

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

DANIEL DELGADO,
Plaintiff,

CASE NO. CV F 09-1839 LJO SKO

**ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

vs.

ORCHARD SUPPLY HARDWARE
CORPORATION,
Defendant.

The parties have filed cross motions for summary judgment. Plaintiff Daniel Delgado filed a motion for summary judgment against defendant Orchard Supply Hardware on June 28, 2011. Defendant Orchard Supply filed a cross motion for summary judgment also on June 28, 2011.

Each party filed an opposition on July 26, 2011. The replies were filed on August 2, 2011. Pursuant to Local Rule 230(g), this matter is submitted on the pleadings without oral argument, and the hearing set for August 9, 2011 is VACATED. Having considered the moving, opposition, and reply papers, as well as the Court's file, the Court issues the following order.¹

¹ The parties have filed numerous objections to the evidence submitted by the opposing side. The Court has not relied on any of the disputed evidence to grant or to deny summary judgment. Where the Court has denied summary judgment as to the claims, the Court found triable issues exist regarding the issues. To the extent that the Court may have considered some of the disputed evidence in finding that triable issues exist regarding the claims, the objections are OVERRULED. Further, the Court is not obligated to consider matters not specifically brought to its attention. Thus, it is immaterial that helpful evidence may be located somewhere in the record. The motion and opposition must designate and reference specific triable facts. *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001).

1 **FACTUAL BACKGROUND**

2 This is a civil rights action by plaintiff Daniel Delgado (“Delgado”) for disability discrimination
3 at the building, structure, facility, complex, property, land, development, and/or surrounding business
4 complex known as: Orchard Supply Hardware Store, located at 5653 Kings Canyon Road, Fresno,
5 California (hereinafter “the Store”). Delgado seeks damages, injunctive and declaratory relief, attorney
6 fees and costs, against Orchard Supply Hardware Corporation (“OSH”).

7 It is undisputed that Delgado has a disability. He cannot walk and uses a wheelchair to travel
8 and use public facilities. (Doc. 35-7, Joint fact no.4; Doc. 54-1, OSH Response fact no. 2.) Delgado
9 visited the OSH Store and encountered several accessibility barriers. Some of the barriers include
10 operable paper towel dispensers in the men’s restroom; check-out aisle accessibility designation; men’s
11 restroom grab bar; toilet seat height; specific parking lot barriers, among other barriers. Following the
12 filing of this lawsuit, the interior building accessibility barriers were remedied by OSH. The only alleged
13 interior architectural barrier that Delgado currently seeks to enjoin at the OSH facility is the strike-side
14 clearance of the hallway door leading to the facility restrooms.

15 Delgado also seeks to enjoin the exterior accessibility barriers in the parking lot, none of which
16 has been remedied.² For the exterior barriers, the dispute between the parties centers upon whether OSH
17 owns, operates and/or controls the exterior areas of the OSH Store such that OSH could remedy the
18 exterior accessibility barriers in the parking lot. Delgado contends that OSH has control over the
19 exterior barriers. OSH contends that the control necessary to remedy the parking lot exterior barriers
20 is exclusively with the landlord.

21 Delgado alleges the following claims for relief:

- 22 1. Injunctive relief under the Americans with Disabilities Act, 42 U.S.C. § 12188(a)(2)
- 23 (“ADA”);
- 24 2. Damages pursuant to the Disabled Persons Act, California Civil Code §54;
- 25 3. Damages pursuant to the Unruh Civil Rights Act (“Unruh Act”), California Civil Code

26 ² Delgado identifies multiple exterior architectural barriers which have not been remedied in the parking lot. (See
27 Doc. 38, Delgado Motion p. 8-9.) In general terms, these barriers include: improper number of compliant accessible parking
28 spaces; parking spaces without access aisles; lack of proper signage; improper location of accessible parking spaces and route
to accessible features and building; improper slope of parking lot at accessible parking spaces; and improper curb ramps.

1 persuasion at trial.” *Nissan Fire*, 210 F.3d at 1102-1103; *see Adickes*, 398 U.S. at 160, 90 S.Ct. 1598.
2 “If, however, a moving party carries its burden of production, the nonmoving party must produce
3 evidence to support its claim or defense.” *Nissan Fire*, 210 F.3d at 1103. “If the nonmoving party fails
4 to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion
5 for summary judgment.” *Nissan Fire*, 210 F.3d at 1103; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322,
6 106 S.Ct. 2548 (1986) (“Rule 56(c) mandates the entry of summary judgment, after adequate time for
7 discovery and upon motion, against a party who fails to make the showing sufficient to establish the
8 existence of an element essential to that party’s case, and on which that party will bear the burden of
9 proof at trial.”)

10 **B. Overview of the ADA**

11 Title III of the Americans with Disabilities Act (“ADA” Title III, 42 U.S.C. § 12181 et seq.)
12 prohibits private entities from discriminating on the basis of disability in “commercial facilities.” The
13 purpose of this provision is to ensure that these properties are readily accessible to and usable by
14 disabled persons. 42 U.S.C. § 12181 et seq. There are four levels to the ADA's regulatory scheme: (a)
15 the ADA statutory language; (b) regulations issued by the Department of Justice; 42 U.S.C.A. §
16 12186(b), (c); (c) the ADA Accessibility Guidelines (ADAAG), which are specific dimensioning and
17 design standards adopted by the Department of Justice; *Id.* §§ 12204(a)-(b), 12186(c); 28 C.F.R. pt. 36,
18 app. A. § 1 et. seq. (ADAAG), and (d) supplementary interpretive materials issued by the DOJ, such as
19 the Technical Assistance Manual.

20 The parties agree that to prevail under the ADA, plaintiff must satisfy the following elements:

- 21 1. Plaintiff must be disabled. 42 U.S.C. § 12182(a).
- 22 2. The subject facility must be a place of public accommodation and therefore governed by
23 Title III of the ADA. 42 U.S.C. 12182(a).
- 24 3. The subject facility must have an architectural barrier. 42 U.S.C. § 12182(b)(2)(A)(iv).
- 25 4. The plaintiff must have actual knowledge of the architectural barrier precluding his full
26 and equal access to the facility. 42 U.S.C. 12188(a).

27
28 The parties agree that the first two elements and the fourth element are satisfied. They agree that

1 plaintiff is disabled, and they agree that the OSH Store is a place of public accommodation. Defendant
2 OSH admits that it owns, operates and/or leases the Store and that the Store is a public accommodation
3 facility/retail store, open to the public, which is intended for nonresidential use and whose operation
4 affects commerce. As to the fourth element, it is undisputed that Delgado visited the OSH Store on
5 multiple occasions.³

6 **C. Conflicting Evidence Regarding the Interior Architectural Barrier**

7 OSH contends that the sole interior architectural barrier identified by plaintiff, the hallway strike
8 door, has been remedied. OSH contends that the hallway strike door has been fitted with an automatic
9 opener, removing any potential barrier related to strike-side clearance. If no architectural barriers exist
10 at the time the court is asked to provide relief, the ADA claim is moot because there is nothing for the
11 court to order the facility to do. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

12 Delgado contends that the remaining interior architectural barrier of the strike-door remains to
13 be remedied. Delgado argues that OSH has not demonstrated that it has met the requirements necessary
14 to make the automatic door opener a permanent solution to the barrier, nor has OSH provided any
15 testimony that the alleged automatic door opener meets state or federal accessibility requirements.

16 A disputed issue of fact exists as to whether the interior hallway door barrier satisfies
17 accessibility requirements. OSH presents evidence by its Director of Facilities, Mark Bringuel, that an
18 automatic door opener was installed on the hallway door. (Doc. 35-4, Bringuel Decl. ¶5.) Mr. Bringuel
19 testifies that:

- 20 1. The activating devices for the door are less than 48" above the finished floor surface, are
21 within view and outside the swing, of the door
- 22 2. The door opens to a minimum of 90 degrees upon activation of the switches, remains open
23 for at least 5 seconds after release of the switches, and the closer provides a minimum
24 5 seconds when it closes from 90 degrees to within 12 inches of latch.

25 Delgado presents evidence from expert Gary D. Layman that the device installed does not satisfy
26 the ADAAG. (Doc. 52-10, Layman Decl. ¶¶5-8.) Mr. Layman states that the ADAAG provides

27 ³ OSH disputes the fact based upon Delgado lack of "specific recollection of each [of] the trips" he made. (Doc. 54-
28 1, Response to Plaintiff's Facts 53.) The Court does not find OSH's position a dispute of a material fact.

1 requirements for automatic door openers and that certain Guidelines are applicable for automatic door
2 openers while others apply to fast opening doors. *Id.* (“1991 ADA standards requires the doors to be
3 installed per ANSI/BHMA A156.19, ANSI/BHMA A156,19 requires the installation to comply with the
4 most current codes at the time of installation . . .”). Mr. Layman cites various reasons why the door was
5 not installed properly. (Doc. 52-10, Layman Decl. ¶¶8-12.) The door was not permitted, it was not
6 inspected, the proper materials, design, test were not provided or approved.

7 This conflicting evidence, that offered by OSH and by Mr. Layman, creates a material issue of
8 fact. The evidence presented by OSH, viewed in the light most favorable to that party, shows that the
9 remaining interior barrier of the hallway door, has been remedied. Plaintiff objects to Mr. Bringuel’s
10 testimony on the grounds, among others, that Mr. Bringuel fails to lay the foundation for giving expert
11 testimony. However, Mr. Bringuel does not testify that the automatic door satisfies the ADA or
12 regulations for accessibility. Rather, his testimony is limited to what could be viewed by personal
13 observation, and does not opine as to ADA compliance. Delgado presents competent evidence that the
14 hallway door may not have been remedied in accordance with appropriate Guidelines and local
15 ordinances. Therefore, a material issue of fact remains as to the remedy to the interior hallway door.

16 Delgado argues that if the Court finds that barriers currently exist for which OSH is responsible,
17 the Court must issue an injunction. But here, the Court finds there are issues of fact as to whether the
18 remedy installed satisfies accessibility requirements under the ADA and applicable state law. OSH
19 installed a device on the hallway door which it claims satisfies accessibility requirements, but plaintiff
20 contends otherwise. Accordingly, the parties have raised an issue of fact.

21 **D. Responsibility between Landlord and Tenant under the ADA**

22 Delgado alleges the exterior architectural barriers exist in the parking lot of the OSH Store,
23 which remain to be remedied. He argues that OSH and the landlord are jointly and severally liable for
24 exterior barriers in that, pursuant to the lease terms and the landlord/tenant course of conduct, OSH has
25 control over the parking lot to remove the barriers, and has control over the exterior areas. As an
26 example, Delgado points to evidence that OSH installed cart corrals in the parking lot and repaired
27 fences.

28 OSH argues that the parking lot is the sole responsibility of the landlord. OSH argues that the

1 lease between OSH and the landlord identities that the parking lot is a common area under the exclusive
2 control of the landlord.⁴

3 **1. Under the ADA, Both Tenant and Landlord May Be Liable**

4 The primary dispute is whether OSH, as the tenant of the facility, is liable for exterior barriers.
5 It is undisputed that OSH is the tenant of the premises and that Save Mart is the owner/landlord.

6 A landlord and tenant may agree to allocate responsibility for compliance in their lease. The
7 relevant regulation provides:

8 Both the landlord who owns the building that houses a place of public
9 accommodation and the tenant who owns or operates the place of public
10 accommodation are public accommodations subject to the requirements
11 of this part. As between the parties, allocation of responsibility for
12 complying with the obligations of this part may be determined by lease
13 or other contract.

12 28 C.F.R. § 36.201(b). The regulation states that a landlord is a “public accommodation,” which triggers
13 coverage under Title III. See § 12182(a).

14 Significantly, the regulation provides that allocation of responsibility between the landlord and
15 a tenant by the lease is effective only “[a]s between the parties.” 28 C.F.R. § 36.201(b). The Ninth
16 Circuit has held that contractual allocation of responsibility has no effect on the rights of third parties.
17 *Botosan v. Paul McNally Realty*, 216 F.3d 827, 833 (9th Cir. 2000). “[B]oth the landlord and tenant are
18 liable under the Act.” *Id.* The ADA's prohibitions against discrimination apply to “any person who
19 owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a)
20 (emphasis added). As a result, “[b]oth the landlord and the tenant are public accommodations and have
21 full responsibility for complying with all ADA title II requirements applicable to that place of public
22 accommodation.” *Botosan*, 216 F.3d at 833 (quoting Department of Justice, Technical Assistance
23 Manual on the American With Disability Act § III-1.2000 (1994)).

24 Therefore, even if the lease agreement between OSH and Save Mart arguably allocated

26 ⁴ OSH cites to the entirety of the 90+ page lease without identifying any specific provision which supports its
27 argument. (See OSH Uncontroverted Fact no. 8). Delgado however, disputes the fact that OSH lacks control. Delgado cites
28 to Lease p. 16, paragraph A granting OSH a nonexclusive easement; paragraph B giving OSH control over parking areas and
preventing the landlord from altering without OSH permission; Lease p. 14, paragraph 7.6A, giving OSH the right to make
any repairs not made by landlord.

1 responsibility to Save Mart to make physical alterations to the property necessary to comply with the
2 ADA, such allocation has no affect on OSH’s obligations to Delgado and other members of the disabled
3 community.

4 **2. Extent of Control is an Issue of Fact**

5 This Court must take into consideration the nature and circumstances of control of the parking
6 lot. In *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2004), the
7 court explained that a party's obligation under Title III is determined with respect to the nature and
8 circumstances of its relationship with the property, among other considerations. *Disabled Right Action*,
9 375 F.3d at 880. In *Disabled Rights Action Committee*, the plaintiff sought to preclude the defendant
10 lessees from operating a rodeo at a facility until such time as the lessee complied with the ADA. The
11 court enjoined defendant lessees to make the facility “accessible to the degree possible within the scope
12 of its lease.” *Las Vegas Events*, 375 F.3d at 880-881. The court found that this provided meaningful
13 relief because the lessees could “mak[e] certain kinds of operational decisions regarding conditions over
14 which they have control-e.g., enjoining them from removing accessible floor seating, or requiring the
15 erection of temporary ramps or lifts.” *Las Vegas Events*, 375 F.3d at 880. *Hubbard v. Rite Aid Corp.*,
16 433 F.Supp.2d 1150 (S.D.Cal. 2006) involved violations of the ADA by the owners of drug store in a
17 shopping center and land parcel. The sidewalk, the path of travel to public right of way on the land
18 parcel where the drug store was located in the shopping center, was not in compliance with ADA
19 requirements. The Court declined to issue an injunction, stating: “Rite Aid cannot alter the path of travel
20 on property it does not own or otherwise control.” The Court stated that it “cannot order the Defendants
21 in this case to alter the path of travel on property that Defendants do not own or operate.” *Hubbard*, 433
22 F. Supp. 2d at 1170.

23 Here, there are disputed issues of fact as to the nature and circumstances of OSH’s control over
24 the parking lot. OSH argues that the lease between OSH and its landlord identifies the parking lot as
25 a common area under the exclusive control of the landlord. It argues under the lease, OSH has no
26 obligation or ability to make changes to the parking lot. Delgado presents evidence that the lease
27 between OSH and the landlord grants to OSH an easement and a right to use the common areas,
28 including the parking lot. (Lease p. 16, §8.1.) Delgado cites to the lease which defines OSH “Sphere

1 of Influence” as including the parking lot and ingress and egress. (Lease p.16, §8.1.(B).) Indeed,
2 Delgado notes that the lease requires OSH’s consent before the landlord may alter the parking lot or
3 facilities. Delgado points to other lease provisions which permit OSH to make repairs to the exterior,
4 and that OSH has done so, such as installing cart corrals and repairing fences.

5 The extent of control a party has over property such that it is obligated to make ADA repairs is
6 an issue of fact. Here, OSH presents evidence that it does not have authority to make changes to the
7 parking lot. Delgado presents evidence that OSH has such authority. The evidence is disputed as to the
8 control over the lot.

9 3. Settlement and Release between Delgado and Landlord

10 OSH argues that plaintiff has settled with the landlord, and therefore, with OSH. OSH argues
11 that is it a “Released Party” by the terms of the Release Agreement. The Release Agreement defines
12 “Released Parties” as Save Mart, “and any other entity (present, future, or former), known or unknown,
13 whom Plaintiff might claim owns or operates the exterior areas of the Facility and surrounding parking
14 lot.” (Doc. 58-2, Sealed Release Agreement p. 1 n.1.) OSH argues that since plaintiff contends OSH
15 “operates” the exterior of the Store, OSH is included in the terms of the Release Agreement. In its reply,
16 OSH argues that the only condition what was required to be performed was payment of the settlement
17 amount, not repairs of the architectural barriers. OSH argues that this release of all claims includes
18 release of OSH.

19 Delgado argues that the release was executed between Save Mart and Delgado. The release
20 provides that Delgado released Save Mart in consideration for the payment by Save Market, and
21 including removal of the barriers. Delgado presents evidence that none of the remedial measures agreed
22 upon in the release have been undertaken. Delgado argues that therefore, neither Save Mart nor OSH
23 has been released under the Agreement as the Release was conditioned upon the performance of the
24 barrier removals which has not been done.

25 The Settlement Agreement and Release (“Release Agreement”) is between Delgado and Save
26 Mart. The Release Agreement states that, “This Settlement Agreement and Release in Full is between
27 Daniel Delgado . . on the one hand, and Save Mart Supermarkets . . . on the other hand.” (Doc. 58-2,
28 Sealed Release Agreement p.1 of 10.) These parties to the agreement agreed that they would settle for:

1 (1) payment of a specific sum of money from Save Mart to Delgado, and (2) “Defendant agrees to make
2 modifications . . . at the Facility, and to make these changes within twelve (12) months . . .” (Doc. 58-2,
3 Sealed Release Agreement p. 2 of 10.) The consideration which was given in exchange for the release
4 was “the Settlement Amount, and the terms contained within the Agreement, . . .” Thus, Delgado settled
5 based upon the payment of money and also based upon the other terms of the Agreement, which
6 included the modifications to the Store.

7 A Release Agreement is a contract. The formation of a binding contract requires: (1) parties
8 capable of contracting; (2) mutual assent; (3) a lawful object; and (4) sufficient consideration. See Cal.
9 Civ.Code. §§ 1550, 1565. There is no dispute that the Release Agreement is a binding contract as
10 between Save Mart and Delgado, as all elements are met.

11 OSH’s position, while not specifically stated, is that it is an unintended third party beneficiary
12 of the Release Agreement. It is not a named party, but claims to have derived a benefit from the Release
13 Agreement. Indeed, OSH is not a contracting party to the Release Agreement, and any rights it may have
14 under the agreement are those of a third party beneficiary. *See Garcia v. Truck Ins. Exchange*, 36 Cal.3d
15 426, 440 (1984).

16 Here, as a third party, OSH, seeks to enforce the terms of the release. “A third party beneficiary
17 may enforce a contract made for its benefit.” *Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524 (2002). Civil
18 Code section 1559 provides: “A contract, made expressly for the benefit of a third person, may be
19 enforced by him at any time before the parties thereto rescind it.” A third party may qualify as a
20 beneficiary under a contract where the contracting parties intended to benefit that third party and such
21 intent appears on the terms of the contract. Civil Code section 1559 excludes enforcement of a contract
22 by persons who are only incidentally or remotely benefitted by it. “A third party should not be permitted
23 to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his
24 right to performance is predicated on the contracting parties’ intent to benefit him....” *Jones v. Aetna*
25 *Casualty & Surety Co.*, 26 Cal.App.4th 1717, 1724 (1994).

26 In essence, the question is whether the contracting parties intended OSH to be a third party
27 beneficiary. “The circumstance that a literal contract interpretation would result in a benefit to the third
28 party is not enough to entitle that party to demand enforcement. The contracting parties must have

1 intended to confer a benefit on the third party.” *Neverkovec v. Fredericks*, 74 Cal.App.4th 337, 348–349
2 (1999). Further, “while the contracting parties may testify regarding their actual intent, the sufficiency
3 of such evidence must be determined according to the usual objective standard of contract
4 interpretation.” *Id.* In determining the meaning of a written contract allegedly made, in part, for the
5 benefit of a third party, evidence of the surrounding circumstances and negotiations of the parties in
6 making the contract is both relevant and admissible. *Neverkovec*, 74 Cal.App.4th at 351.

7 Reading the Release Agreement as a whole, and in the context of the circumstances under which
8 it was entered, the Court finds a material issue of fact as to whether the parties intended to release OSH
9 from further claims. It is not at all clear from any evidence that OSH was an intended beneficiary of the
10 Release Agreement. The burden is on the third party to prove the parties to the release agreement
11 intended to benefit the third party. *Neverkovec*, 74 Cal.App.4th at 348; *Vahle v. Barwick*, 93
12 Cal.App.4th 1323, 1328 (2001) (to obtain summary judgment on the ground that a general release has
13 discharged him from liability, a third party to the release agreement must affirmatively show that the
14 parties intended to release him. The burden of proof is on the third party.)

15 OSH has failed to carry its burden of showing that the contracting parties intended to release
16 OSH from liability for the exterior architectural barriers. OSH has offered no evidence of the
17 contracting parties’ intent. Rather, OSH relies solely upon the Release Agreement language.

18 The Release Agreement language which purports to release OSH is, at best, ambiguous. An
19 ambiguity arises when language is reasonably susceptible of more than one application to material facts.
20 *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th 384, 391, 46 Cal.Rptr.3d 668, 673 (2006). As California
21 courts have observed:

22 “[the] meaning of language is to be found in its applications. An indeterminacy in the
23 application of language signals its vagueness or ambiguity. An ambiguity arises when
24 language is reasonably susceptible of more than one application to material facts. There
cannot be an ambiguity per se, i.e., an ambiguity unrelated to an application.”

25 *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th at 391 (the phrase “at any time” is not in itself ambiguous
26 with respect to cause for termination does not preclude the possibility that AWI’s letter, when considered
27 as a whole, contains ambiguity on the topic); *see also Herzog v. National American Ins. Co.*, 2 Cal.3d
28 192, 199, fn. 5, 84 Cal.Rptr. 705 (1970) (“language which might be considered ambiguous as applied

1 to some circumstances is not necessarily ambiguous per se”.) “[L]anguage in a contract must be
2 construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot
3 be found to be ambiguous in the abstract.” *Powerine Oil Co., Inc. v. Superior Court*, 37 Cal.4th 377,
4 391, 33 Cal.Rptr.3d 562, 572 (2005). Thus, the application of the language to the facts may create an
5 ambiguity.

6 Given the circumstances of the Release Agreement, and in light of the ongoing litigation against
7 OSH, there is a material issue of fact as to whether OSH was released by the Release Agreement.

8 **E. State Law Claims**

9 In addition to the ADA claim, the complaint asserts claims under California's Unruh Civil Rights
10 Act and California's Disabled Persons Act. Cal. Civ.Code §§ 51, 54. Plaintiff seeks recovery of statutory
11 damages under California law.

12 **1. Overview of State Law Protections**

13 Unruh provides that “All persons within the jurisdiction of this state are free and equal, and ...
14 are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all
15 business establishments of every kind whatsoever,” Cal.Civ. Code § 51(b). Section 52 provides a
16 damages action for violations of thereof. Section 51(f), in turn, expressly renders an ADA violation a
17 violation of Unruh: “[a] violation of the right of any individual under the Americans with Disabilities
18 Act of 1990 ... shall also constitute a violation of this section.”

19 The Disabled Persons Act (“DPA”) provides that “[i]ndividuals with disabilities or medical
20 conditions have the same right as the general public to the full and free use of the streets, highways,
21 sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians'
22 offices, public facilities, and other public places.” Cal. Civ.Code § 54(a). It further provides that
23 “[i]ndividuals with disabilities shall be entitled to full and equal access ... to accommodations,
24 advantages, facilities ... places of public accommodation, amusement, or resort, and other places to
25 which the general public is invited....” Cal. Civ.Code § 54.1(a)(1). As with the Unruh Act, the DPA
26 allows for a plaintiff to establish a violation of the DPA by a showing of an ADA violation. See Cal.
27 Civ.Code §§ 54(c), 54.1(d). A showing of intent is not required to obtain damages under the DPA.
28 *Donald v. Café Royale, Inc.*, 218 Cal.App.3d 168, 177-80, 266 Cal.Rptr. 804 (1990).

1 **2. Actionable Violations of Relevant State or Federal Access Standards**

2 OSH argues that plaintiff cannot establish he encountered barriers or was deterred from visiting
3 the Store. (Doc. 35, Moving paper p.8-10.) OSH argues that unlike the ADA, California law places no
4 obligation on pre-existing places of public accommodation to remove barriers. Under California law,
5 a facility must simply comply with the California Building standards that are “in effect on the date of
6 an application for a building permit.” Gov. Code §4451(c). OSH argues that the Store was constructed
7 in December 1991 and has not been altered, renovated or remodeled. Since it has not been remodeled,
8 the building standards applicable are those of 1991. OSH argues that plaintiff’s expert, Mr. Layman,
9 opined that the Store failed to comply with the 2007 California Building Code, which do not apply to
10 a store constructed in 1991. (Doc. 35-3, Layman Depo. p.12:2.)

11 Statutory damages are available under Civ.Code §52(a) or 54.3(a) only “if a violation or
12 violations of one or more construction-related accessibility standards denied the plaintiff full and equal
13 access to the place of public accommodation on a particular occasion.” Civ.Code §55.56(a). Gov.Code
14 4451 provides that a public accommodation must comply with California Building code standards “in
15 effect on the date of an application for a building permit.” Buildings in existence as of the date the
16 statutes were enacted need not be modified unless and until "alterations, structural repairs or additions
17 are made to such building or facility." Gov. Code, § 4456.

18 OSH relies upon the testimony of Mark Bringuel for the proposition that the Store has not been
19 altered, remodeled or renovated since 1991. (See Doc. 35-4, Bringuel Decl.¶3.) However, Delgado
20 presents evidence that Mr. Bringuel has only been employed for approximately three and one-half years
21 at OSH, and his declaration does not state how he knows about prior construction activities at the Store.
22 He does not explain how he knows, given the brevity of his employment, of all construction activity
23 since 1991. His deposition testimony indicates, arguably, that he does not know of prior construction
24 activity. (Doc. 52-14, Bringuel Depo.)

25 Delgado presents evidence, from which the Court infers, that Orchard applied for some kind of
26 Store alteration. (Doc. 52-11, Exh. A to Layman Decl.) The documents appear to be a submission to
27 the City of Fresno on behalf of OSH by an engineering company in 1998. Mr. Layman characterizes
28 these documents as “plans submitted by OSH for a permit and the Fresno City plan inspector’s

1 comments for a wall opening and door installation.” (Doc. 52-10, Layman Decl. ¶20.) OSH argues that
2 these documents are not a “permit application at all” but are merely plans for a wall opening. (Doc. 62,
3 Reply p.8.) OSH offers no competent evidence for its position.

4 Mr. Layman’s testimony raises an issue of fact as to whether OSH “altered, renovated or
5 remodeled” the Store. Mr. Layman states these document were “plans submitted by OSH for a permit.”
6 Whether OSH altered, renovated or modified the Store since 1991 is an issue of fact. The credibility
7 of Mr. Bringuel’s testimony, in light of the lack foundational basis, raises an issue of fact.

8 **3. Plaintiff will not be Deterred from Visiting the Store**

9 OSH argues that plaintiff has never been deterred from visiting the Store. OSH presents
10 evidence that Delgado testified that he “will always continue to buy stuff at OSH.” (Doc. 35-3, Exh. 4,
11 Delgado Dep p. 151.) OSH argues Delgado cannot show he was denied full and fair access because he
12 will not be deterred from shopping at the Store.

13 Pursuant to Cal.Civ. Code §55.56(b), there are alternative ways to show that Plaintiff was denied
14 full and equal access:

15 “A plaintiff is denied full and equal access only if the plaintiff personally
16 encountered the violation on a particular occasion, *or* the plaintiff was
17 deterred from accessing a place of public accommodation on a particular
occasion.” (Emphasis added.)

18 Personal encounter alone is sufficient to show denial of full access if “the plaintiff experienced
19 difficulty, discomfort, or embarrassment because of the violation.” Cal.Civ.Code §55.56(c).

20 Delgado submits his declaration which shows that he visited the Store on nine occasions and
21 actually encountered barriers. For instance, he identified that the rear grab bar in the men’s restroom was
22 not sufficiently wide such that it was “very difficult for me to properly transfer to and from the toilet
23 from my wheelchair.” (Doc. 40, Delgado Decl. 6(d).) Plaintiff states that a check-out aisle was not wide
24 enough for him to access and he attempted to check out in the aisle but it was too small. (Doc. 40,
25 Delgado Decl. 6(b).) Plaintiff need only show that he encountered a violation “*on a particular*
26 *occasion.*” The statute permits plaintiff to recovered based on each particular occasion that plaintiff was
27 denied full and equal access. Cal.Civ.Code §55.56(c). A plaintiff is denied full and equal access “when
28 he personally encounters the violation” *or* “he is deterred from accessing” the facility. Plaintiff has

1 raised an issue of fact.

2 **F. Supplemental Jurisdiction**

3 OSH argues that the Court should decline supplemental jurisdiction over the state law claims.
4 It argues that the state law claims are novel and complex state law and that the state law claims
5 “substantially predominate” over the remedy sought through the federal claims. 28 U.S.C. §1367(c).

6 This Court has supplemental jurisdiction over the state law claims. See *Brady v. Brown*, 51 F.3d
7 810, 815-16 (9th Cir. 1995) (“The operative facts for both the RICO and the state law claims are the
8 same actions described . . . There was thus a common nucleus of operative facts encompassing both the
9 state and federal claims.”) The Court has supplemental jurisdiction if the claims arise from a common
10 nucleus of operative facts.

11 Here, the claims arise from a common nucleus of operative facts. Both the federal and state law
12 claims are based upon architectural barriers which infringe upon the accessibility to the OSH Store.
13 Accordingly, this Court has supplemental jurisdiction over the state law claims.

14 The Court will exercise supplemental jurisdiction over the state law claims. Here, the state issues
15 are not unsettled or novel and complex. Plaintiff’s state and federal law claim involve the identical
16 nucleus of operative facts, and require a very similar, if not identical, showing in order to succeed. If
17 this court forced plaintiff to pursue his state law claims in state court, the result would be two highly
18 duplicative trials, constituting an unnecessary expenditure of plaintiff’s, defendant’s, and the two courts’
19 resources. As a practical matter, plaintiff’s state law claims for damages may be the driving force behind
20 this action. To rule as OSH proposes, however, would effectively preclude a district court from ever
21 asserting supplemental jurisdiction over a state law claim under the Unruh Act.

22 **CONCLUSION**

23 For the foregoing reasons, the cross-motions for summary judgment are DENIED in their
24 entirety.

25 IT IS SO ORDERED.

26 **Dated: August 4, 2011**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

27

28