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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARTIN VOGEL,	)	CV 16-00887-RSWL-AJWx
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER re: Defendant's</b>
	)	<b>Motion for Summary</b>
	)	<b>Judgment, or, in the</b>
	)	<b>Alternative, Summary</b>
	)	<b>Adjudication [32]</b>
WINCHELL'S DONUT HOUSES	)	
OPERATING COMPANY, LP,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

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Currently before the Court is Defendant Winchell's Donut Houses Operating Company, LP ("Defendant") Motion for Summary Judgment, or, in the Alternative, Summary Adjudication ("Motion") [32] as to all claims in the Complaint. Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS** Defendant's Motion.

///

1 I. BACKGROUND

2 A. Factual Background

3 Plaintiff Martin Vogel ("Plaintiff") is a  
4 "physically disabled" T-3 paraplegic who requires the  
5 use of a wheelchair when traveling in public. Compl. ¶  
6 8, ECF No. 1. Defendant owns, operates, and/or leases  
7 a Pizza Hut Restaurant in Norwalk, California (the  
8 "Restaurant"). Id. at ¶ 2.

9 Plaintiff visited the Restaurant on January 3,  
10 2016. Decl. of Martin Vogel ("Vogel Decl.") ¶ 2, ECF  
11 No 33-1. Plaintiff alleges that both the Restaurant's  
12 disabled parking space and the access aisle are too  
13 steep, mainly due to an encroaching built-up ramp.  
14 Compl. ¶ 10. Because the parking space and access  
15 aisle are not level, Plaintiff cannot easily transfer  
16 from a vehicle because his wheelchair rolls, or a lift  
17 platform for his wheelchair cannot sit level. Id.  
18 These barriers prevented Plaintiff from full and equal  
19 access to the Restaurant, violating the Americans with  
20 Disabilities Act ("ADA") and related state-law  
21 disability claims. Id.

22 After Plaintiff filed this lawsuit, Defendant  
23 repaved the disabled parking space and access aisle so  
24 that both comply with current accessibility standards.  
25 Decl. of Tim Stockton ("Stockton Decl.") ¶ 1, ECF No.  
26 32-3. Currently, the parking space and access aisle  
27 slopes are no steeper than 1:48, in conformity with the  
28 ADA and California Building Code ("CBC") standards.

1 Id. at ¶ 2, Exs. A, B, ECF. Nos. 32:4-5.

2 **B. Procedural Background**

3 On February 9, 2016, Plaintiff filed this  
4 Complaint, alleging Defendant violated the following:  
5 (1) the Americans with Disabilities Act ("ADA"), 42  
6 U.S.C. § 12101, *et seq.*, by denying him "full and equal  
7 enjoyment" of the Restaurant premises; (2) the  
8 California Disabled Persons Act ("CDPA"), California  
9 Civil Code § 54; (3) the Unruh Civil Rights Act ("Unruh  
10 Act"), California Civil Code § 51, and (4) denial of  
11 full and equal access to public facilities, California  
12 Health & Safety Code § 19955 *et seq.* Compl. ¶¶ 17, 36-  
13 38, 43-45, 48-51.

14 Plaintiff seeks declaratory judgment that Defendant  
15 violated the ADA. Id. at ¶ 31. For each CDPA offense,  
16 Plaintiff seeks actual damages, statutory minimum  
17 damages of \$1,000, declaratory relief, and any other  
18 relevant remedies. Id. at ¶ 37; Cal. Civ. Code § 54.3.  
19 For each Unruh Act violation, Plaintiff seeks statutory  
20 minimum damages of \$4,000. Compl. ¶ 45; Cal. Civ. Code  
21 § 52. Plaintiff also seeks injunctive relief and  
22 attorneys' fees for any violation of California Health  
23 & Safety Code § 19955. Compl. ¶ 51; Cal. Health &  
24 Safety Code § 19953.

25 On March 20, 2017, Defendant filed its Motion [32].  
26 On March 28, 2017, Plaintiff filed his Opposition [33].  
27 On April 4, 2017, Defendant filed its Reply and  
28 Evidentiary Objections [35-1] to the Vogel Declaration

1 [33-1].

2 **II. FINDINGS OF FACT**

3 1. Plaintiff's Complaint identifies two alleged  
4 barriers: (1) a disabled parking space has  
5 excessive slopes due at least in part to an  
6 encroaching built-up curb ramp; (2) the access  
7 aisle has excessive slopes due mainly to an  
8 encroaching built-up curb ramp. Def.'s Stmt. of  
9 Uncontroverted Facts ("Def.'s SUF") ¶ 1, ECF No.  
10 32-2; Pl.'s Stmt. of Genuine Disputes ("Pl.'s  
11 Facts") ¶¶ 1-2, ECF No. 33-4; Compl. ¶ 10.

12 **III. DISCUSSION**

13 **A. Legal Standard**

14 Federal Rule of Civil Procedure 56 states that a  
15 "court shall grant summary judgment" when the movant  
16 "shows that there is no genuine dispute as to any  
17 material fact and the movant is entitled to judgment as  
18 a matter of law." Fed. R. Civ. P. 56(a). A fact is  
19 "material" for purposes of summary judgment if it might  
20 affect the outcome of the suit, and a "genuine issue"  
21 exists if the evidence is such that a reasonable fact  
22 finder could return a verdict for the non-moving party.  
23 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
24 (1986). The evidence, and any inferences based on  
25 underlying facts, must be viewed in the light most  
26 favorable to the opposing party. Twentieth Century-Fox  
27 Film Corp. v. MCA, Inc., 715 F.2d 1327, 1329 (9th Cir.  
28 1983). In ruling on a motion for summary judgment, the

1 court's function is not to weigh the evidence, but only  
2 to determine if a genuine issue of material fact  
3 exists. Anderson, 477 U.S. at 255.

4 Under Rule 56, the party moving for summary  
5 judgment has the initial burden to show "no genuine  
6 dispute as to any material fact." Fed. R. Civ. P.  
7 56(a); see Nissan Fire & Marine Ins. Co. v. Fritz Cos.,  
8 210 F.3d 1099, 1102-03 (9th Cir. 2000). The burden  
9 then shifts to the non-moving party to produce  
10 admissible evidence showing a triable issue of fact.  
11 Nissan Fire & Marine Ins., 210 F.3d at 1102-03; see  
12 Fed. R. Civ. P. 56(a). Summary judgment "is  
13 appropriate when the plaintiff fails to make a showing  
14 sufficient to establish the existence of an element  
15 essential to [their] case, and on which [they] will  
16 bear the burden of proof at trial." Cleveland v.  
17 Policy Mgmt. Sys. Corp., 526 U.S. 795, 805-06 (1999);  
18 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).  
19 The standard "provides that the mere existence of *some*  
20 alleged factual dispute between the parties will not  
21 defeat an otherwise properly supported motion for  
22 summary judgment; the requirement is that there be no  
23 *genuine issues of material fact.*" Anderson, 477 U.S.  
24 at 247-48.

## 25 **B. Discussion**

### 26 1. Defendant's Evidentiary Objections

27 Defendant objects to the Vogel Declaration in its  
28 entirety, to Paragraphs 3 and 4, and to Exhibit A

1 depicting the alleged access barriers at the  
2 Restaurant. See generally Def.'s Evid. Objs., ECF No.  
3 35-1. Defendant objects on the following grounds: (1)  
4 the Vogel Declaration is a sham declaration that  
5 contradicts his deposition testimony; (2) Vogel did not  
6 sign his declaration; (3) Vogel did not respond to  
7 Defendant's Statement of Undisputed Facts, thus deeming  
8 them admitted; (4) the declaration lacks foundation and  
9 proffers mere legal conclusions. Id. at ¶¶ 1-4.

10 The "sham affidavit rule" states that a party  
11 cannot create an issue of fact by proffering an  
12 affidavit contradicting his prior deposition testimony.  
13 Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th  
14 Cir. 1991). There are two caveats to a district  
15 court's discretion to invoke the sham affidavit rule:  
16 (1) the rule does not apply when a contradictory  
17 affidavit is introduced to explain portions of earlier  
18 deposition testimony; and (2) the inconsistency between  
19 a party's deposition testimony and subsequent affidavit  
20 must be clear and unambiguous to justify striking the  
21 affidavit. Van Asdale v. Int'l Game Tech., 577 F.2d  
22 989, 998-999 (9th Cir. 2009). Here, the  
23 inconsistencies between the declaration and excerpted  
24 portions of Vogel's deposition testimony are not clear;  
25 indeed, Defendant makes no effort to unpack the alleged  
26 inconsistencies. Plaintiff's deposition testimony—that  
27 he competes in wheelchair races requiring him to jump  
28 off a curb—would seemingly contradict the allegation in

1 his declaration that the access barriers' slopes were  
2 too steep for him to transfer from his vehicle.  
3 Compare Vogel Dep., Ex. D. to Decl. of Michael J.  
4 Chilleen ("Chilleen Decl."), at 32:2-6, with Compl. ¶  
5 10. But upon a closer reading of the Complaint,  
6 Plaintiff does not complain of the access barriers in  
7 terms of his ability to maneuver over the curbs as he  
8 would during a wheelchair race; rather, he complains  
9 that he is unable to transfer or unload from his  
10 vehicle. Thus, the connection between the deposition  
11 testimony and allegations in the declaration is too  
12 tenuous to render the inconsistencies clear.

13 For declarations signed by individuals other than  
14 CM/ECF Filers, Local Rule 5-4.3.4 requires a hand-  
15 signed signature. It appears that Plaintiff is not a  
16 registered CM/ECF filer. Defendant asks the Court to  
17 strike the Vogel Declaration because Plaintiff has  
18 failed to properly sign it. But Defendant does not  
19 sufficiently develop this objection to compel the Court  
20 to strike the declaration in its entirety. Similarly,  
21 Defendant's remaining objections regarding legal  
22 conclusion and lacks foundation are "devoid of any  
23 specific argument or analysis as to why any particular  
24 exhibit or assertion in a declaration should be  
25 excluded." United States v. HVI Cat Canyon, Inc., 213  
26 F. Supp. 3d 1249, 1257 (C.D. Cal. 2016). As to the  
27 argument that Plaintiff did not respond to Defendant's  
28 Statement of Undisputed Facts, Plaintiff appropriately

1 filed a Statement of Genuine Disputes pursuant to Local  
2 Rule 56-2. Accordingly, the Court  
3 **OVERRULES** Defendant's objections in their entirety [35-  
4 1].

5 2. ADA Claim

6 Plaintiff raises a claim for violation of Title III  
7 of the ADA, which prohibits discrimination in any place  
8 of public accommodation. Grove v. De La Cruz, 407 F.  
9 Supp. 2d 1126, 1130 (C.D. Cal. 2005); 42 U.S.C. §  
10 12182. In order to sustain a prima facie case for  
11 discrimination under Title III of the ADA, the  
12 plaintiff must show that (1) he or she is disabled  
13 within the meaning of the ADA; (2) the defendant is a  
14 private entity that owns, leases, or operates a place  
15 of public accommodation; and (3) the defendant denied  
16 public accommodations to the plaintiff because of his  
17 or her disability. See 42 U.S.C. § 12182(a); Molski v.  
18 M.J. Cable, Inc., 481 F.3d 724, 730 (9th Cir. 2007).  
19 Monetary damages are not available in private suits  
20 under Title III, Wander v. Kaus, 304 F.3d 856, 858 (9th  
21 Cir. 2002), but the ADA gives courts the discretion to  
22 award injunctive relief, attorneys' fees, litigation  
23 expenses, and costs to the prevailing parties. See 42  
24 U.S.C. § 12205; Molski, 481 F.3d at 730.

25 Plaintiff points to two barriers which prevented  
26 him from enjoying the Restaurant accommodations: (1)  
27 the disabled parking space's slopes/cross-slopes are  
28 too steep, due to an encroaching built-up curb ramp;



1 (2) the access aisle's slopes/cross-slopes are too  
2 steep, due to an encroaching built-up curb ramp.  
3 Compl. ¶ 10. Without a level parking space or access  
4 aisle, it is difficult for Plaintiff to transfer from  
5 his vehicle, as his wheelchair cannot roll or his lift  
6 platform cannot sit level. Id. Before reaching the  
7 merits of Plaintiff's ADA claim, the Court discusses  
8 Defendant's arguments regarding standing and mootness.

9 a. *Standing*

10 In order to have constitutional standing, Plaintiff  
11 must demonstrate that (1) he has suffered an injury-in-  
12 fact that is both concrete and particularized and  
13 actual or imminent; (2) the injury is traceable to the  
14 defendant's challenged action; and (3) it is likely  
15 that a favorable decision will redress the injury.  
16 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560  
17 (1992). In ADA cases, courts have been instructed "to  
18 take a broad view of constitutional standing . . .  
19 especially where, as under the ADA, private enforcement  
20 suits are the primary method of obtaining compliance  
21 with the Act." Chapman v. Pier 1 Imports (U.S.) Inc.,  
22 631 F.3d 939, 946 (9th Cir. 2011)(internal quotation  
23 marks and citations omitted). The Ninth Circuit has  
24 explained that there are two ways an ADA plaintiff can  
25 show a cognizable injury-in-fact: (1) by showing  
26 injury-in-fact plus an intent to return to the facility  
27 at issue; or (2) showing that he was deterred from  
28 visiting the facility because he encountered barriers

1 relating to his disability there. Id. at 949.

2 Defendant argues that Plaintiff has no concrete  
3 plans to return to the Restaurant; thus, he has not  
4 suffered an injury-in-fact and lacks standing under the  
5 first "type" recognized by the Ninth Circuit. Def.'s  
6 Mot. for Summ. J. ("Mot.") 5:16-18. Plaintiff counters  
7 that he has standing because he alleged that he was  
8 deterred from returning to the Restaurant after  
9 encountering the access barriers on his January 3, 2016  
10 visit. Pl.'s Opp'n to Mot. For Summ. J. ("Opp'n")  
11 6:26-28.

12 The record is sparse as to Plaintiff's genuine  
13 intent to return to the Restaurant. To flesh out a  
14 plaintiff's intent to return, a court may look at the  
15 proximity of the facility to the plaintiff's residence,  
16 plaintiff's past patronage, plaintiff's concrete plans,  
17 and plaintiff's frequency of travel near the facility.  
18 Molski v. Mandarin Touch Restaurant, 385 F. Supp. 2d  
19 1042, 1045 (C.D. Cal. 2005). The Restaurant—part of a  
20 national chain—is in Norwalk, and Plaintiff could  
21 easily find a closer location to Pasadena, his stated  
22 residence. Chilleen Decl. Ex. B, at 4:19-20, ECF No.  
23 32-8. Nor does Plaintiff provide a reason for frequent  
24 travel to Norwalk. And Plaintiff's past patronage of  
25 the Restaurant is unclear—he does not indicate whether  
26 the January 3, 2016 visit was an isolated incident or

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1 part of frequent visits to the Restaurant.<sup>1</sup> Although  
2 Plaintiff "enjoy[s] the Restaurant as well as the food  
3 they sell" and intends to return in the future, he  
4 admits that he does not have specific plans to return  
5 at this time. Vogel Decl. ¶ 3; Chilleen Decl. Ex. B,  
6 at 9:17-18. These facts do not evince a clear intent  
7 to return found in other cases. Cf. Doran v. 7-Eleven,  
8 Inc., 524 F.3d 1034, 1040-41 (9th Cir. 2008)(sincere  
9 intent to return where plaintiff had visited 7-Eleven  
10 store ten to twenty times previously, the store was  
11 near his favorite restaurant and near Disneyland where  
12 he planned to visit at least once a year, and he  
13 testified in deposition that he would return to the  
14 store once the access barriers were fixed). Thus,  
15 Plaintiff has not demonstrated a concrete injury.

16 The Court is satisfied, however, that Plaintiff has  
17 standing under the second "type" announced by the Ninth  
18 Circuit. "[A]n ADA plaintiff who has encountered or  
19 has personal knowledge of at least one barrier related  
20 to his or her disability when he files a complaint and  
21 who has been deterred from attempting to gain access to  
22 the public accommodation because of that barrier, has

23 \_\_\_\_\_

24 <sup>1</sup> While not dispositive, the fact that Plaintiff has filed  
25 529 ADA-related lawsuits since 2012—countless of them against  
26 fast-food chains and other chain stores that can be visited  
27 throughout California—also undercuts his intent to return to this  
28 specific Restaurant. Chilleen Decl. Ex. A; Mandarin Touch, 385  
F. Supp. 2d at 1045 ("[Plaintiff] professes an intent to return  
to each [of the 400] business[es] that he sues . . . one would  
have to believe that he had a genuine desire to return to each  
business he sued.")

1 suffered an injury in fact under Article III of the  
2 ADA." Doran, 524 F.3d at 1047. Plaintiff encountered  
3 the alleged ADA violations when he visited the  
4 Restaurant on January 3, 2016 and took photographs.  
5 Vogel Decl. Ex. A. And Plaintiff explains how the  
6 specific barriers relate to his disability as a  
7 wheelchair-bound paraplegic—the disabled parking space  
8 and access aisle have slopes/cross-slopes that are too  
9 steep, due to an encroaching built-up curb ramp, which  
10 make it difficult for Plaintiff to exit his vehicle, as  
11 his wheelchair rolls or his lift platform cannot sit  
12 level. Compl. ¶ 10; Kohler v. Bed Bath & Beyond of  
13 Cal., LLC, No. 11-4451 RSWL (Spx), 2012 WL 3018320, at  
14 \*2 (C.D. Cal. July 23, 2012)(injury-in-fact satisfied  
15 where slope and cross-slope of disabled parking space  
16 exceeded maximum). Moreover, Plaintiff states that he  
17 would return to the Restaurant were it made accessible  
18 to him. Vogel Decl. ¶ 3. Considered together, this  
19 evidence makes it plausible that Plaintiff would be  
20 deterred from returning to the Restaurant. Thus,  
21 Plaintiff has standing to raise his ADA claim.

22 b. *Mootness*

23 Defendant next argues that Plaintiff's ADA claim is  
24 moot because Defendant repaved the allegedly  
25 noncompliant disabled parking space and access aisle.  
26 Mot. 4:9-10. Plaintiff concedes that Defendant removed  
27 the access barriers after he filed his Complaint, but  
28 argues that even if his ADA claim is moot, his right to

1 statutory minimum damages under the state-law claims  
2 are not. See Opp'n 3:4-7.

3 Because a plaintiff can only sue for injunctive  
4 relief in an ADA case, the Ninth Circuit has explained  
5 that "a defendant's voluntary removal of alleged  
6 barriers prior to trial can have the effect of mooting  
7 a plaintiff's ADA claim." Oliver v. Ralphs Grocery  
8 Co., 654 F.3d 903, 905 (9th Cir. 2011); see also  
9 Hubbard v. 7-Eleven, Inc., 433 F. Supp. 2d 1134, 1145  
10 (S.D. Cal. 2006)(defendant repaired ramp slope from  
11 public sidewalk to store entrance, which was too steep,  
12 thus mooting the ADA claim).

13 Previously, the disabled parking space and access  
14 aisle slopes were too steep, due at least to an  
15 encroaching built-up curb ramp. Compl. ¶ 10.  
16 Defendant proffers a declaration from Tim Stockton,  
17 Defendant's Senior Director of Real Estate and  
18 Development, who personally supervised the repaving of  
19 the disabled parking space and access aisle. Stockton  
20 Decl. ¶ 2. Defendant also presents photographs that  
21 show the disabled parking space and access aisle slopes  
22 are currently no steeper than 1:48, in compliance with  
23 the ADA Accessibility Guidelines ("ADAAG"). Id. at ¶¶  
24 1-2, Exs. A-B, ECF Nos. 32:3-5; ADAAG § 502.4 ("[for  
25 parking spaces and access aisles] [s]lopes not steeper  
26 than 1:48 shall be permitted.") The alleged ADA  
27 violations have been corrected, and Plaintiff does not  
28 dispute this, even stating that he "does not deny that

1 [the barriers] alleged in this Complaint were  
2 eventually removed." Opp'n 3:4-5; compare Def.'s SUF  
3 ¶¶ 2-3, with Pl.'s Facts. The Court thus **GRANTS**  
4 summary judgment as to the ADA claim.<sup>2</sup> Additionally,  
5 Plaintiff is correct that the ADA claim's mootness does  
6 not moot the CDPA, Unruh Act, and state-law claims for  
7 damages. Kohler v. Presidio Int'l, Inc., No. CV  
8 10-4680 PSG (PJWx), 2013 WL 228120, at \*2 (C.D. Cal.  
9 Jan. 22, 2013). Thus, the Court proceeds with an  
10 analysis of those remaining claims.

### 11 3. State-Law Claims

12 Defendant also moves for summary judgment as to the  
13 state-law claims under the CDPA, the Unruh Act, and the  
14 California Health & Safety Code. Because the Court  
15 grants summary judgment as to Plaintiff's ADA claim,  
16 the only remaining issue is whether the Court may  
17 exercise supplemental jurisdiction over the pendent  
18 state-law claims.

19 The Court has supplemental jurisdiction "over all  
20 other claims that are so related to claims in the  
21 action within such original jurisdiction that they form  
22 part of the same case or controversy . . . ." 28

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24 <sup>2</sup> Because Defendant has fixed the barriers affecting the  
25 disabled parking space and access aisle, the Court will not  
26 entertain the parties' arguments whether, in Plaintiff's prima  
27 facie case for its ADA claim, the access barriers violated  
28 construction-related accessibility standards. See Parr v. L&L  
Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1087 (D. Haw.  
2000)(discussing the accessibility compliance of only non-  
remediated, non-mooted access barriers).

1 U.S.C. § 1367(a). The ADA claims and state-law claims  
2 share a common nucleus of operative fact and are "part  
3 of the same case or controversy;" both use identical  
4 factual allegations and violations of the ADA  
5 constitute violations of the parallel sections in the  
6 Unruh Act and CDPA. See Cal. Civ. Code §§ 51(f),  
7 54(c). Nevertheless, once the court acquires  
8 supplemental jurisdiction, it may decline to exercise  
9 it if:

- 10 (1) the claim raises a novel or complex issue of  
11 State law;
- 12 (2) the claim substantially predominates over the  
13 claim or claims over which the district court  
14 has original jurisdiction;
- 15 (3) the district court has dismissed all claims  
16 over which it has original jurisdiction, or;
- 17 (4) in exceptional circumstances, there are other  
18 compelling reasons for declining jurisdiction.

19 28 U.S.C. § 1367(c). The decision to retain  
20 jurisdiction over state-law claims is within the  
21 district court's discretion, weighing factors such as  
22 economy, convenience, fairness, and comity. Brady v.  
23 Brown, 51 F.3d 810, 816 (9th Cir. 1995).

24 Defendant argues that the Court should dismiss the  
25 remaining state-law claims as it has dismissed the ADA  
26 claim over which it has original jurisdiction.  
27 Plaintiff responds that "economy, convenience,  
28 fairness, and comity" dictate that the Court retain the

1 state-law claims, as they are borne out of the same  
2 facts as the ADA claims and because discovery and  
3 motion practice are complete and the case is set for  
4 trial.

5 Here, the Court granted summary judgment on the ADA  
6 claim, the only claim over which it has original  
7 jurisdiction. Thus, the Court declines to exercise  
8 supplemental jurisdiction over the state-law claims, as  
9 it "has dismissed all claims over which it has original  
10 jurisdiction." 28 U.S.C. § 1367(c)(1). See, e.g.,  
11 Oliver, 654 F.3d at 910 (finding district court did not  
12 abuse its discretion in dismissing state-law claims  
13 under the Unruh Act and CDPA after losing original  
14 jurisdiction over ADA claim); see also Rodgers v.  
15 Chevys Restaurants, LLC, No. C13-03923 HRL, 2015 WL  
16 909763 (N.D. Cal. Feb. 24, 2015)("In a Title III ADA  
17 action, a district court may properly decline  
18 supplemental jurisdiction over related state-law access  
19 claims once the ADA claim has been dismissed.").  
20 Nevertheless, to ensure "values of economy,  
21 convenience, fairness, and comity," the Court considers  
22 the parties' remaining arguments as to the supplemental  
23 jurisdiction inquiry.

24 First, Plaintiff is correct that the Court should  
25 not decline to exercise supplemental jurisdiction on  
26 the "novel or complex issues of state law" factor in  
27 section 1367(c)(1). Defendant generally argues that  
28 the recently enacted Senate Bill 1186 ("SB") presents



1 complex issues regarding how damages are calculated,  
2 mot. 16:20-22, but does not unpack how SB 1186, and the  
3 cited caselaw render the state-law claims complex with  
4 respect to Plaintiff's specific circumstances. Thus,  
5 the Court will not decline supplemental jurisdiction on  
6 this ground.

7       However, the Court does decline to exercise  
8 supplemental jurisdiction over the state-law claims  
9 because the state-law claims substantially predominate  
10 over the federal ADA claim. Plaintiff argues that ADA  
11 plaintiffs frequently join ADA, Unruh Act, and CDPA  
12 claims in one lawsuit because they require the same  
13 burden of proof and both the Unruh Act and CDPA allow  
14 for damages based on ADA violations. Opp'n 13:12-14.  
15 "The mere fact that the Unruh Act incorporates  
16 violations of the ADA does not give [the] Court federal  
17 question jurisdiction over Plaintiff's state law  
18 claim." Carpenter v. Raintree Realty, LLC, No. CV  
19 11-06798-RGK (MRWx), 2012 WL 2579179, at \*2 (C.D. Cal.  
20 July 2, 2012). At the same time, the Court hesitates  
21 to determine that the state-law claims predominate over  
22 the ADA claim merely because the ADA claim allows for  
23 injunctive relief, while the state law claims permit  
24 monetary damages and more expansive remedies. To do so  
25 would "preclude a district court from ever asserting  
26 supplemental jurisdiction over a state law claim under  
27 the Unruh Act [or other state laws]." Kohler v.  
28 Islands Restaurants, LP, 956 F. Supp. 2d 1170, 1176

1 (S.D. Cal. 2013). Thus, a more comprehensive look at  
2 the facts at hand is necessary.

3 Molski v. EOS Estate Winery, No. CV 03-5880-GAF,  
4 2004 WL 3952249, at \*4 (C.D. Cal. July 14, 2005) is  
5 instructive. In that case, the court noted that  
6 plaintiff's ADA claim was merely a "jurisdictional  
7 hook" into federal court, but the "predominant focus"  
8 of the lawsuit was his damages under his state-law  
9 claims, even though he voluntarily limited himself to  
10 \$4,000. Id. Moreover, all but one of the claims were  
11 state-law claims and plaintiff could just as easily  
12 have sought injunctive relief through the state-law  
13 claims, rather than by tacking on an ADA claim; thus,  
14 "the federal claim add[ed] nothing to the lawsuit that  
15 could not be obtained in Superior Court." Id. Here,  
16 although Plaintiff similarly requested only \$4,000 in  
17 statutory damages for each Unruh Act offense, he seeks  
18 more expansive remedies available under his state-law  
19 claims, including mandatory attorneys' fees pursuant to  
20 the Unruh Act and CDPA's fee-shifting provisions,  
21 actual damages under the CDPA, and declaratory relief  
22 under the CDPA. Schutz v. McDonald's Corp., 133 F.  
23 Supp. 3d 1241, 1247 (S.D. Cal. 2015). And Plaintiff  
24 states in his Complaint that he seeks declaratory  
25 relief under the ADA "in order to pursue damages under  
26 [the Unruh Act or CDPA]." Compl. ¶ 31. The facts,  
27 then, would suggest that Plaintiff's state-law claims  
28 predominate in a more meaningful way than a typical

1 case where Plaintiff tacks these state-law claims on to  
2 his primary ADA claim.

3 Plaintiff cites a handful of cases where district  
4 courts in this circuit concluded that Unruh Act and DPA  
5 claims do not substantially predominate over the  
6 federal ADA claims. See, e.g., Wilson v. PFS LLC, No.  
7 06CV1046WQH(NLS), 2006 WL 3841517, at \*6 (S.D. Cal.  
8 Nov. 2, 2006)(state law claims did not substantially  
9 predominate over ADA claims, as both claims are  
10 "identical" and an ADA violation constitutes a  
11 violation of the parallel state laws). However,  
12 Plaintiff's cases are distinguishable because there,  
13 unlike here, the ADA claim remained in the case, or the  
14 court declined to dismiss the ADA claim on standing or  
15 mootness grounds; thus, the court still had original  
16 jurisdiction over a claim in the case. For instance,  
17 in Johnson v. Makinen, No. 2:09-CV-796 FCD KJM, 2009 WL  
18 2137130, at \*3 (E.D. Cal. July 15, 2009)(emphasis  
19 added), the court concluded that the state-law claims  
20 did not substantially predominate over the ADA claim,  
21 as plaintiff did not abandon either claim, the *request*  
22 *for injunctive relief was not moot*, his federal claims  
23 equaled in number the state law claims, and his federal  
24 claim had not been dismissed. Here, unlike Makinen and  
25 the other cases on which Plaintiff relies, the ADA  
26 claim has been mooted and dismissed and the state-law  
27 claims far outnumber the federal claims.

28 Lastly, although not dispositive of the Court's

1 decision to decline supplemental jurisdiction, the  
2 Court notes that since 2012, Plaintiff has been a  
3 litigant in 529 cases, countless of which involve  
4 state-law claims for damages hitched to his ADA claims  
5 and similar allegations of access barriers to his  
6 wheelchair. Vogel v. Rite Aid Corp., 992 F. Supp. 2d  
7 998, 1004 (C.D. Cal. 2014)(Vogel filed suit with ADA,  
8 CDPA, Unruh Act, and California Health & Safety Code  
9 claims); Vogel v. Linden Optometry APC, CV 13-00295 GAF  
10 SHX, 2013 WL 1831686, at \*1 (C.D. Cal. Apr. 30,  
11 2013)(same). In EOS Estate Winery, 2005 WL 3952249, at  
12 \*4, the Court considered a serial ADA-plaintiff's  
13 litigation strategy as an "exceptional circumstance"  
14 that would warrant declining supplemental jurisdiction  
15 under section 1367(c)(4): "[Molski] has developed a  
16 well-oiled system: [he] files a complaint in which he  
17 always complains of lack of van-accessible parking . .  
18 . he asks for injunctive relief and damages, and waits  
19 for settlement . . . [h]is intentions are not to obtain  
20 injunctive relief, since he could do so by merely  
21 filing suit under the ADA . . . Molski instead  
22 attaches the ADA claim to his state claims for damages  
23 so he can get into the federal system, which he then  
24 uses to his advantage." While less extreme here,  
25 Plaintiff often raises ADA and state-law claims while  
26 complaining of disabled parking space and access aisle  
27 slope steepness. See, e.g., Vogel v. Salazar, No. SACV  
28 14-00853-CJC (DFMx), 2014 WL 5427531, at \*1 (C.D. Cal.

1 Oct. 24, 2014)(Vogel encountered access aisle and  
2 parking spaces with slopes that prevented him from  
3 unloading and transferring from his vehicle). This  
4 also counsels towards declining supplemental  
5 jurisdiction over the state-law claims.

6 "[I]n the usual case in which federal-law claims  
7 are eliminated before trial, the balance of factors . .  
8 . will point toward declining to exercise jurisdiction  
9 over the remaining state law claims." Carnegie-Mellon  
10 Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988).

11 Bearing in mind the mooted ADA claim, and the above  
12 analysis regarding the section 1367(c) factors, the  
13 Court declines to exercise supplemental jurisdiction  
14 over the remaining state-law claims and **GRANTS**  
15 Defendant's Motion as to the Unruh Act, CDPA, and  
16 California Health & Safety Code claims.

17 **IV. CONCLUSION**

18 Based on the foregoing, the Court **GRANTS**  
19 Defendant's Motion for Summary Judgment as to the  
20 entire Complaint [32].

21  
22 DATED: May 18, 2017

s/ RONALD S.W. LEW

23 **HONORABLE RONALD S.W. LEW**  
24 Senior U.S. District Judge  
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