

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

**RONALD MOORE,**

**Plaintiff,**

V.

**DOLLAR TREE STORES INC. dba DOLLAR  
TREE; PARAMJIT SINGH; RAVINDER  
SINGH.**

## Defendants.

1:13-cv-01336 LJO BAM

**MEMORANDUM DECISION AND  
ORDER RE PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT (DOC.  
43) AND DEFENDANT DOLLAR  
TREE'S MOTION FOR SUMMARY  
JUDGMENT (DOC. 44)**

## I. INTRODUCTION

This is a civil rights action by Plaintiff Ronald Moore for discrimination at the Dollar Tree Store, located at 3780 West Shields Avenue in Fresno, California (the “Store”). Plaintiff brings this action under Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (“ADA”), California’s Unruh Act, Cal. Civ. Code § 51 et. seq., and California Health and Safety Code Section 19953, seeking damages, injunctive and declaratory relief, attorneys’ fees and costs. Plaintiff alleges that he is confined to a wheelchair and that he encountered barriers to his full and equal access to the Store. Dollar Tree denies that Plaintiff has been discriminated against in any manner. Now before the Court are the Parties’ cross-motions for summary judgment. Docs. 43 and 44. The motion was originally set for hearing November 18, 2014, but the hearing was vacated and matter submitted for decision on the papers. *See M.O. 50.*

## **II. PROCEDURAL HISTORY**

2 Plaintiff filed his complaint against Dollar Tree and its landlords on August 22, 2013. Doc. 2. He  
3 filed an amended complaint (“FAC”) on March 11, 2014. Doc. 31. The FAC asserted that Defendants  
4 denied Plaintiff full and equal access at the time of his visit to the Store because (a) ramps in the parking  
5 lot were too steep for him to use, (b) the pathway to the men’s restroom was blocked with boxes stacked  
6 to the ceiling, and (c) an accessible counter was not open and the counter that he was forced to use was  
7 too high. FAC at ¶ 10. Plaintiff also sought relief for the following barriers he became aware of later: (a)  
8 other features in the parking lot made it inaccessible for wheelchairs, (b) the building entrance door  
9 exceeded the maximum allowable pressure and sweep speed, (c) the men’s restroom door hardware was  
10 not properly configured, (d) the controls on the water closet were not located on the correct side, (e) the  
11 water closet in the men’s room was improperly configured and the seat was not at the correct height, (f)  
12 a properly configured portion at the designated accessible check-out aisle was not provided, (g) proper  
13 signage was not provided at the designated accessible check-out aisle, and (h) proper wheelchair  
14 clearances were not provided and/or maintained along interior routes of travel. FAC at ¶ 11.

15 Landlord Defendants were dismissed from this action per Plaintiff's request on May 20, 2014.  
16 Doc. 42. This action resolved the liability of Defendants for claims associated with the parking lot.  
17 Def.'s Mot. for Summ. J. ("Def.'s MSJ"), Doc. 44, 1, fn. 1; Pl.'s Mot. for Summ. J. ("Pl.'s MSJ"), Doc.  
18 43-1, 9. Discovery closed August 15, 2014. Doc. 20.

19 Plaintiff filed his motion for summary judgment on October 15, 2014. In this motion, he  
20 abandoned claims related to the sweep speed of the building entrance door, the hardware on the door of  
21 the men's restroom, the location of the flush controls of the water closet, and the absence of signage at  
22 designated accessible checkout counter. Pl.'s MSJ at 9-10. Plaintiff sought resolution on the remaining  
23 claims, with the exception of his claim regarding his access to the path to the men's restroom. *Id.*  
24 Plaintiff reserved this issue for trial. *Id.* Defendant filed its Opposition November 4, 2014. Doc. 45.  
25 Plaintiff replied November 11, 2014. Doc. 48.

26 Defendant filed a cross-motion for summary judgment on October 20, 2014. In its motion,

1 Defendant argued that (a) Plaintiff's ADA claims are moot and (b) Plaintiff's state law claims must be  
2 dismissed in light of the undisputed facts Defendant puts forward. Def.'s MSJ at 1. Plaintiff filed his  
3 Opposition November 4, 2014. Doc. 45. Defendant replied November 10, 2014. Doc. 47. This reply was  
4 replaced by an erratum on November 11, 2014. Doc. 49.

5 In their arguments, both parties relied upon evidence that was not timely disclosed during  
6 discovery. *See* Mem. Decision and Order Re. Evidentiary Objections, Doc. 56. Predictably, both parties  
7 argued that their own evidence should be admitted and the others' excluded. *Id.* This Court found that  
8 excluding the untimely evidence would have the unjust effect of precluding a large amount of evidence  
9 vital to the parties' abilities to litigate the case. *Id.* Thus, instead of excluding the evidence, the Court re-  
10 opened the discovery period for the limited purpose of allowing Plaintiff to inspect the Store and  
11 validate testimony that Defendant claimed would moot Plaintiff's claims. *Id.* The Court also allowed  
12 both sides to submit supplemental briefs. *Id.*

13 Parties filed supplemental briefs December 23, 2014. Reply to Response to Mot. for Summ. J.  
14 ("Pl.'s Supp."), Doc. 57; Def.'s Suppl. Brief ("Def.'s Supp."), Doc. 58. In his brief, Plaintiff abandoned  
15 claims regarding the location of the toilet and the clear floor space around it. Pl.'s Supp. Plaintiff also  
16 presented evidence that he claims supports his outstanding motion for summary judgment as to the  
17 pathway to the restroom and the operational pressure of the door. *Id.* Defendants countered that the  
18 evidence Plaintiff submitted actually tended to support Defendant's arguments on these issues. Def.'s  
19 Supp.

20 **III. FACTUAL BACKGROUND<sup>1</sup>**

21 Plaintiff suffers from a condition that requires him to use a wheelchair for mobility. Declaration  
22 of Ronald Moore ("Moore Decl."), Doc.43-3, ¶ 2. Plaintiff visited Defendant's Store on January 11,  
23 2013 and claims that on that day, the route to the bathroom was obstructed with boxes and checkout  
24 counter was uncomfortably high. FAC ¶ 10 (b) & (c). Plaintiff also alleges other barriers exist, though

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26 <sup>1</sup> Because on summary judgment the evidence of the non-moving party is assumed to be true and disputed facts are construed  
in the non-movants favor, the Court sets forth the undisputed facts and notes those disagreements of fact that are relevant to  
this decision.

1 he did not encounter them. *Id.* at ¶ 11(e)-(l).

2 Defendant presents evidence showing that each of the barriers alleged by Plaintiff has been  
3 remedied and that the areas in dispute are currently in compliance with ADA and state law requirements.  
4 Plaintiff maintains that barriers still exist.

5 **A. Route to the Bathroom.**

6 Plaintiff describes that he was unable to use the restroom at the Store because there were  
7 numerous boxes blocking the path to it. Moore Decl. ¶ 10. The parties agree that items blocking the  
8 pathway at the time of Plaintiff's visit were "moveable," however; they dispute whether the items could  
9 be moved in a timely fashion. *See* Plaintiff's Response to Dollar Tree's Statement of Undisputed  
10 Material Facts ("PSUF"), Doc. No.45-1, #16.

11 Plaintiff provides evidence that the path was obstructed on three subsequent occasions in June  
12 and July of 2014. Declaration of Matthew Dellepere ("Dellepere Decl."), Doc. 45-8, at ¶¶ 4-6;  
13 Declaration of Geoshua Levinson ("Levinson Decl."), Doc. 45-4 at ¶¶ 7-9. Dollar Tree district manager  
14 Marita Henton testified that as of "early August 2014," the path of travel to the restroom is at least 36  
15 inches in width at all points and that the path is checked "regularly" to ensure ADA compliance.  
16 Declaration of Marita Henton ("Henton Decl."), Doc. 44-2 at ¶¶ 1-2. Plaintiff submits evidence that the  
17 path to restroom was obstructed when his expert visited the Store on December 12, 2014. Suppl. Decl.  
18 of Kelly Bray ("Bray Supp. Decl."), Doc. 57-2, ¶ 7-8. Defendant submits testimony that these  
19 obstructions were temporary. Declaration of Marita Henton in Support of Suppl. Brief ("Henton Supp.  
20 Decl."), Doc. 58-1, ¶ 3.

21 **B. Accessibility of Checkout Aisles**

22 Plaintiff claims that at the time of his visit he could not find an open accessible checkout counter  
23 and instead had to use a standard counter that was too high for him to reach. FAC ¶ 10(c). This forced  
24 him to "reach up uncomfortably" when he had to put his items down and pay for them. Moore Decl. at ¶  
25 11.

26 Plaintiff also claims that the accessible counters the store maintains are impermissibly high. FAC

1 ¶ 11(j). Plaintiff submits evidence that the height of the accessible checkout counter is 35 inches. Bray  
2 Decl. ¶ 8. Defendant does not dispute this assertion. Def.’s Resp. to Pl.’s Statement of Undisputed Facts  
3 (“DSUF”), Doc. 46-1; Henton Decl. at 3 (“The accessible checkout aisles do not exceed 38 inches in  
4 height.”).

5 **C. Building Entrance Door Pressure**

6 Defendants provide evidence that the building entrance door requires less than five pounds of  
7 pressure to open. Henton Decl. at ¶4. Plaintiff disputes the truth of this assertion and provides evidence  
8 that there are two doors; which required either ten or eleven pounds of pressure to open as of February  
9 18, 2014. *See* Pl.’s Opposition at 11; Bray Decl. ¶ 9. Plaintiff submits evidence that as of December 12,  
10 2014 the operational door pressures of both doors was less than five pounds of pressure. Bray Supp.  
11 Decl., Doc. at ¶ 5.

12 **IV. LEGAL BACKGROUND**

13 **A. The ADA**

14 Title III of the ADA prohibits discrimination against persons with disabilities in places of public  
15 accommodation. *See* 42 U.S.C. § 12182(a). The ADA defines discrimination to include “the failure to  
16 remove architectural barriers” in existing facilities where such removal is “readily achievable.” 42  
17 U.S.C. § 12182(b)(2)(A)(iv). The ADA authorizes only injunctive relief for disabled individuals who  
18 suffer prohibited discrimination and does not provide for the recovery of monetary damages by private  
19 individuals. *See* 42 U.S.C. § 12188(a)(2); *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1136  
20 (9th Cir.2002). In order to prevail under the ADA Plaintiff must prove that 1) he is disabled under the  
21 ADA, 2) that the Dollar Tree store contains architectural barriers prohibited by the ADA, and 3) that the  
22 removal of those barriers is readily achievable. 42 U.S.C. § 12183(a)(2). Plaintiff bears the burden of  
23 proving the existence of an architectural barrier and suggesting a method of removing the barrier that is  
24 “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. §  
25 12181(9). *See Pascuiti v. New York Yankees*, 1999 WL 1102748 (S.D.N.Y.1999). If Plaintiff satisfies  
26 this burden, Defendant then bears the ultimate burden of proving that the suggested method of removal

1 is not readily achievable. 42 U.S.C. § 12182(b)(2)(A)(v). Title III gives the Department of Justice  
2 authority to develop regulations implementing the requirements of the ADA. 42 U.S.C. § 12186(b). The  
3 ADA Accessibility Guidelines (“ADAAG”) are codified at 28 C.F.R. Pt. 36, Appendix A. 28 C.F.R. §  
4 36.402(a) provides that “any alteration to a place of public accommodation . . . after January 26, 1992,  
5 shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are  
6 readily accessible to and usable by individuals with disabilities, including individuals who use  
7 wheelchairs.”

8 To impose liability, the barrier does not need to completely preclude plaintiff from entering or  
9 using the facility; it need only interfere with the plaintiff's full and equal enjoyment of the facility. *See*  
10 *Moeller v. Taco Bell Corp.*, 816 F.Supp.2d 831, 848 (N.D.Cal.2011) (citing *Doran v. 7-Eleven Inc.*, 524  
11 F.3d 1034, 1041 n. 4 (9th Cir. 2008) (discussing that the ADA “does not limit its antidiscrimination  
12 mandate to barriers that completely prohibit access.”). “Because the ADAAG establishes the technical  
13 standards required for ‘full and equal enjoyment,’ if a barrier violating the ADAAG relates to a  
14 plaintiff's disability, it will impair the plaintiff's full and equal access, which constitutes ‘discrimination’  
15 under the ADA, thereby violating the ADA.” *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 947  
16 (9th Cir. 2011).

17 **B. California's Unruh Act**

18 The Unruh Act broadly outlaws arbitrary discrimination in public accommodations, including  
19 discrimination based on disability. Cal. Civ. Code § 51(b); *Jankey v. Sung Koo Lee*, 55 Cal. 4th 1038,  
20 1044 (2012). In the disability context, the Unruh Act operates virtually identically to the ADA. *Molski v.*  
21 *M.J. Cable, Inc.*, 481 F.3d 724, 731 (9th Cir. 2007). Any violation of the ADA necessarily constitutes a  
22 violation of the Unruh Act. *Id.* (citing Cal. Civ. Code § 51(f)). Where the basis of liability for an Unruh  
23 Act violation is an ADA violation, plaintiff need not prove intentional discrimination. *Munson v. Del*  
24 *Taco, Inc.*, 46 Cal. 4th 661, 678 (2009). Moreover, the Unruh Act allows for monetary damages  
25 including automatic minimum penalties in the amount of \$4,000 per occurrence, and attorneys' fees as  
26 “may be determined by the court.” Cal. Civ. Code § 52. To recover statutory damages, plaintiffs must

1 show that they were denied “equal access;” proof of actual damages is not required. *See, e.g., Botosan v.*  
2 *Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000).

3 **C. California Health and Safety Codes**

4 California Health and Safety Code section 19955 (“Health and Safety Code”) requires that  
5 California public accommodations and facilities adhere to the state architect's regulations under  
6 Government Code 4450 to ensure all public accommodations are accessible to persons with disabilities.  
7 Cal. Health & Safety Code § 19955; Cal. Gov. Code § 4450. From December 31, 1981 to the present,  
8 the standards governing the physical accessibility of public accommodations in California have included  
9 those set forth in Title 24 of the California Regulatory Code (“Title 24”). *Moeller*, 816 F.Supp.2d at 848.  
10 The Health and Safety Code does not require the plaintiff to establish that he or she was individually  
11 denied access to the public accommodation; rather, it allows the plaintiff to enforce compliance (i.e.,  
12 injunctive relief) with the handicapped access standards provided for by the Health and Safety Code and  
13 the Government Code. *Urhausen v. Longs Drug Stores California, Inc.*, 155 Cal. App. 4th 254, 262  
14 (2007). It also entitles the prevailing party in the action to attorneys' fees. Cal. Health & Safety Code §  
15 19953.

16 **V. APPLICABLE CODE SECTIONS**

17 **A. ADA**

18 Under the ADA, alterations to commercial facilities completed between January 26, 1992 and  
19 September 15, 2010 are subject to the 1991 ADAAG Standards. 28 C.F.R. §§ 36.401, 36.406. The ADA  
20 defines an alteration as “a change to a place of public accommodation or a commercial facility that  
21 affects or could affect the usability of the building or facility or any part thereof.” 28 C.F.R. § 36.402(b).  
22 “Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction,  
23 historic restoration, changes or rearrangement in structural parts or elements, and changes or  
24 rearrangement in the plan configuration of walls and full-height partitions.” *Id.* Any alterations  
25 undertaken after March 15, 2012 must comply with the 2010 ADAAG guidelines. 28 C.F.R. §  
26 35.151(c); *see also* 28 C.F.R. § 36.401(a)(1).

1      Defendant opened the Store in April of 2002. DSUF #13. Prior to its opening and between the  
2 years of 2001 and 2002, Defendant remodeled the interior to suit its needs. DSUF #14. Defendant  
3 disputes Plaintiff's characterization of its building activities as a "complete remodel," claiming that the  
4 "construction documents speak for themselves." *Id.* However, according to construction plans identified  
5 by Bates Numbers DT000001-4, Defendant had a significant amount of work done to the interior,  
6 beginning in November 2001. TEM Decl. 43-6 ¶ 7, Ex. C. These plans called for remodeling the  
7 bathrooms and offices and wiring the checkout areas, among other improvements. *Id.*<sup>2</sup> The Court  
8 considers this a significant alteration of the space.

9      Because it is undisputed that Defendant altered the interior of the Store between January 26,  
10 2002 and September 15, 2010, the 1991 ADAAG Standards apply to conditions that Plaintiff alleges  
11 existed prior to any remedial efforts by Defendant.

12 **B. California Code**

13      As of July 1, 1970, whenever buildings of public accommodation are altered, they must comply  
14 with California's Building Codes. Cal. Health & Safety Code § 19959. This requirement only pertains to  
15 the area that is altered. *Id.* Since December 31, 1981, the standards have been set forth in Title 24 of the  
16 California regulatory code Title 24 of the California Code of Regulations. Cal. Health & Safety Code §  
17 18902. The Code is published in tri-annual cycles. Cal. Health & Safety Code § 18938(c). The 2001  
18 Code was made effective November 1, 2002. Cal. Bldg. Standards Comm'n, 2001 Cal. Bldg. Code, Title  
19 24, title page, Doc. 149F01. For the three years prior to that date, the 1998 Code was effective. Cal.  
20 Health & Safety Code § 18938(c).

21      Logically, alterations made to the Store must have occurred prior to the Store's opening in April  
22 of 2002. Since the 2001 Code did not become effective until November 1, 2002, the 1998 code is  
23 operative. Any alterations undertaken by Defendant after January 1, 2014 (including any that result from

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25      <sup>2</sup> Plaintiff also provides evidence in the form of deposition testimony of James Johnson, who was identified by the Defendant  
26 as the person most knowledgeable about the construction and alteration history of the Store. TEM Decl. at ¶ 8. Mr. Johnson  
testified that the building underwent some amount of construction prior to its opening in 2002 and that it was expanded in  
2004. TEM Decl. at ¶ 8, Ex. D, at 38. No construction plans were provided by either party regarding the 2004 expansion, so  
the Court cannot determine the significance, if any, of the expansion activities.

1 this action) must comply with the 2013 California Building Code. Cal. Bldg. Standards Comm'n, 2013  
2 Cal. Bldg. Code, Title 24, title page.<sup>3</sup>

3

4 **VI. STANDARD OF DECISION**

5 Summary judgment is proper if the movant shows “there is no genuine dispute as to any material  
6 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. The moving party  
7 bears the initial burden of “informing the district court of the basis for its motion, and identifying those  
8 portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with  
9 the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.”  
10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). A fact is material  
11 if it could affect the outcome of the suit under the governing substantive law; “irrelevant” or  
12 “unnecessary” factual disputes will not be counted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
13 (1986).

14 If the moving party would bear the burden of proof on an issue at trial, that party must  
15 “affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party.”  
16 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). In contrast, if the non-moving  
17 party bears the burden of proof on an issue, the moving party can prevail by “merely pointing out that  
18 there is an absence of evidence” to support the non-moving party’s case. *Id.* When the moving party  
19 meets its burden, the non-moving party must demonstrate that there are genuine disputes as to material  
20 facts by either:

21 (A) citing to particular parts of materials in the record, including  
22 depositions, documents, electronically stored information, affidavits or  
23 declarations, stipulations (including those made for purposes of the motion  
only), admissions, interrogatory answers, or other materials; or

24 (B) showing that the materials cited do not establish the absence or  
25 presence of a genuine dispute, or that an adverse party cannot produce

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26 <sup>3</sup> Available at:

[http://www.ecodes.biz/ecodes\\_support/free\\_resources/2013California/13Building/PDFs/2013%20California%20Building%20Code%20Volume%201%20Title%20Page.pdf](http://www.ecodes.biz/ecodes_support/free_resources/2013California/13Building/PDFs/2013%20California%20Building%20Code%20Volume%201%20Title%20Page.pdf).

admissible evidence to support the fact.

Fed. R. Civ. P. 56(c).

In ruling on a motion for summary judgment, a court does not make credibility determinations or weigh evidence. *See Anderson*, 477 U.S. at 255. Rather, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. Fed. R. Civ. P. 56(c)(2). “Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.” *Soremekun*, 509 F.3d at 984.

## **VII. ANALYSIS**

Parties move independently for summary judgment as to whether most barriers alleged by Plaintiff are prohibited by the ADA or State regulations. However, only Defendant seeks judgment as to the issue of whether the path to the restroom is impermissibly blocked. Plaintiff also seeks judgment as to certain threshold issues.

#### **A. Threshold ADA Issues**

Plaintiff moves for summary judgment establishing that he is a disabled person as defined by the ADA. Pl.’s MSJ at 4-5. In support of this assertion, Plaintiff presents testimonial evidence that he suffers from a condition that requires him to use a wheelchair for mobility. Moore Decl. at ¶ 2. Plaintiff also presents a copy of a placard issued to him by the California Department of Motor Vehicles, which allows him to park in parking areas designated for the disabled. Moore Decl. ¶ 4, Ex. A. Defendant does not present any evidence to dispute these claims; or put forth any arguments in his Opposition as to how Plaintiff’s evidence is insufficient. *See* DSUF #1-5. Since there is no genuine dispute as to these facts, Plaintiff is entitled to summary judgment on this issue.

Plaintiff moves for summary judgment establishing that the Store is a place of public accommodation. Pl.’s MSJ at 5-6. Under the ADA, “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment” are all examples of places of public accommodation. 42 U.S.C.A. § 12181(7)(E). Plaintiff claims that the Parties have stipulated that the

1 Store is a place of public accommodation. *Id.* at 5. Defendant does not argue otherwise in its Opposition  
2 or anywhere in the papers supporting its own MSJ. Thus, this issue is not the subject of a genuine  
3 dispute and Plaintiff is entitled to summary judgment on this issue.

4 Plaintiff also moves for summary judgment establishing that he has “actual knowledge” of the  
5 barriers documented in expert reports. Pl.’s MSJ at 13-14. Plaintiff cites to his own testimony attesting  
6 to this fact. Moore Decl. ¶ 12. Defendant disputes this assertion, based on lack of knowledge. DSUF #  
7 20. Defendant, however, provides no evidence of its own to contradict this fact and provides no  
8 explanation as to why Plaintiff’s declaration does not establish the absence of a genuine dispute  
9 regarding this issue. Therefore, Plaintiff is entitled to summary judgment as to the issue that he has  
10 “personal knowledge” of the barriers identified in the expert reports.

11 Finally, Plaintiff moves for summary judgment as to the issue that he has suffered “irreparable  
12 injury.” Pl.’s MSJ at 14. Plaintiff premises this claim on this Court’s finding that Defendant has violated  
13 the ADA. *Id.* (“When a federal statute has been violated, it is presumed that a plaintiff has suffered  
14 irreparable injury . . . Moore has established that Defendant violated the ADA (a federal statute).”). As  
15 discussed in Sections VII(A) & C, *infra*, the Court does not find that Plaintiff is established to summary  
16 judgment on his ADA act claims. Thus, he is not entitled summary judgment as to whether he has  
17 suffered “irreparable damage.”

18 For the reasons described above, the Court GRANTS Plaintiff’s motion for summary judgment,  
19 as to the issues that Plaintiff is a disabled person under the ADA, that the Defendant’s Store is a place of  
20 public accommodation, and that he has personal knowledge of the barriers identified his expert reports.  
21 The Court DENIES summary judgment on the issue that Plaintiff has suffered irreparable damage.

22 **B. Operational Pressure of the Front Doors**

23 Both sides seek summary judgment as to Plaintiff’s claim that the operational pressure of the  
24 front doors exceeds state guidelines. Pl.’s MSJ at 12-13; Def.’s. MSJ at 5. The 1998 California Building  
25 Code provides that “the maximum effort to operate doors shall not exceed 8 ½ pounds (38 N) for  
26 exterior doors and 5 pounds (22 N) for interior doors.” 1998 Cal. Bldg. Code 1133B.2.5. Here, the doors

1 in question are described as “entrance doors” by both parties. Thus, the Court considers them to be  
2 “exterior doors” which may not exceed 8 ½ pounds of pressure. Plaintiff’s own evidence demonstrates  
3 that the operational pressure required to open these doors was less than five pounds of pressure as of its  
4 last inspection on December 12, 2014. Bray Suppl. Decl. at ¶ 5. Defendant argues that the Store’s current  
5 compliance moots this claim. Def.’s Mem. at 5; Def.’s Supp. at 3.<sup>4</sup> Plaintiff argues that the Store’s  
6 current compliance with this guideline does not moot its claim under the voluntary cessation doctrine.  
7 Pl.’s MSJ at 12-13; Pl.’s Supp. At 1-2. Plaintiff further claims that the operational pressure must be  
8 continually maintained and that injunctive relief is needed to ensure continued compliance. *Id.*

9 **1. Legal Background of Voluntary Cessation Doctrine**

10 An issue is moot “when the issues presented are no longer ‘live’ or the parties lack a legally  
11 cognizable interest in the outcome.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000). “If the parties  
12 cannot obtain any effective relief, any opinion about the legality of a challenged action is advisory. *Id.*  
13 “The question is not whether the precise relief sought at the time the application for an injunction was  
14 filed is still available. The question is whether there can be any effective relief.” *Or. Natural Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 820 (9th Cir. 2006).

16 Courts have long recognized a “voluntary cessation exception” to mootness. *Rosemere Neighborhood Ass’n v. U.S. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009). Under this doctrine, when a  
17 defendant’s voluntary cessation of a challenged activity is the basis for mootness, it becomes the  
18 defendant’s burden to demonstrate that “subsequent events made it absolutely clear that the allegedly  
19 wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). “The heavy burden of persuading the court that the  
20 challenged conduct cannot reasonably be expected to start up again lies with the party asserting  
21 mootness.” *Id.* This is because “otherwise they would simply be free to ‘return to (their) old ways’ after  
22  
23

25  
26 <sup>4</sup> Defendant argues for the first time in his supplementary brief that Plaintiff lacks standing to bring this claim. Def.’s Supp. at 3. The Court will not consider arguments brought for the first time in a reply, much less a *supplemental* reply. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not consider arguments raised for the first time in a reply brief.”). Defendant may seek leave from the court to file an untimely motion on this issue or it may raise it at trial.

1 the threat of a lawsuit had passed.” *Armster v. U.S. Dist. Court for Cent. Dist. of California*, 806 F.2d  
2 1347, 1359 (9th Cir. 1986) (quoting *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983)).

3 Some courts consider ADA barrier cases as a “unique subset” of voluntary cessation-doctrine  
4 cases. *See Houston v. 7-Eleven, Inc.*, No. 13-60004-CIV, 2014 WL 351970, at \*2 (S.D. Fla. Jan. 31,  
5 2014). However, these courts rely on the basic principle that external circumstances can change such  
6 that it becomes clear that a defendant cannot reasonably be expected to resume a challenged activity. *Id.*  
7 at \*3 (“Since 7-Eleven has made structural modifications to remove or remediate all ADA violations at  
8 the 7090 Store, this Court is convinced that the allegedly wrongful behavior could not reasonably be  
9 expected to recur.”). Thus, “a defendant’s voluntary removal of alleged barriers prior to trial can have  
10 the effect of mooting [an] ADA claim.” *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir.  
11 2011). This “is particularly true of structural modifications, which are unlikely to be altered in the  
12 future.” *Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 774 (D. Or. 1997) supplemented, 1  
13 F. Supp. 2d 1159 (D. Or. 1998).

14 **2. Whether the Court Must Dismiss Plaintiff’s Claim Regarding the Operational**  
**Pressure of the Front Doors**

15 As discussed above, the most recent evidence submitted by both Parties demonstrates the Store’s  
16 exterior doors currently comply with State law. The parties, however, dispute facts that would show  
17 whether the defendant can reasonably be expected to lapse into non-compliance. Plaintiff presents  
18 evidence that “the operational door pressure must be regularly checked and adjusted as the screws and  
19 operating mechanisms which control such pressures do not remain static and can cause the door’s  
20 pressure to increase with time and weather, even if initially set properly.” Bray Decl. at ¶ 10. Dollar  
21 Tree’s district manager testifies that the operational door pressure is “checked regularly to make sure it  
22 does not exceed 5 lbs of pressure.” Henton Decl. at ¶ 4. While Defendants analogize this testimony to  
23 the facts of structural modification cases, this is a bit of a stretch. In those cases, Defendants spent  
24 considerable sums of money physically altering their properties. *See, e.g., Houston v. 7-Eleven, Inc.*,  
25 2014 WL 351970 at \*2 (“These accessibility upgrades included repaving and restriping the parking lot  
26 and enlarging the existing disabled parking space and access isle, remodeling the restroom to make it

1 larger, relocating the sink, installing a new tile floor, and relocating the back storage room at the store.

2 In total, 7-Eleven spent over \$30,000 performing these accessibility upgrades.”). Here, Defendant  
3 submits no evidence that they have made permanent modifications that would similarly make it  
4 “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”

5 *Friends of the Earth, Inc.*, 528 U.S. at 189. Rather, Defendant relies solely on the testimony of a district  
6 manager that the changes are permanent. Plaintiff disputes the weight and credibility this testimony is  
7 given. Since the Court cannot weigh evidence at this stage, Defendant cannot establish that Plaintiff’s  
8 claim on this issue is moot.

9 Similarly, Plaintiff has not established that he is entitled to summary judgment on this claim  
10 either. Plaintiff provides evidence that the operational pressure of the exterior doors was between 10 and  
11 11 pounds on one occasion (February 18, 2014). Bray Decl. at ¶ 9. Plaintiff also provides evidence that  
12 the operational pressure must be checked regularly. *Id.* at ¶ 10. Defendant presents evidence that the  
13 operational pressure is checked regularly and that the door is currently in compliance. Henton Decl. at ¶  
14 4. Thus, there is a genuine dispute as to whether the Defendant’s current practices regarding the doors  
15 warrant injunctive relief.

16 Thus, the Court DENIES Plaintiff’s and Defendant’s motions for summary judgment as to  
17 whether the operational pressure of the store’s front doors comply with California law.

18 **C. Whether the Checkout Counter Height Complies with State and Federal Law**

19 Both parties move for summary judgment on Plaintiff’s claim that the height of the accessible  
20 checkout counter violates California guidelines as alleged in paragraph 11(j) of the FAC. Def.’s Mem. at  
21 4-5; Pl.’s Mem. at 11-12. Plaintiff submits evidence that the height of the accessible checkout counter is  
22 35 inches. Bray Decl. ¶ 8. Defendant does not dispute this assertion. DSUF #3. Henton Decl. at 3 (“The  
23 accessible checkout aisles do not exceed 38 inches in height.”). The parties, however, dispute which  
24 code sections apply to the checkout counter in this case.

25 The 1998 California Building Code provides that accessible checkstands have a maximum  
26 counter height “not exceeding 38 inches (965 mm) above the finish floor.” Cal. Bldg. Code § 1110B.1.3.

1 Plaintiff argues that Cal. Bldg. Code § 1122B.4 should apply. Pl.’s Opposition, Doc. 48, at 11. Section  
2 1122B.4, however, states that a maximum height of 34 inches is mandated for single counters that  
3 contain “more than one transaction station, such as (but not limited to) a bank counter with multiple  
4 teller windows or a retail sales counter with multiple cash register stations . . .” Plaintiff does not argue,  
5 or submit evidence that would show that the counter at issue here is a single counter with more than one  
6 transaction statement. Therefore, section 1110B.1.3 is the correct guideline; not section 1122B.4.  
7 Because the undisputed evidence shows that the counter is 35 inches in height, it complies with the  
8 California Building Code.

9 The relevant federal guidelines provide that:

10 “[i]n department stores and miscellaneous retail stores where counters  
11 have cash registers and are provided for sales or distribution of goods or  
12 services to the public, at least one of each type shall have a portion of the  
counter which is at least 36 inches (915 mm) in length with a maximum  
height of 36 inches (915 mm) above the finish floor.”

13 1991 ADAAG § 7.2(1).<sup>5</sup> The guidelines also provide that counter height in checkout aisles “shall not  
14 exceed 38 inches above the finish floor.” 1991 ADAAG § 7.3(2). Because the undisputed evidence  
15 shows that the counter is 35 inches in height, it complies with both guidelines.

16 In Plaintiff’s Opposition, he argues that Defendant is not entitled to summary judgment on this  
17 claim because the accessible checkout aisles “are not always open.” Pl.’s Opposition at 9. This argument  
18 may be pertinent to resolution of Plaintiff’s separate claim regarding the availability of accessible  
19 counters. *See* FAC ¶ 10(c).<sup>6</sup> It is irrelevant, however, to the issue of whether the height of accessible  
20 counters complies with state and federal guidelines.

21 The parties agree that there are no further factual disputes related to this claim. The counter  
22 height at issue is compliant with both state and federal guidelines. Therefore, the Court GRANTS  
23 Defendant’s Motion for summary judgment on this issue; Plaintiff’s motion for summary judgment on  
24 this issue is DENIED.

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26<sup>5</sup> Available at <http://www.ada.gov/1991standards/adastd94-archive.pdf>.

<sup>6</sup> Neither party, however, moved for summary judgment on this claim.

1      **D. Maintenance of An Accessible Path the Men's Restroom**

2              Federal and state guidelines require that shops provide an accessible route of travel through their  
3 facilities at least 36 inches wide. 1991 ADAAG § 4.3.3; 1998 Cal. Bldg. Code § 1133B.6.2.

4              Defendants move for summary judgment on Plaintiff's claim that the Store does not maintain an  
5 accessible path of travel to the men's restroom. Def.'s MSJ at 11-15. Defendant argues that (a) to the  
6 extent that the pathway is ever blocked, it can be cleared in a negligible amount of time and (b) the  
7 claim is moot. *Id.* Plaintiff argues that factual disputes exist that preclude summary judgment this claim.  
8 Pl.'s Opposition at 4-6.

9      **1. Whether Barriers Encountered By Plaintiff and Investigators Presented "Mere**  
10              **Delays**

11              Defendant argues that barriers encountered by Plaintiff and his investigators did not amount to  
12 denials of access to the men's restroom because the barriers were made of moveable objects. Def.'s MSJ  
13 at 11. Rather, Defendants argue that their placement only meant that there would be a "mere delay" in  
14 access. *Id.* Defendant cites to several cases where delays in access to facilities were found not to be  
15 actionable. Some of these cases involved findings that delays in access did not amount to denials  
16 because the delays were "reasonable." *Anderson v. Ross Stores, Inc.*, No. C 99-4056 CRB, 2000 WL  
17 1585269, at \*10 (N.D. Cal. Oct. 10, 2000) (" . . . the undisputed evidence shows that the Ross Stores  
18 employees were attempting to resolve Ms. Anderson's request for accommodation during the delay. . . .  
19 the defendant's employees did not act unreasonably . . ."); *Frankeberger v. Starwood Hotels & Resorts*  
20 *Worldwide, Inc.*, No. C09-1827RSL, 2010 WL 2217871, at \*4 (W.D. Wash. June 1, 2010) (" . . . a wait  
21 of less than sixteen minutes for assistance was neither unreasonable nor reflective of discrimination. ").  
22 Other cases cited by Defendant held that plaintiffs lacked standing because they could not establish  
23 injury-in-fact. *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 839 (9th Cir. 2007) ("We  
24 agree that the initial mistake in assigning a room to Skaff with a bathtub rather than a roll-in shower  
25 caused no cognizable damage because it was immediately corrected by reassignment to a room with a  
26 roll-in shower as had been requested."); *O'Connor v. Scottsdale Healthcare Corp.*, 871 F. Supp. 2d 900,  
904 (D. Ariz. 2012), aff'd, 582 F. App'x 695 (9th Cir. 2014) ("Although Plaintiff obviously found her

1 interaction with the security guard very unpleasant, the short delay caused by the encounter was too  
2 minor an injury to confer standing under the ADA.”). Under these lines of case law, Defendant might be  
3 entitled to summary judgment if it can affirmatively demonstrate that the delay that would have  
4 accompanied clearing a path to the restroom was either reasonable or would have been so minor as to  
5 undermine Plaintiff’s claim to have suffered an injury.

6 Plaintiff, however, testifies that at the time of his visit there were so many boxes blocking the  
7 pathway that “it would have taken forever” to move them. Moore Decl. ¶5. Plaintiff’s expert also  
8 testified that when he visited the property on July 3, 2014 the pathway was obstructed in such a way that it  
9 would have been “impossible” for a wheelchair to pass. Dellepere Decl. ¶ 6. While Dellepere did not  
10 estimate how long it would have taken to clear a path, he provided photographs showing a large number  
11 of boxes in the pathway. Dellepere Decl. Ex. B. Clearly, the parties dispute the extent to which the  
12 pathway was blocked with boxes on both occasions. Parties similarly dispute whether Defendant has a  
13 policy or practice of storing boxes in a manner that obstructs the path to the restroom, or if Plaintiff and  
14 his experts happened upon the Store while it was in the process of moving its inventory around. Since  
15 these facts are material to the issue of whether removing the boxes would have presented an excusable  
16 “mere delay” to disabled patrons such as Plaintiff, summary judgment is not appropriate.

17 **2. Whether this Claim is Moot**

18 Defendant also presents evidence that, as of “early August 2014,” the path of travel to the  
19 restroom is at least 36 inches wide and that it is “regularly checked to ensure compliance.” Henton Decl.  
20 ¶ 2. Defendant claims that this evidence shows that the conditions have been remedied and that  
21 Plaintiff’s claims are moot. Def.’s MSJ at 4. Plaintiff argues that Defendant has not cured this deficiency  
22 and submits evidence that the pathway was obstructed when his expert went to visit the Store on  
23 December 12, 2014. Pl.’s Supp. at 4. Defendant responds that Plaintiff’s characterization of its expert’s  
24 evidence should not be credited. Def.’s Supp. at 4. However, at summary judgment, a court cannot make  
25 credibility determinations or weigh evidence. *See Anderson*, 477 U.S. at 255. Further, “[t]he evidence of  
26 the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* Here,

1 Plaintiff has provided evidence that, if believed, undermines Defendant's assertion that the pathway to  
2 the men's restroom remains free of obstacles. Thus, the Court DENIES Defendant's Motion for  
3 summary judgment on this issue.

4 **E. Availability of Damages under State Law**

5 Defendants maintain that Plaintiff may not recover damages under California State law for  
6 claims related to his experience with the checkout counter or the pathway to the restroom because a) he  
7 does not provide measurements of alleged barriers, b) he does not know when the store was constructed,  
8 c) he failed to request modifications and d) he does not establish that he was denied access. Def.'s MSJ  
9 at 9-14.

10 **1. Lack of Measurements**

11 Defendant cites to *Martinez v. Columbia Sportswear USA Corp.*, 859 F. Supp. 2d 1174, 1179  
12 (E.D. Cal. 2012) aff'd, 553 F. App'x 760 (9th Cir. 2014), for the proposition that "a plaintiff cannot meet  
13 his burden to show the existence of a barrier if he does not provide measurements of the alleged barrier."  
14 Def.'s MSJ at 9. This does not accurately describe the court's holding. In *Martinez*, the plaintiff alleged  
15 that an Eddie Bauer store failed to display an ADA ISA sign. *Id.* at 1178. When the store put one up,  
16 plaintiff claimed that his claim was not moot because the sign was hung too low. *Id.* Plaintiff, however,  
17 could not provide any factual or legal authority for this position. *Id.* at 1179. The court awarded  
18 summary judgment to Eddie Bauer because Plaintiff did not present any affirmative evidence to support  
19 his claim beyond the conclusory allegation that the sign was "too low." *Id.*

20 Here, Plaintiff presents affirmative evidence of the barriers in his testimony describing that the  
21 counter he used caused him discomfort because it was too high and that he was unable to navigate the  
22 path to the restroom because it was too narrow. Moore Decl. As Plaintiff points out, the Ninth Circuit  
23 has found evidence based on ADA plaintiffs' personal experiences credible. *Strong v. Valdez Fine*  
24 *Foods*, 724 F.3d 1042, 1046 (9th Cir. 2013) ("The ADA was enacted as a boon to disabled people, not  
25 expert witnesses. Specialized or technical knowledge is not required to understand [plaintiff]'s  
26 straightforward assertions."). Plaintiff's testimony sufficient to support his assertion that barriers exist at

1 Defendant's store.

2        **2. Failure to Identify Version of Building Code**

3            Defendant also claims that Plaintiff cannot establish a state law violation because he cannot  
4 identify which version of the building code is applicable. Def's MSJ at 10. Defendant relies, in part, on  
5 an unpublished opinion from the Southern District of California, wherein a plaintiff "admittedly" did not  
6 know the dates on which the features of the subject property were constructed or altered and "thus could  
7 not show a violation of law." *Sharp v. Covenant Care LLC, et al.*, 11-cv-01379-CAB (WMC), Doc. 73 at  
8 2-3 (S.D. Cal. Apr. 12, 2013). The *Sharp* court relied on *Gray v. JPMorgan Chase Bank*, No. CV 11-  
9 05337 DDP PLAX, 2012 WL 1340315, at \*3 (C.D. Cal. Apr. 18, 2012), wherein a court dismissed a  
10 case because the operative complaint did not allege facts that would support his allegation that a  
11 particular version of the code applied.

12            Here, Plaintiff provides evidence that he obtained during discovery that this Court was able to  
13 rely on to determine which version of the Code applied. *See* Section V(B), *supra*. Plaintiff alleged facts  
14 in his operative complaint that support the violations of the applicable code provisions he asserted; and  
15 he provided evidence that support these allegations. This is sufficient to overcome defendant's motion  
16 for summary judgment.

17        **3. Failure to Request Modifications**

18            In his FAC, Plaintiff cites to 42 U.S.C. § 12182(b)(2)(A)(ii), and alleges that "Defendants  
19 violated the ADA by failing to make reasonable modifications in policies, practices or procedures at the  
20 Facility, when these modifications were necessary to afford (and would not fundamentally alter the  
21 nature of) these goods, services, facilities or accommodations." FAC ¶¶ 29-30. Plaintiff seeks  
22 declaratory relief on this issue so that he may pursue damages under the Unruh Act. *Id.* at ¶ 32.  
23 Defendant argues that he is entitled to summary judgment on this issue because Plaintiff "never  
24 requested any modifications to Dollar Tree's policies and/or practices." Def.'s MSJ at 11.

25            Plaintiff responds that he "is not asking that Dollar Tree modify its policies" but that "it may be  
26 true that Dollar Tree must modify its own internal policies and procedures to that [it complies with state

1 and federal laws].” Pl.’s Opposition at 3. The Court does not see how Plaintiff can both seek to hold  
2 Defendant liable for failing to modify its policies while denying that policy modification is a necessary  
3 form of relief. Thus, the Court reads Plaintiff’s statement as waiving his claims in paragraphs 29-32.

4 Therefore, the Court GRANTS Defendant’s motion for summary judgment as to claims  
5 presented in paragraphs 29-32 of the FAC.

6 **4. Whether Plaintiff was Denied Access**

7 Defendant argues that Plaintiff’s state law claims for damages fail because Plaintiff “cannot  
8 show that he personally encountered a violation that caused him ‘difficulty, discomfort’ or  
9 embarrassment.”” Def.’s MSJ at 15. Defendant asserts that access to the restroom could have been  
10 established in a few minutes and that Plaintiff was not aggrieved by the high checkstand because he paid  
11 with cash. *Id.* As discussed in Section VII(D), *supra*, the Court has already found that there are genuine  
12 disputes as to facts regarding the accessibility of the path to the restroom. Thus, this issue may not be  
13 decided on summary judgment.

14 As to whether the Plaintiff was personally harmed by his experience at the checkstand,  
15 Defendant presents Plaintiff’s deposition testimony where Plaintiff admits that he paid cash at the time  
16 of his visit. Deposition of Ronald Moore (“Moore Depo.”), Doc. 44-14, at 38. Defendant argues that  
17 Plaintiff’s complaints regarding the height of the checkstand could only have affected him personally if  
18 paid by credit card or check, and thus required use of the counter.

19 Plaintiff did not squarely address this issue in his Opposition. Plaintiff did, however, present  
20 testimony in support of his own motion for summary judgment wherein he described that the checkout  
21 counter was too high for him to place the parcels he intended to purchase. Moore Decl. at ¶ 11 (“When I  
22 got back to the cashier counter, the counter was too high for me to easily put my items down and pay for  
23 them. . . I already suffer a lot of back pains, and anything that requires me to reach too high just adds to  
24 the shooting pain I feel.”). This is a sufficient showing that the alleged violation caused him “difficulty,  
25 discomfort, or embarrassment.” Thus, the Court DENIES Defendant’s motion for summary judgment as  
26 to this issue.

1      F.      **Whether This Court Should Decline Supplemental Jurisdiction over State Law Claims**

2      Defendant argues that this Court should decline supplemental jurisdiction over Plaintiff's state  
3      law claims because they raise novel and complex issues of state law and because his state law claims  
4      predominate over his federal claims. Def.'s MSJ at 17-20.<sup>7</sup>

5      1.      **Novelty and Complexity of State Law Claims**

6      Defendant argues that this Court should decline supplemental jurisdiction because the case  
7      presents "novel and complex issues of state law." Def.'s MSJ at 17-18. The only examples Defendant  
8      provides, however, are either irrelevant or erroneous.

9      First, Defendant argues that this Court should be wary of the recently enacted SB 1186, which  
10     addresses the misuse of California's disability laws by plaintiffs who seek to stack claims for the same  
11     violations across multiple visits to the same facility. *Id.* at 17. SB 1186 addresses this through  
12     "subdivision (h) of Section 55.56 of the Civil Code [which] reiterate[s] that where multiple claims for  
13     the same construction-related accessibility violation on separate particular occasions are alleged, a  
14     plaintiff's conduct must have a reasonable explanation for the asserted need for multiple visits to a site  
15     where a known barrier violation would deny full and equal access, in light of the obligation to mitigate  
16     damages." 2012 Cal. Legis. Serv. Ch. 383 (S.B. 1186) § 25(a). First, this Court does not consider the  
17     evaluation of a "reasonable explanation" to be an especially complex issue of law. Second, as Plaintiff  
18     points out, this argument is irrelevant to the case at hand because Plaintiff does not seek to stack claims  
19     across multiple visits in a manner that would invoke this new section.

20      Defendant also argues that the Ninth Circuit and California appellate courts are split as to the  
21     standard under which defendants can recover attorneys' fees under California law. Def.'s MSJ at 18-19.  
22     This is not an accurate characterization of the case law. The Ninth Circuit acknowledges that California  
23     courts mandate recovery of attorney's fees under the state's disability laws. *Hubbard v. SoBreck, LLC*,  
24     554 F.3d 742, 746 (9th Cir. 2009) (citing *Molski v. Arciero Wine Grp.*, 164 Cal. App. 4th 786, 793

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25  
26     <sup>7</sup> Defendant also argues that supplemental jurisdiction should be declined if all federal claims have been dismissed. This argument is moot because the Court has not dismissed all of Plaintiff's federal claims.

1 (2008)). However, the Ninth Circuit has also found that where defendants seek to recover for state law  
2 claims that parallel ADA claims, there is a conflict *between the laws*. *Id.* at 747. Their holding on this  
3 issue is clear- that parallel ADA claims trump state law claims and the decision to award attorneys' fees  
4 to the prevailing party is discretionary. *Id.* at 745.

5 The California Supreme Court has disagreed with the Ninth Circuit's holding. *Jankey*, 55 Cal.  
6 4th at 1053. However, whether a state statute is preempted by federal law is a question of federal law.  
7 *See Local Union 598 v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1218 (9th Cir.1988) ("Preemption  
8 is a question of federal law . . ."). Therefore, this Court is bound by the Ninth Circuit's decision in  
9 *Hubbard*. *See Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir.1987) ("District courts are, of  
10 course, bound by the law of their own circuit."); *see also, e.g., Oliver v. In-N-Out Burgers*, 945 F. Supp.  
11 2d 1126, 1132 (S.D. Cal. 2013) (finding that the standard established in *Hubbard* trumped the holding in  
12 *Jankey*); *Plyley v. Grangaard*, No. C 12-05825 WHA, 2014 WL 1599930, at \*3 (N.D. Cal. Apr. 21,  
13 2014)(same).

14 **2. Whether State Law Claims Predominate**

15 Defendant also argues that argue that this Court should decline to exercise jurisdiction because  
16 the state law claims predominate over the federal claims. Def's. MSJ at 19-20. Defendant cites to several  
17 examples of cases dismissed by federal courts on this principle. *Id.* Plaintiffs argues (without  
18 elaboration) that these cases present distinct factual scenarios. Pl.'s Opposition at 17.

19 Ninth Circuit case law provides that once a factual predicate is established corresponding to one  
20 of the 1367(c) categories, the district courts must exercise discretion "with the underlying objective of  
21 'most sensibly accommodating' the values of 'economy, convenience, fairness, and comity.'" *Executive*  
22 *Software N. Am., Inc. v. U.S. Dist. Court for Cent. Dist. of California*, 24 F.3d 1545, 1557 (9th Cir.  
23 1994) (overruled on other grounds). Thus, courts must explain how declining jurisdiction serves these  
24 purposes. *Trustees of Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape &*  
25 *Maint., Inc.*, 333 F.3d 923, 925 (9th Cir. 2003).

26 Cases cited by Defendant are similar to this case to the extent that they involve parallel state law

1 and ADA claims. They are not persuasive, though, because they failed provide meaningful reasons as to  
2 how the state law claims “substantially predominate” over federal claims. Moreover, most failed to  
3 address how declining jurisdiction served these the values of economy, convenience, fairness, and  
4 comity. Finally, most of the cases cited declined jurisdiction because they involved claims stacked  
5 across visits; which courts felt presented novel and complex issues of state law. *See Pinnock v. Safino*  
6 *Designs, Inc.*, No. 06CV1707-L (WMC), 2007 WL 2462107, at \*4 (S.D. Cal. Aug. 28, 2007); *Molski v.*  
7 *EOS Estate Winery*, No. CV 03-5880-GAF, 2005 WL 3952249, at \*3 (C.D. Cal. July 14, 2005); *Jankey*  
8 *v. Beach Hut*, No. CV 05-3856 SVW JTLX, 2005 WL 5517235, at \*6 (C.D. Cal. Dec. 8, 2005); *Molski*  
9 *v. Hitching Post I Rest., Inc.*, No. CV 04-1077SVWRNBX, 2005 WL 3952248, at \*7 (C.D. Cal. May 25,  
10 2005).

11 This Court finds that the mere fact that the state claims allow for the recovery of monetary  
12 damages, whereas the ADA provides for injunctive relief only, does not compel the conclusion that the  
13 state claims “substantially predominate” over the federal claim. *See also Chavez v. Suzuki*, No.  
14 05CV1569 BTM (BLM), 2005 WL 3477848, at \*2 (S.D. Cal. Nov. 30, 2005). Other than the availability  
15 of statutory damages under state law, the state and federal claims are identical. The burdens of proof and  
16 standards of liability are the same. Indeed, the Unruh Act specifically provides that a violation under the  
17 ADA also constitutes a violation of the Unruh Act. Cal. Civ. Code §§ 51(f). Moreover, the Court's  
18 exercise of supplemental jurisdiction would best advance economy, convenience, fairness, and comity.  
19 The state and federal claims are so intertwined that it makes little sense to decline supplemental  
20 jurisdiction. To do so would create the danger of multiple suits, courts rushing to judgment, increased  
21 litigation costs, and wasted judicial resources.

22 Thus, this Court DENIES Defendant's request to decline supplemental jurisdiction.

23 **VIII. CONCLUSION AND ORDER**

24 **For the reasons set forth above, Plaintiff's motion for summary judgment, Doc. 43, is**  
25 **GRANTED IN PART and DENIED IN PART as follows:**

26 The Court GRANTS Plaintiff's motion for summary judgment, as to the issues that Plaintiff is a

1 disabled person under the ADA, that the Defendant's Store is a place of public accommodation, and that  
2 he has personal knowledge of the barriers identified his expert reports.

3 The Court DENIES summary judgment on the issue that Plaintiff has suffered irreparable  
4 damage.

5 The Court DENIES Plaintiff's motion for summary judgment as to whether the operational  
6 pressures of the store's front doors comply with California law.

7 The Court DENIES Plaintiff's motion for summary judgment as to the compliance of the  
8 accessible checkout counters with state and federal disability guidelines.

9 **Defendants' motion for summary judgment, Doc. 44, is GRANTED IN PART and**  
10 **DENIED IN PART as follows:**

11 The Court DENIES Defendant's motion for summary judgment as to whether the operational  
12 pressures of the store's front doors comply with California law.

13 The Court GRANTS Defendant's motion for summary judgment as to the compliance of the  
14 accessible checkout counters with state and federal disability guidelines.

15 The Court DENIES Defendant's motion for summary judgment as to the pathway to the  
16 restroom.

17 The Court DENIES Defendant's motion for summary judgment as to whether Plaintiff may not  
18 seek damages because he failed to provide measurements, adequately identify the correct version of the  
19 California Building Code or describe his denial of access.

20 The Court GRANTS Defendant's motion for summary judgment as to claims presented in  
21 paragraphs 29-32 of the FAC.

22 The Court DENIES Defendant's request to decline supplemental jurisdiction over Plaintiff's  
23 state law claims.

24  
25 Trial is scheduled to begin February 24, 2015 at 8:30 a.m. before U.S. District Judge Lawrence J.  
26 O'Neill in Department 4 (LJO). However, there are two criminal cases calendared ahead of this one on

1 this date. Civil trials set before Judge O'Neill trail until he becomes available and are subject to  
2 suspension mid-trial to accommodate criminal matters. The parties are required to reconsider consent to  
3 conduct all further proceedings before a Magistrate Judge, whose schedules are far more realistic and  
4 accommodating to parties.

5  
6 IT IS SO ORDERED.

7 Dated: January 5, 2015

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