 2011 NETFLIX, INC., by its counsel,

By: /s/ David F. McDowell
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND RELEVANT BACKGROUND.

When defendant Netflix, Inc. ("Netflix") launched "Watch Instantly," its popular Internet-based streaming video plan, the company revolutionized the video rental business by bringing movies and TV shows directly to Netflix subscribers over the Internet. (FAC ¶¶ 1–3, 13–16.) New technology, as always, brought new challenges: what made Watch Instantly possible also created substantial technical hurdles to providing some common services in traditional videos, including closed captioning — and rendered existing regulatory guidance obsolete. (*Id.* ¶¶ 3–5, 16–17.) That notwithstanding, in January 2008, Netflix began a campaign to caption, voluntarily, its most popular streaming videos, with the goal of captioning 80% of them by the end of 2011. (*Id.* ¶¶ 17–19). Meanwhile, in October 2010, Congress enacted the Twenty First Century Communications and Video Accessibility Act ("21st Century Act") to require the Federal Communications Commission ("FCC") to determine how best to regulate captioning of Internet-based streaming videos, includding those available on Watch Instantly.

Technology and Congress, however, were not fast enough for some, who, following Internet rumors that *some* Netflix streaming videos lack captions (FAC ¶¶ 21–26), opted for another course: litigation. In March, a hearing-impaired Netflix subscriber filed *Cullen v. Netflix, Inc.* (the "*Cullen* Action"), a class action in the Northern District of California alleging Netflix's inability to caption immediately every one its streaming video violates anti-discrimination laws, and seeking an order compelling Netflix to caption all streaming content. Three months later, the National Association of the Deaf; Western Massachusetts Association of the Deaf and Hearing Impaired; and Lee Nettles (together, "NAD" or "Plaintiffs") — *comprising exclusively NAD members who do not subscribe to Netflix* — filed this copycat suit, the "*NAD* Action," which, like the first-filed *Cullen* Action and based on virtually identical allegations,

accuses Netflix of violating anti-discrimination laws — in particular, the Americans with Disabilities Act ("ADA") — and seeks an order compelling it to caption all streaming videos.

Neither suit has any merit; but the *NAD* Action — filed in the wrong place at the wrong time by the wrong people — is particularly troublesome. Three reasons compel dismissal.

Primary Jurisdiction. Adjudication of this action would directly conflict with the primary jurisdiction of the FCC, which, under the 21st Century Act, has exclusive authority to make a first pass, through regulation, at the precise issue raised: the extent to which streaming video providers must offer closed captioning. The 21st Century Act requires the FCC to balance the benefits of captioning against the economic costs and technical feasibility of implementation. Because Plaintiffs ask the Court to pass judgment on issues within the FCC's exclusive realm but without the guidelines established by Congress, the case should be dismissed to avoid conflict with legislative and agency prerogatives.

No Standing. Primary jurisdiction issues aside, this action was brought by the wrong plaintiffs — all of whom lack standing. Conceding that they "ha[ve] not subscribed to Netflix" or viewed *any* supposedly "ineffective" closed captioning, Plaintiffs cannot have suffered a particularized injury caused by Netflix. (FAC ¶¶ 30, 31, 33, 35, 41, 45.) Plaintiffs allege that the ADA shields them from having to engage in the "futile gesture" of suffering injury before filing suit (FAC ¶ 54), but their claims are not ripe until Plaintiffs have first-hand "actual notice" of, and suffer injury from, the alleged conduct — they *cannot* simply rely, as here, on a hypothetical chain of contingencies: that *if* an individual subscribed to Netflix, and *if* she had actually viewed "ineffective" captioning, she *might* suffer injury.

First-Filed Rule. Finally, even if jurisdiction exists in *a* federal court, the first-filed rule requires dismissal of this action from *this* Court because it is materially identical to the first-filed

Cullen Action in the Northern District of California, the proper venue for both actions. Allowing this action to proceed would waste scarce judicial resources and risk inconsistent judgments. Otherwise, the case should be transferred to the Northern District of California for consolidation.

II. THE COMPLAINT'S REQUEST FOR ADJUDICATION OF AN ISSUE DEDICATED EXCLUSIVELY TO THE FCC COMPELS DISMISSAL UNDER THE PRIMARY JURISDICTION DOCTRINE.

A. First Circuit Primary Jurisdiction Doctrine Requires Dismissal.

The *NAD* Action should be dismissed because it invites inevitable conflict with the "exclusive" primary jurisdiction of the FCC, to which, under the 21st Century Act,[1] Congress assigned the task to decide the precise issue raised here: the extent to which Internet-based streaming video providers must offer closed captioning — or, in NAD's terms, whether Netflix's closed captioning is "effective" as a matter of law. *Compare* (FAC Prayer ¶¶ 1–2) *with* 47 USC § 613(i) ("The Commission shall have exclusive jurisdiction with respect to any complaint under this section.").[2]

As such, dismissal under the primary jurisdiction doctrine is warranted. Under the primary jurisdiction doctrine,

> a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956); *see Rymes Heating Oils, Inc. v. Springfield Terminal Ry. Co.*, 358 F.3d 82, 91 (1st Cir. 2004) (affirming dismissal under primary

[1] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, §§ 201 & 202, 124 Stat. 2751, codified in part at 47 USC § 613 (2010).

[2] Motions to dismiss for lack of primary jurisdiction are governed by Federal Rule of Civil Procedure 12(b)(1). *Liquilux Gas Corp. v. Martin Gas Sales*, 771 F. Supp. 502 (D.P.R. 1991), *aff'd*., 979 F.2d 887 (1st Cir. 1992).

jurisdiction doctrine, which "promotes uniformity" in resolution of nationally important issues and permits agencies that are "uniquely suited" resolve them). Three factors determine whether primary jurisdiction compels dismissal:

> (1) whether the agency determination lies at the heart of the task assigned the agency by Congress;
>
> (2) whether agency expertise is required to unravel intricate, technical facts; and
>
> (3) whether, though perhaps not determinative, the agency determination would materially aid the court.

Rymes Heating Oils, 358 F.3d at 91 (applying factors to affirm dismissal); *accord Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992–993 (1st Cir. 1995) (deferring to agency's decision as to whether defendant's conduct violated federal law).

Primary jurisdiction has compelled dismissal of cases with facts materially identical to those presented in the *NAD* Action. *Zulauf v. Kentucky Educ. Television*, 28 F. Supp. 2d 1022 (E.D. Ky. 1998), dismissed a complaint alleging a television station discriminated against deaf viewers by "failing to provide closed captioning for all of its programs" in violation of the ADA. *Id.* at 1023. In light of the Video Programming Accessibility Act of 1996 (the "1996 Act," predecessor of the 21st Century Act), which delegated to the FCC authority to promulgate regulations for closed captioning of television programming, the central issue was, as here, how Congress's delegation to the FCC "affect[ed] suits brought under . . . the ADA alleging discrimination due to a broadcaster's failure to provide closed captioning for all of its programs." *Id*. Because the 1996 Act gave primary jurisdiction to regulate closed captioning of television programming to the FCC, the court dismissed the complaint. The court relied on essentially the same analysis required by the First Circuit: (1) under the 1996 Act, the FCC had "exclusive jurisdiction" over closed captioning regulations, and the 1996 Act provided a comprehensive scheme "addressing a broadcaster's duty to provide closed captioning for its video

programming," *id.* at 1023–1024; (2) "the FCC ha[d] expertise" in broadcasting and captioning and the 1996 Act "was to promote uniformity," *id.* at 1023; and (3) the Court required the FCC to take a first pass on the issue "to give full effect to each of the statutes," *id.*

Replacing only the name of the statute ("21st Century Act" for the 1996 Act) underscores the core rational of *Zulauf* maps perfectly onto this case — both of which require dismissal under the primary jurisdiction doctrine because

> the [21st Century Act] is the latest and most specific statute addressing a [streaming video provider's] duty to provide closed captioning for its video programming, and the Court is merely honoring Congress's intent to allow the FCC to address any complaints under the statute. Additionally, Congress's intent in giving the FCC exclusive jurisdiction over any complaints filed under the [21st Century Act] was to promote uniformity in the area of closed captioning, and the Court's ruling recognizes this intent. Finally, on this point, the FCC has expertise in the area of broadcasting and has already taken steps to determine how much closed captioning broadcasters can reasonably provide. ***It would be inefficient and a waste of judicial resources for the Court to try and reinvent the wheel and determine the proper rate at which [streaming video providers] should be providing closed captioning for their programming.***

Zalauf, 28 F. Supp. 2d at 1023–24 (emphasis added).

The reasons for dismissing the NAD Action are even more compelling than in *Zulauf*.

B. Each Primary Jurisdiction Factor Favors Dismissal.

1. The adequacy of streaming video captioning lies at the heart of the FCC's assigned task.

The three primary jurisdiction factors plainly require dismissal of the *NAD* Action.

First, the *NAD* Action presents precisely the issue of first impression that the 21st Century Act empowers the FCC to resolve: as noted, the extent to which federal law requires subtitles in Internet-based streaming videos its affect on ADA claims. (*E.g.*, FAC Prayer ¶ 2

[seeking an injunction requiring Netflix "to provide *effective* communication through closed captioning on Watch Instantly content"] [emphasis added].)

Congress expressly recognized the need to articulate legal standards for whether Internet-based video providers offer sufficient — in NAD's words, "effective" — closed captioning:

> The purpose of [the 21st Century Act] is to update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.

Senate Committee on Commerce, Science and Transportation, Conference Report, S. Rep. No. 111-386, at 1 (2010); *accord* 47 USC § 613(c)(2)(A) (the FCC "shall revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol").

That the 21st Century Act expressly requires that the FCC "***shall have exclusive jurisdiction with respect to any complaint under this section***," 47 USC § 613(i), underscores the importance of this issue to the FCC's assigned task, *see Zulauf*, 28 F. Supp. 2d at 1024 (construing identical provision to FCC exclusive jurisdiction to regulate closed captioning).

The 21st Century Act's structure confirms the FCC's primary jurisdiction by directing the FCC to "revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol" by, among other things, (1) defining the "video programming distributors" and "video programming providers" subject to regulation, (2) "describ[ing] [distributors' and providers'] responsibilities," and (3) establishing a "mechanism to make available to [distributors and providers] information on video programming subject to the Act on an ongoing basis." 47 USC § 613(a)(2)(A), (c)(2)(D)(iii)–(v).

Thus, the issue of whether Netflix's streaming video captioning complies with federal law falls squarely in the FCC's exclusive domain.

2. The FCC's expertise is required to unravel intricate, technical facts concerning Netflix's captioning.

Second, the FCC's expertise in policy, technology, and applying telecommunications law renders the agency particularly apt for determining under what circumstances a streaming video provider's closed captioning practices comply with federal law. *E.g.*, *Blackstone Valley*, 67 F.3d at 992–993 (deferring to agency judgment because the "judicial machinery is ill-suited" to balance various technical factors required to determine whether action violates federal law, a "determination [] much better left to" agency decision); *N. Cnty Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1162 (9th Cir. 2010) (applying primary jurisdiction doctrine because courts are "ill equipped to properly resolve" plaintiff's claim without "a predicate determination from the [FCC]."). Issues coming within the FCC's regulatory authority are especially appropriate for invoking the primary jurisdiction doctrine, which, as the Ninth Circuit has explained, is designed

> to protect agencies possessing quasi-legislative powers and that are actively involved in the administration of regulatory statutes. Charged with the administration of the Telecommunications and Federal Communications Acts, the FCC is such an agency.

Clark v. Time Warner Cable, 523 F.3d 1110, 1115 (9th Cir. 2008) (citations and internal quotations omitted); *accord Am. Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 244–45 (D. Mass. 1995) (dismissing claim for primary jurisdiction; "It is obvious that the FCC, and not this Court" has "a detailed knowledge of the economics and standard practices of the [] industry, and an understanding of the technical feasibility of various proposed alternatives.").

The 21st Century Act expressly leverages the FCC's expertise to make it better situated than the Court to determine the "effectiveness" and adequacy of Netflix's closed captioning. For example, the 21st Century Act mandates that closed captioning regulations reflect careful cost-benefit analyses, imposed in part by a detailed, 14-month schedule that ensures any regulations

account for the "economic[] burden[s]" of compliance. 47 USC § 613(c)(2)(A), (B), (D)(ii); 21st Century Act § 201(a), (e), 124 Stat. at 2765–68 (prescribing timeline); *Zulauf*, 28 F. Supp. 2d at 1023 (inferring intent to create comprehensive scheme from timeline to draft regulations).

To these ends, the 21st Century Act also created the Video Programming and Emergency Access Advisory Committee ("Advisory Committee"), comprising industry representatives and disabled group advocates whose membership ensures that the FCC considers their competing interests when drafting and revising regulations. 47 USC § 613(c)(2)(A); *accord* 21st Century Act § 201(a), (e), 124 Stat. at 2765. (An important note: *NAD sits on the Advisory Committee as one of the 15 designated representatives for disabled individuals.*) The FCC has already begun formal procedures for implementing the statute, and half of the Advisory Committee's most recent report for the FCC addresses "Technical Requirements," "Technical Capabilities and Procedures Needed," and "New Developments" concerning regulation of streaming video closed captioning — all drawing on the FCC's superior technical knowledge.[3] The Court has no such policy committee to assist it with the complex policy issues raised by the *NAD* Action.

Nor would the Court benefit from an additional fail-safe that will, when the FCC promulgates them, ensure captioning regulations do not impose stifling technological burdens: "exemptions" where, as will likely be the case here, the FCC "determine[s] that the application of such regulations would be economically burdensome." 47 USC § 613(c)(2)(D)(ii).

If the Court considered the *NAD* Action now, it would assume the task of engaging in precisely the same policy-heavy cost-benefit analysis that Congress delegated to the FCC's exclusive jurisdiction — without the benefit of FCC's expertise or Congress's fail-safes and

[3] FCC, *First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol* (July 13, 2011) at 16–30, http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf.

would necessarily conflict with, and render superfluous, the 21st Century Act's mandates that the FCC use its technical and policy expertise to address Congress's concerns. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

3. The FCC's determination would materially aid in resolving the issues.

Third, the FCC's determination of what constitutes appropriate closed captioning would materially aid in effecting appropriate closed captioning on Internet-based streaming video. Allowing for the FCC to promulgate appropriate regulations would allow Netflix's (and others') captioning systems for streaming videos to proceed with appropriate, federally mandated guidance. By contrast, Plaintiffs' alternative — this lawsuit — invites "irreconcilable inconsistency" between two statutes: (1) the older ADA, which Plaintiffs claim entitles them to immediate closed captioning for all streaming videos; and (2) the recent 21st Century Act, which requires the FCC to analyze the costs and benefits of captioning streaming video. *Zulauf*, 28 F. Supp. 2d at 1023 ("in case of an irreconcilable inconsistency between them the later and more specific statute usually controls the earlier and more general one"). In short, dismissal would permit the FCC to regulate Netflix's closed captioning practices as Congress intended; adjudication of this suit, however, would undermine those efforts.

For these reasons, Netflix respectfully requests that the Court dismiss Plaintiffs' attempted end-run around the 21st Century Act and FCC.

III. THE COMPLAINT'S FAILURE TO ALLEGE ANY COGNIZABLE INJURY RENDERS THE MATTER UNRIPE FOR ADJUDICATION AND COMPELS DISMISSAL FOR LACK OF STANDING.

A. Plaintiffs Have Not Suffered Any Actual Injury.

Even if the FCC did not have primary jurisdiction, neither would this Court because Plaintiffs have not suffered a cognizable injury and, therefore, lack standing. Indeed, the *NAD* Action is premised on the purported standing of individuals who, "ha[ving] not subscribed to Netflix," do not have any first-hand knowledge about Netflix's alleged discrimination, have not even attempted to view closed captioning on Netflix streaming videos (because, as nonsubscribers, they cannot) (FAC ¶¶ 29, 30, 31, 33, 38, 41)[4] — and thereby cannot have suffered any actual and direct injury from Netflix's closed captioning. Instead, NAD alleges members *might* suffer injury *if* they become Netflix subscribers; *if*, after subscribing, they select one of the less popular streaming videos without closed captioning; and, only then, *possibly* suffer an injury here. (*Id.*) Plaintiffs' standing — both for the individual plaintiff and the two organizations (which sue solely "on behalf of [their] deaf and hard of hearing members" [FAC ¶¶ 29, 37]) — depends entirely on the attenuated threat of future injury.

Even under their theory of future harm, however, Plaintiffs have the burden to show — but cannot — that that "the threatened injury is impending and concrete" and that they have "such a personal stake in the outcome of the controversy as to warrant invocation of federal-court jurisdiction." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 67–68 (1st Cir. 2003) (affirming dismissal of ADA claim based on threat of future injury for lack of standing); *accord Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 320–21 (D. Mass. 1997) (dismissing association's ADA claim; members lacked "standing to sue in their own right," "an essential

[4] The sole exception (James Johnson, FAC ¶ 33) cancelled his subscription in December 2010, so he too has no actual notice about Netflix's captioning as of the time of the suit.

element of representational standing."). Allegations are particularly insufficient where, as here, they are based entirely on "[s]ubjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts," *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995) — such as which videos lacked captioning and what would constitute "effective" captioning.

As shown below, Plaintiffs fail to meet their burden to show an impending and concrete injury beyond merely a "general scenario" unsupported by anything but subjective and unsupported characterizations.

B. Plaintiffs Do Not Qualify for the "Futile Gesture" Rule Because the Action Is Not Ripe and Plaintiffs Suffer No Hardship.

Plaintiffs' standing theory relies on the "futile gesture" provision of the ADA, which provides:

> The remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 USC 2000a-3(a)) are the remedies and procedures this title provides to any person . . . who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303. ***Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.***

42 USC § 12188(a)(1) (emphasis added). Under the "futile gesture" rule, Plaintiffs say they "do not have to engage in the 'futile gesture' of purchasing a subscription when they have actual knowledge that they will have inferior, ineffective access to the services and privileges that Netflix provides subscribers." (FAC ¶¶ 45, 54.) Plaintiffs misconstrue § 12188 and ignore their burden to show that an injury is "impending and concrete." *McInnis*, 319 F.3d at 68.

The First Circuit rejected precisely this position in *McInnis-Misenor v. Maine Medical Center*, where, as here, plaintiffs prematurely filed an ADA suit under the theory that, though

they had not suffered an injury from alleged discrimination, the possibility of a future injury brought them under the "futile gesture" rule. 319 F.3d at 66. There, plaintiffs, a husband and his wheelchair-bound wife, claimed the defendant hospital's post-birth recovery area lacked certain ADA-required accommodations for wheelchair-bound patients — a condition that disrupted the birth of her first child and would, plaintiffs alleged, complicate the birth of a planned second child. *Id.* at 66. After filing a claim with the Maine Human Rights Commission, plaintiffs filed a federal suit under the theory that actual pregnancy and delivery at the hospital amounted to a "futile gesture" that should not stop them from seeking preventative relief. *Id.*

Disagreeing, the district court granted the hospital's motion to dismiss the claim for lack of standing and the First Circuit affirmed. After reviewing § 12188(a)(1), the court found that the *McInnis* plaintiffs, like the NAD plaintiffs here, are

> not "being subjected to discrimination," so [the plaintiff's] claim must rest on whether she "has reasonable grounds for believing [she, like the NAD plaintiffs,] is about to be subjected to discrimination." The statutory language "about to be subjected to discrimination" dovetails with the usual prudential analysis as to whether McInnis-Misenor's claims are too contingent and premature.

McInnis, 319 F.3d at 69 (quoting § 12188(a)(1)). Because the ADA cannot "displace the normal background prudential standing limitations," plaintiffs relying on the futile gesture rule must still satisfy constitutional ripeness principles, which "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* at 69–70. To prove ripeness, the complaint must demonstrate (1) *fitness* for judicial decision (*i.e.*, "whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all"); and (2) potential *hardship* (*i.e.*, "the extent to which withholding judgment will impose hardship — an inquiry that typically turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties"). *Id.*

Here, as in *McInnis*, plaintiffs' claims fail on both counts.

Not Fit for Adjudication. Like *McInnis*, the *NAD* Action is not fit for adjudication because "[t]he chain of contingencies lying between the plaintiffs' current state and their complained-of future injury" is far too tenuous. 319 F.3d at 72. In *McInnis*, the wheelchair-bound wife was not yet pregnant with her second child, the hospital might have improved its facilities to accommodate her, and the plaintiff might not have used that hospital in the event of pregnancy — all rendering the prospect of injury too hypothetical to establish "actual injury." *Id.* Here, the prospect of NAD members' supposed injury is even more attenuated. ***First***, because none of the members subscribes to Watch Instantly (FAC ¶¶ 29, 30, 31, 33, 38, 41), they cannot have "actual notice" that "discrimination" occurred in the first place, know whether they would actually use the subscription, predict whether the videos they will watch lack captioning, or suffer any injury. NAD members may *think* Netflix and *might* eventually cause them injury based on bloggers' musings about their "concern about" Netflix's captioning (FAC ¶¶ 21–25), but notions based on online rumors do not amount to "actual notice," let alone satisfy standing. *E.g.*, *Resnick v. Magical Cruise Co., Ltd.*, 148 F. Supp. 2d 1298, 1302–1303 (M.D. Fla. 2001) (dismissing claim ADA claim because "merely reviewing [a] website" is not "actual notice" of discrimination). (At least the *McInnis* plaintiffs previously witnessed the lack of accommodations themselves.) ***Second***, the appropriate regulatory body here, the FCC, has not even drafted regulations governing closed captioning. (*See* Part II, *supra*.) (Even in *McInnis*, the appropriate regulatory body (the Maine Human Rights Commission) had at least passed judgment on the issue. 319 F.3d at 72–73.)

No Hardship. The *NAD* Action alleges "wholly contingent harm," not the "direct and immediate" harm required for standing. *McInnis*, 319 F.3d at 73. Indeed, Plaintiffs' purported

injury epitomizes "contingent" — it depends on a number of conditions that are far from certain to occur: (1) purchasing a Netflix subscription, (2) using the subscription, and (3) happening to choose one of the videos that lack captioning out of the thousands of the available streaming movies and TV shows. That Plaintiffs' claims concern watching videos — in contrast to the more grievous but still insufficient potential harm from giving inadequate care to a new mother in *McInnis* — further undermines the claim.

Because the *NAD* Action is, "at this stage, largely hypothetical," it is not "fit for federal judicial review" and must be dismissed. *Id.* at 73.

IV. THE COMPLAINT'S DUPLICATION OF THE FIRST-FILED *CULLEN* ACTION COMPELS DISMISSAL OR, AT MINIMUM, TRANSFER TO THE NORTHERN DISTRICT OF CALIFORNIA.

A. The First-Filed Rule Compels Dismissal.

Even if the *NAD* Action were properly in *a* federal court, the District of Massachusetts is not in the *correct* one: Principles of comity and the orderly administration of justice dictate that this action be dismissed as duplicative of the earlier-filed *Cullen* Action pending in the Northern District of California. As the First Circuit has explained:

> Where identical actions are proceeding concurrently in two federal courts, entailing duplicative litigation and a waste of judicial resources, the first filed action is generally preferred in a choice-of-venue decision.

Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987); *accord W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 729 (5th Cir. 1985) (dismissal in favor of first-filed case proper in order "to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result"); *Carey v. Hillsborough Cnty. Dep't of Corr.*, No. 05-cv-442-PB, 2006 U.S. Dist. LEXIS 23515, at *6–7 (D.N.H. Mar. 6, 2006) (dismissing later-filed action as duplicative).

"Identical actions" are duplicative of pending litigation and should be dismissed as such where, as here, "the claims, parties, and available relief do not significantly differ between the two actions." *Serlin v. Arthur Andersen & Co*., 3 F.3d 221, 223 (7th Cir. 1993) (internal quotation and emphasis omitted); *see Carey*, 2006 U.S. Dist. LEXIS 23515, at *6–7 (adopting *Serlin*'s definition of "duplicative" litigation); *accord Biolitec, Inc. v. AngioDynamics, Inc.*, 581 F. Supp. 2d 152, 157–58 (D. Mass. 2008) (Neiman, J.) (dismissing action under first-filed rule; though "the claims in the two cases are not mirror images of one another," "the essence of Plaintiff's position in the two suits . . . is identical"). The parallel actions here "do not significantly differ" because NAD virtually copies the allegations of the *Cullen* Action. *Serlin*, 3 F.3d at 223. Among other similarities, both actions:

- Name the same single defendant, Netflix, whose principal place of business is in Los Gatos, California (*compare* FAC ¶ 13 *with* Exhibit A to the Declaration of David F. McDowell ("McDowell Decl."), *Cullen* Compl. ¶ 2);
- Complain about precisely the same conduct: that Netflix fails to provide "meaningful" and "effective" closed captioning (*compare* FAC ¶¶ 4, 14 *with* McDowell Decl., Ex. A, *Cullen* Compl. ¶¶ 11, 15, 33) because, according to both sets of plaintiffs, Netflix does not currently provide closed captioning of a sufficient "percentage" of its streaming videos (*compare, e.g.*, FAC ¶ 20 *with* McDowell Decl., Ex. A, *Cullen* Compl. ¶¶ 7, 33–40);
- Recite the same representations purportedly revealing Netflix's motives, including:
    - an October 5, 2009, email exchange between Netflix and NAD regarding the progress of Netflix's captioning (*compare* FAC ¶¶ 25–26 *with* McDowell Decl., Ex. A, *Cullen* Compl. ¶¶ 20–21),

- an April 2010, announcement by Netflix CEO, Neil Hunt, that Netflix released a "limited library" of subtitled streaming videos (*compare* FAC ¶ 18 *with* McDowell Decl., Ex. A, *Cullen* Compl. ¶ 22), and
- a February 24, 2011, Netflix announcement that Netflix expanded its subtitled streaming videos to include "3,500 television and movie titles" "representing about 30% of viewing," and that Netflix expected to provide captions for "80% of 'viewing coverage' by the end of 2011" (*compare* FAC ¶ 19 *with* McDowell Decl., Ex. A, *Cullen* Compl. ¶¶ 27–29);

- Charge Netflix with "discrimination" against hearing impaired individuals based on the virtually identical anti-discrimination statutes (*compare* FAC ¶¶ 47–55 [ADA] *with* McDowell Decl., Ex. A, *Cullen* Compl. ¶¶ 103–112 [California analogues to the ADA]);[5] and
- Seek virtually identical declaratory and injunctive relief requiring Netflix to provide "effective" or "meaningful" captioning on all streaming videos (*compare* FAC Prayer ¶¶ 1–2 *with* McDowell Decl., Ex. A, *Cullen* Compl. Prayer ¶¶ B–C).

The *Cullen* Action's only material distinction from the *NAD* Action — that it seeks class relief and additional relief for additional causes of action — further compels dismissal because the *Cullen* Action wholly subsumes every aspect of the *NAD* Action. Thus, as in *Young v. Kelly*,

[5] Both the *Cullen* Action and *NAD* Action assert the same discrimination claims, though under different names — a fact confirmed by the procedural history of both. The *Cullen* Action was first filed March 11, 2011 (McDowell Decl. ¶ 2), and alleged, as here, an ADA claim. After Netflix filed its Motion to Dismiss the *NAD* Action under the First-Filed Rule on July 29, 2011 (Dkt. No. 14), plaintiffs in the *Cullen* Action filed a Second Amended Complaint (McDowell Decl., Ex. A) — which, having removed a cause of action under the ADA, was an apparent attempt to distinguish the *NAD* Action and allow the duplicative *NAD* Action to proceed. That attempt fails, however, because the *Cullen* Action continues to assert claims under the California's Unruh Civil Rights Act and Disabled Persons Act — both of which claims rise and fall with ADA claims. *See* Cal. Civ. Code § 51(f) (violation under ADA "shall also constitute" Unruh Civil Rights Act violation); Cal. Civ. Code § 54(c) (violation under ADA "shall also constitute" Disabled Persons Act violation). In short, though asserted under different names, the claims remain the same.

No. 88-cv-0511E(M), 1993 U.S. Dist. LEXIS 13816 (W.D.N.Y. Sept. 30, 1993), *aff'd*, 33 F.3d 49 (2d. Cir. 1994), the later-filed individual action seeking declaratory and injunctive relief should be dismissed in favor of the first-filed class action

> in order to prevent interference with the orderly administration of the class action and to avoid a risk of inconsistent adjudications. . . . Moreover, one action can yield in deference to another earlier action even if claims and parties are not identical.

Id. at *2–3 (dismissing later-filed individual action subsumed within earlier-filed class action); *cf. W. Gulf*, 751 F.2d at 730 ("Regardless of whether or not the suits here are identical, if they overlap on the substantive issues, the cases would be required to be consolidated in . . . the jurisdiction first seized of the issues.")

The "risk of inconsistent adjudications" is particularly striking here, where competing requests for orders requiring Netflix to provide "effective" captioning (FAC Prayer ¶¶ 1–2) or "meaningful" captioning (McDowell Decl., Ex. A, *Cullen* Compl. Prayer ¶¶ B–C)]) raises the risk of pitting one district court's order against another's. Captioning that Judge Davila in the Northern District of California considers "meaningful" may conflict with this Court's conception of "effective," yet Netflix could be compelled to comply with both. Such inconsistency is exactly what the comity doctrine is meant to prevent.

Nor does NAD have any overwhelming need to litigate in the District of Massachusetts instead of the Northern District of California. ***First***, because this lawsuit alleges nationwide conduct arising from Los Gatos, California (FAC ¶¶ 13, 14, 19) and NAD's membership includes individuals "from all fifty states" (FAC ¶ 10), this district has no unique interest in adjudicating whether subtitling is adequate. *E.g.*, *United States ex rel. Ondis v. City of Woonsocket, R.I.*, 480 F. Supp. 2d 434, 436 (D. Mass. 2007), *aff'd*, 587 F.3d 49 (1st Cir. 2009) ("where the operative facts of the case have no material connection with this district, plaintiff's

choice of forum carries less weight."). ***Second***, Netflix's principal place of business in Los Gatos, California is squarely in the Northern District of California. (FAC ¶ 13.) ***Third***, seven of Plaintiffs' eight counsel are located in Berkeley and Oakland, California, also in the Northern District of California, with just a single local counsel located in Boston. (FAC at 18–19.) ***Fourth***, because NAD certainly was aware of the *Cullen* Action at the time this lawsuit was, NAD's selection of an alternate district in which to file, notwithstanding their addition of a handful of local plaintiffs, smacks of forum shopping. *Cf. Scheinbart v. Certain-Teed Prods. Corp.*, 367 F. Supp. 707, 711 (S.D.N.Y. 1973) ("A plaintiff's obvious forum shopping merely adds weight to the other considerations").

To prevent inconsistent judgments, the waste of judicial resources, and the unfair burden of two-front litigation, Netflix respectfully urges the Court to dismiss the *NAD* Action.

B. In the Alternative, This Case Should Be Transferred to the Northern District of California.

1. Applicable law.

In the alternative, Netflix respectfully requests that the Court transfer the *NAD* Action to the Northern District of California for the convenience of parties and witnesses and in the interests of justice. 28 USC § 1404(a).[6] The Court has wide discretion to transfer this case to the most appropriate forum. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (district courts have discretion "to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness") (citation omitted). The factors to be considered with respect to transfer include (a) the existence of related litigation; (b) convenience of the parties; (c) parties' contacts with the forum and the relationship of claims to the forum;

[6] Venue is proper in the Northern District of California; it is beyond dispute that Netflix "does business" there. *Handigran v. Travis & Natalie, Inc.*, 379 F. Supp. 2d 83, 84 (D. Mass. 2005) (citing 28 USC § 1404(a).)

(d) the relative ease of access to sources of proof; (e) availability of process to compel the presence of unwilling witnesses; and (f) the interests of justice in general. *Stewart Org.*, 487 U.S. at 29; *Cianbro Corp.*, 814 F.2d at 11 (reciting factors).

Each of the reasons for dismissing this action based on comity also support transferring it to the Northern District of California.

2. Existence of the first-filed *Cullen* Action favors transfer.

The first-to-file rule supports transfer without reaching other factors traditionally considered under 28 USC § 1404(a) where, as here, another pending action involves substantially similar legal and factual issues. *See Cianbro*, 814 F.2d at 11 (affirming transfer of duplicative case; "we regard these factors as irrelevant" and "inconclusive" in light of first-filed rule). Even where the section 1404(a) factors are applied, the desire to avoid multiplicity of litigation should be given "great weight" in ruling on motions to transfer. 15 Wright, Miller & Cooper, *Fed. Prac. & Proc.* § 3854 at 250 (3d ed. 2007).

> To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.

Cont'l Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960); *see Wiley v. Gerber Prods. Co.*, 667 F. Supp. 2d 171, 172 (D. Mass. 2009) (transferring later-filed action to venue of first-filed action "to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense"). The existence of the first-filed *Cullen* Action strongly favors transfer of the *NAD* Action to the Northern District of California.

3. Convenience of the parties, access to sources of proof, and the interests of justice also favor transfer.

The other factors under § 1404(a) also favor transfer to the Northern District of California. Nearly everything related to this case, including witnesses, are in Los Gatos,

California — a factor that "strongly favor[s]" transfer to the Northern District of California, *Ondis*, 480 F. Supp. 2d at 437 ("convenience of the witnesses is probably the most important factor"): Netflix's primary place of business is there; all key personnel responsible for closed captioning of streaming video content live and work there; and most of the relevant documents are located there. (Declaration of Neil Hunt ¶¶ 2–4.) Even NAD's counsel come almost exclusively from the Northern District of California. In Massachusetts, by contrast, Netflix has no personnel with knowledge about the topic or relevant documents. (*Id.* ¶¶ 2–4). In these circumstances, Plaintiffs' choice of forum "carries less weight." *Ondis*, 480 F. Supp. 2d at 436; *accord Impervious Paint Indus., Ltd. v. Ashland Oil, Inc.*, 444 F. Supp. 465, 468 (E.D. Pa. 1978) (transfer proper if "§ 1404(a) factors are in equipoise or favor one district particularly.").

If this case is not dismissed, it should be transferred to the Northern District of California.

V. CONCLUSION.

For the foregoing reasons, Netflix respectfully requests this action be dismissed; or, in the alternative, transferred to the Northern District of California.

September 12, 2011

NETFLIX, INC., by its counsel,

By: /s/ David F. McDowell
David F. McDowell (*pro hac vice*)

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[PROPOSED] ORDER

Defendant Netflix, Inc.'s Motion to Dismiss plaintiffs National Association of the Deaf; Western Massachusetts Association of the Deaf and Hearing Impaired; and Lee Nettles's First Amended Complaint came on regularly for hearing on Monday, October 17, 2011, at 8:30 a.m. in the Hampden Courtroom of the above-entitled court.

After considering the moving, opposition, and reply papers, arguments of counsel and all other matters presented to the Court, IT IS HEREBY ORDERED THAT the motion is ALLOWED. This Action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

By: _____
Hon. Michael A. Ponsor, U.S. District Judge

CERTIFICATE OF SERVICE

I, Elsa Laris, hereby certify that a copy of the foregoing documents has been served upon all opposing counsel of record by ECF on this 12th day of September, 2011.

/s/ Elsa Laris
Elsa Laris

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