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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SCOTT JOHNSON,

 Plaintiff,

 v.

STARBUCKS CORPORATION, a
Washington Corporation; and DOES
1-10,

 Defendants.

No. 2:16-cv-2797 WBS AC

MEMORANDUM AND ORDER RE:
MOTION FOR SUMMARY JUDGMENT

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Plaintiff Scott Johnson, an individual with a disability, initiated this action against defendant Starbucks Corporation ("Starbucks"), seeking damages under the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101, and the Unruh Civil Rights Act, California Civil Code §§ 51-53; penalties under the Unruh Act; and attorneys' fees and costs. Plaintiff moves for summary judgment.¹ (Docket No. 38.)

¹ Because plaintiff does not oppose defendant's Request for Judicial Notice (Docket No. 39-6) and the court finds the

1 I. Factual and Procedural Background

2 Plaintiff is a quadriplegic who uses a wheelchair for
3 mobility. (Decl. of Scott Johnson ("Johnson Decl.") ¶ 2 (Docket
4 No. 38-5).) On at least six different occasions between May 12,
5 2016 and September 21, 2016, plaintiff visited and made purchases
6 at the Starbucks-operated coffee shop located at 3045 Arden Way,
7 Sacramento, California ("Arden Starbucks"). (Id. ¶ 4.)

8 Plaintiff alleges that during his visits, he encountered access
9 barriers that denied him full and equal access to the coffee
10 shop. Specifically, plaintiff contends that he had difficulty
11 using the sales counter because it "was crowded with merchandise
12 and displays, which narrowed the clear width of the counter."

13 (Id. ¶ 6.) Plaintiff maintains that he encountered these
14 barriers each time he visited the Arden Starbucks and that the
15 barriers caused him difficulty, discomfort, and frustration.

16 (Id. ¶¶ 6-8.)

17 On February 6, 2018, plaintiff's accessibility
18 consultant and expert witness Gary Waters conducted a site
19 inspection of the Arden Starbucks. (Decl. of Gary Waters
20 ("Waters Decl.") ¶ 8 (Docket No. 38-10).) According to his
21 expert report,² Waters found that the location still had the
22 alleged access barriers on the date of his inspection. (Access
23 Compliance Evaluation Survey and Report ("Waters Report") at 4-5

24
25 materials in the Request to be properly subject to judicial
26 notice, the court hereby GRANTS the Request.

27 ² The court uses the Waters Report only for its relevant
28 factual content and thus will not exclude it from consideration.
(See Def.'s Obj. to Report (Starbucks' request that the court
exclude Waters' expert report) (Docket No. 39-10).)

1 (Docket No. 38-11).) His expert report contains photographs of
2 the sales counter, including pictures of specific measurements.
3 The report includes a finding that the two sections of counter
4 available for customer service are less than 36 inches long
5 because “[m]uch of the counter space is taken up by merchandise
6 display, cash registers, and other items.” (Id. at 5.) Waters
7 reports that the counter is measured at just less than 34.5
8 inches above the floor. (Id. at 8.)

9 Plaintiff filed this action on November 28, 2016,
10 alleging two claims: (1) violations of the ADA, 42 U.S.C. § 12101
11 et seq.; and (2) violations of the Unruh Civil Rights Act,
12 California Civil Code §§ 51-53. Defendant filed a motion to stay
13 proceedings pending a ruling by the Judicial Panel on
14 Multidistrict Litigation (“JPML”) on a motion to transfer this
15 case, along with 20 other similar lawsuits filed by plaintiff, to
16 a single district court as multidistrict litigation. (Docket No.
17 22.) This court denied the motion to stay on May 22, 2018.
18 (Docket No. 28.) The JPML denied the motion to transfer on
19 August 2, 2018. In Re: Starbucks Corp., Case No. 2849, Docket
20 No. 13 (JPML Aug. 1, 2018). Another judge in this district
21 declined to relate the similar cases within this district.
22 (Docket No. 35.) Plaintiff now moves for summary judgment.

23 II. Discussion

24 A. Legal Standard

25 Summary judgment is proper “if the movant shows that
26 there is no genuine dispute as to any material fact and the
27 movant is entitled to judgment as a matter of law.” Fed. R. Civ.
28 P. 56(a). A material fact is one that could affect the outcome

1 of the suit, and a genuine issue is one that could permit a
2 reasonable jury to enter a verdict in the non-moving party's
3 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
4 (1986).

5 The party moving for summary judgment bears the initial
6 burden of establishing the absence of a genuine issue of material
7 fact and can satisfy this burden by presenting evidence that
8 negates an essential element of the non-moving party's case.
9 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

10 Alternatively, the movant can demonstrate that the non-moving
11 party cannot provide evidence to support an essential element
12 upon which it will bear the burden of proof at trial. Id. Any
13 inferences drawn from the underlying facts must, however, be
14 viewed in the light most favorable to the party opposing the
15 motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
16 U.S. 574, 587 (1986).

17 B. Americans with Disabilities Act

18 The ADA was enacted in 1990 to "remedy widespread
19 discrimination against disabled individuals," PGA Tour, Inc. v.
20 Martin, 532 U.S. 661, 674 (2001), and permits private lawsuits
21 against businesses that fail to accommodate individuals with
22 disabilities, 42 U.S.C. § 12188(a). To prevail on an ADA claim,
23 "the plaintiff must show that (1) [he or] she is disabled within
24 the meaning of the ADA; (2) the defendant is a private entity
25 that owns, leases, or operates a place of public accommodation;
26 and (3) the plaintiff was denied public accommodations by the
27 defendant because of [his or] her disability." Molski v. M.J.
28 Cable, Inc., 481 F.3d 724, 730 (9th Cir. 2007). Only the third

1 element is in dispute in this case.

2 “The third element--whether [a plaintiff is] denied
3 public accommodations on the basis of disability--is met if there
4 was a violation of applicable accessibility standards.” Johnson
5 v. Wayside Prop., Inc., 41 F. Supp. 3d 973, 976 (E.D. Cal. 2014)
6 (Shubb, J.) (citation omitted); see Chapman v. Pier 1 Imps.
7 (U.S.), Inc., 631 F.3d 939, 945 (9th Cir. 2011) (en banc). Those
8 standards are set forth by the ADA Accessibility Guidelines
9 (“ADAAG”). The Department of Justice (“DOJ”) promulgated the
10 ADAAG in 1991 and revised them in 2010. See Kohler v. Flava
11 Enters., Inc., 826 F. Supp. 2d 1221, 1229 (S.D. Cal. 2011). All
12 architectural and structural elements in a facility are required
13 to comply with the 1991 Standards to the extent that compliance
14 is readily achievable; by contrast, the 2010 standards apply only
15 to elements that have been altered in existing facilities, or
16 that fail to comply with the 1991 Standards, on or after March
17 15, 2012. 28 C.F.R. § 36.304(d)(1)-(2). These standards
18 “provide[] the objective contours of the standard that
19 architectural features must not impede disabled individuals’ full
20 and equal enjoyment of accommodations.” Chapman, 631 F.3d at
21 945; see 28 C.F.R. pt. 1191 (2010 Standards); 28 C.F.R. pt. 36,
22 App. D (1991 Standards).

23 1. Sections 904.4 and 904.4.1

24 The two 2010 standards at issue in this case are
25 Sections 904.4 and 904.4.1. Section 904.4 states:

26 Sales and Service Counters. Sales counters and service
27 counters shall comply with 904.4.1 or 904.4.2. The
28 accessible portion of the counter top shall extend the same
depth as the sales or service counter top.

1 EXCEPTION: In alterations, when the provision of a counter
2 complying with 904.4 would result in a reduction of the
3 number of existing counters at work stations or a reduction
4 of the number of existing mail boxes, the counter shall be
5 permitted to have a portion which is 24 inches (610 mm) long
6 minimum complying with 904.4.1 provided that the required
7 clear floor or ground space is centered on the accessible
8 length of the counter.

9 36 C.F.R. § Pt. 1191, App. D, § 904.4. Section 904.4.1, which
10 applies in this case because an individual would approach the
11 Arden Starbucks sales counter with his or her wheelchair parallel
12 to it, provides in full:

13 Parallel Approach. A portion of the counter surface that is
14 36 inches (915 mm) long minimum and 36 inches (915 mm) high
15 maximum above the finish floor shall be provided. A clear
16 floor or ground space complying with 305 shall be positioned
17 for a parallel approach adjacent to the 36 inch (915 mm)
18 minimum length of counter.

19 EXCEPTION: Where the provided counter surface is less than
20 36 inches (915 mm) long, the entire counter surface shall be
21 36 inches (915 mm) high maximum above the finish floor.

22 Id. § 904.4.1. Plaintiff argues that the Arden Starbucks
23 violates Section 904.4.1 because neither of its sales locations
24 on the counter provide at least 36 inches in length of counter
25 space. Defendant responds by relying on the exception to this
26 section. Defendant contends that the first paragraph of Section
27 904.4.1 only applies to establishments with a two-tiered sales
28 counter, one high counter for non-disabled use and one low
counter for disabled use. Defendant argues that the exception in
the second paragraph applies because the sales counter at issue
here is at a uniform height and thus the entire surface
accommodates disabled patrons. Plaintiff insists that the
exception only applies where it is not possible to provide a 36-
inch-wide counter, which is not the case here.

There is no support for plaintiff's interpretation

1 within the relevant text. The exception to 904.4.1 never states
2 that it applies only where it is technically infeasible or not
3 possible to provide a counter at least 36 inches long. The court
4 will not rewrite the standard beyond what its literal words will
5 support. Cf. 62 Cases, More or Less, Each Containing Six Jars of
6 Jam v. United States, 340 U.S. 593, 596 (1951) (observing that a
7 court cannot add language when interpreting a text). To the
8 extent plaintiff believes that the language in another ADAAG
9 standard requires such an interpretation, he is mistaken. See 36
10 C.F.R. § Pt. 1191, App. B § 202.3, Exception 2 (stating that
11 alterations do not have to comply with applicable requirements
12 where compliance is "technically infeasible"). None of the
13 relevant language in Section 202.3 exists in Section 904.4.1.
14 The court presumes that the drafters of Section 904.4.1 acted
15 intentionally in including and excluding specific language. Cf.
16 Russello v. United States, 464 U.S. 16, 23 (1983) (presuming that
17 drafters act intentionally where they include particular language
18 in one section of a document but omit that same language in
19 another section of the same text). The absence of language
20 within Section 904.4.1 that supports plaintiff's interpretation
21 likely reflects an intentional choice to forgo plaintiff's
22 preferred reading.³

23
24 ³ Plaintiff also relies on two decisions from the
25 Northern District of California in support of his claim that
26 Starbucks has a history of problems with its sales counters. See
27 Crandall v. Starbucks Corp., 249 F. Supp. 3d 1087 (N.D. Cal.
28 2017); Kalani v. Starbucks Corp., 81 F. Supp. 3d 876 (N.D. Cal.
2015), aff'd sub nom. Kalani v. Starbucks Coffee Co., 698 F.
App'x 883 (9th Cir. 2017). These decisions are not relevant
because they do not address the exception to Section 904.4.1.
See Johnson v. Starbucks Corp., No. 16-CV-00724-DMR, 2018 WL

1 By contrast, defendant's interpretation better comports
2 with the text and structure of the two provisions. The text of
3 the exception makes it clear that it applies when "the provided
4 counter surface is less than 36 inches (915 mm) long." Defendant
5 then correctly concludes that all that is required is that "the
6 entire counter surface [] be 36 inches (915 mm) high maximum
7 above the finish floor." Defendant's interpretation best
8 reconciles Section 904.4.1 with its exception. The regulations
9 envision that all sales counters will either be two-tiered, with
10 the first tier at a higher level for use by non-disabled persons
11 and the second tier at a lower level for use by disabled persons,
12 or single-tiered, with the entire counter at a uniform height.

13 If a private entity elects to have a two-tiered sales
14 counter, it satisfies the first paragraph of the rule so long as
15 the lower tier of the counter is at least 36 inches long and a
16 maximum height of 36 inches. If the private party elects to have
17 a single-tiered sales counter, it also satisfies the first
18 paragraph if that counter meets those minimum length and maximum
19 height requirements. A single-tier counter which does not meet
20 the minimum length requirement of the first paragraph, may still
21 comply with the regulation under the exception in the second
22 paragraph, provided that the height of the counter is no greater
23 than 36 inches.

24 This reading gives full and independent effect to the
25 text of each provision and avoids creating internal
26 inconsistencies or surplusage. Cf. Boise Cascade Corp. v. U.S.

27 5099283, at *4 n.5 (N.D. Cal. Oct. 17, 2018) (reaching the same
28 conclusion).

1 E.P.A., 942 F.2d 1427, 1432 (9th Cir. 1991) (holding that courts
2 must give effect to each word in a text and make every effort not
3 to interpret a provision in a manner that renders other
4 provisions inconsistent, meaningless, or superfluous). This
5 reading is also consonant with the purpose of the ADA. See
6 Martin, 532 U.S. at 674 (explaining that the purpose of the ADA
7 is to eradicate discrimination against disabled individuals).
8 Where every individual, regardless of disability, uses the same
9 sales counter at a uniform height, persons with disabilities are
10 not provided with comparatively inferior services.

11 Plaintiff contends, however, that defendant's
12 interpretation of the exception leads to an absurd result
13 because, for instance, a private entity could provide a counter
14 that is only one inch long. Plaintiff argues that such a result
15 conflicts with the entire purpose of a length requirement.⁴
16 There are several problems with plaintiff's argument. First,
17 even though this section of the regulations may not preclude a
18 one inch counter, other regulations in the ADA would not allow

19
20 ⁴ In support of this argument, plaintiff cites to Section
21 904.4's exception, which permits counters to be a minimum of 24
22 inches long where compliance with 904.4 would result in a
23 reduction of the number of existing counters. See 36 C.F.R. §
24 Pt. 1191, App. D, § 904.4. Plaintiff believes that this
25 exception is evidence of the fact that a minimum length
26 requirement is necessary for accessibility purposes. This
27 exception, however, is inapplicable to this case. It only
28 applies to private entities attempting to alter their existing
counters so that those counters would comply with Sections 904.4
and 904.4.1. Here, defendant argues that its counter already
complies with these sections and thus it does not have to make
any alterations. Moreover, this exception to Section 904.4 also
shows that the drafters of the ADAAG standards knew exactly how
to include a minimum length requirement within an exception and
chose not to include one within the exception to Section 904.4.1.

1 such a result. As will be explained below, a private entity must
2 also comply with Section 36.211 and its separate requirement that
3 public accommodations be accessible to and usable by persons with
4 disabilities. See 28 C.F.R., Part 36, Appendix C, § 36.211(a).
5 Second, practically speaking, where only a counter of uniform
6 height is provided, businesses have an incentive to construct it
7 at a usable length because otherwise they would not be able to
8 transact business with any customers. Therefore, the court finds
9 that the exception applies and will now determine whether
10 plaintiff has shown that the sales counter does not comply with
11 its specifications.⁵

12 Here, it is undisputed that the sections of counter
13 space available for customer service are less than 36 inches long
14 (See Waters Report at 5.) It is also undisputed that sales
15 counter is uniform in height, (see Decl. of Bobbie Pereira
16 ("Pereira Decl.") ¶ 3), and falls below the maximum height of 36
17 inches specified in the exception (see Waters Report at 8
18 (finding that the sales counter measures at just less than 34.5
19 inches above the floor)). Because the counter meets the
20 technical specifications set forth in the exception, the court
21 will deny plaintiff summary judgment on the alleged violation of
22 Section 904.4.1.

23
24 ⁵ Plaintiff argues that the sales counter does not
25 qualify for the exception because the entire counter, including
26 cluttered space, is longer than 36 inches. Even if the cluttered
27 space is included in calculating the length of the counter, the
28 counter would satisfy the relevant technical requirements of the
first paragraph of Section 904.4.1 because it is more than 36
inches long. And the parties agree that the entire counter falls
below the maximum height of 36 inches.

1 2. Section 36.211

2 Plaintiff also alleges that, even if the Arden
3 Starbucks complies with the previously-mentioned requirements,
4 the features of the facility violate Section 36.211 of the 1991
5 standards because they are not maintained in an accessible or
6 usable manner. See 28 C.F.R., Part 36, Appendix C, § 36.211(a)
7 ("A public accommodation shall maintain in operable working
8 condition those features of facilities and equipment that are
9 required to be readily accessible to and usable by persons with
10 disabilities by the Act or this part."); see also Kohler, 826 F.
11 Supp. 2d at 1227 ("A violation of the ADA can occur where a
12 defendant's business is in compliance with ADAAG requirements,
13 but that defendant does not maintain its compliant features in a
14 useable manner."). Plaintiff maintains that the sales counter is
15 not useable for persons with disabilities because defendant
16 crowds the counter with merchandise and display, substantially
17 narrowing the useable space.

18 For the purposes of summary judgment, plaintiff has not
19 established beyond dispute that the sales counter is not
20 accessible for or usable by persons with disabilities. Plaintiff
21 simply asserts as much in conclusory terms in his declaration.
22 (See Johnson Decl. ¶¶ 6-8.) However, merely alleging that a
23 sales counter was cluttered with merchandise is insufficient by
24 itself to support the conclusion that a wheelchair user was
25 deprived of "full and equal" access to the services of a public
26 accommodation. See Chapman, 779 F.3d at 1009. Moreover,
27 plaintiff's own evidence establishes that he used the sales
28 counter to purchase coffee every time he visited the Arden

1 Starbucks. (See Pl.'s Ex. 3 (copies of plaintiff's receipts from
2 visits to the Arden Starbucks on May 12, 2016, May 25, 2016, May
3 26, 2016, July 7, 2016, August 14, 2016, September 15, 2016, and
4 September 21, 2016) (Docket No. 38-6).) Given this evidence, a
5 reasonable jury could find in defendant's favor on this issue.
6 Consequently, plaintiff is not entitled to summary judgment on
7 the alleged violation of Section 36.211.

8 Accordingly, because plaintiff is not entitled to
9 judgment as a matter of law on any alleged ADA violations, the
10 court will deny summary judgment as to this claim.⁶

11 C. Unruh Act

12 The Unruh Act provides in relevant part that every
13 person is "entitled to the full and equal accommodations,
14 advantages, privileges, or services in all business
15 establishments of every kind whatsoever" notwithstanding his or
16 her disability. Cal. Civ. Code § 51(b). The Unruh Act
17 "incorporates the substantive standards of the ADA and creates a
18 private right of action as a matter of state law." Dep't of Fair
19 Emp't & Hous. v. Law School Admission Council Inc., 896 F. Supp.
20 2d 849, 865 (N.D. Cal. 2012); Cal. Civ. Code § 51(f) ("A
21 violation of the right of any individual under the federal
22 Americans with Disabilities Act of 1990 . . . shall also
23 constitute a violation of this section.").

24 For the reasons given above, plaintiff cannot rely on
25 his alleged ADA violations to support summary judgment on his

26 ⁶ Because plaintiff has not shown that he is entitled to
27 summary judgment on the merits of his ADA claim, the court does
28 not decide whether there is a triable issue of fact as to
plaintiff's standing to seek injunctive relief under the ADA.

1 Unruh Act claim. To the extent plaintiff relies on the
2 independent force of the Unruh Act, plaintiff must plead and
3 prove intentional discrimination in public accommodations in
4 violation of the terms of the Act. Greater Los Angeles Agency on
5 Deafness, Inc. v. Cable News Network, Inc., 742 F.3d 414, 425
6 (9th Cir. 2014) (citing Munson v. Del Taco, Inc., 46 Cal. 4th
7 661, 668 (2009)). Intentional discrimination captures willful,
8 affirmative misconduct, and the plaintiff must therefore show
9 more than the disparate impact of a facially neutral policy. See
10 id. (citations omitted); see also Koebke v. Bernardo Heights
11 Country Club, 36 Cal. 4th 824, 855 (2005) (“A disparate impact
12 analysis or test does not apply to Unruh Act claims.”).

13 The only information provided for the requirement of
14 intentional discrimination is plaintiff’s allegation that “the
15 failure to remove these barriers was intentional because: (1)
16 these particular barriers are intuitive and obvious; (2) the
17 defendants exercised control and dominion over the conditions at
18 this location and, therefore, the lack of accessible facilities
19 was not an ‘accident’ because had the defendants intended any
20 other configuration, they had the means and ability to make the
21 change.” (Compl. ¶ 29.) This allegation does not establish that
22 defendant deliberately designed the sales counter in a way to
23 disadvantage disabled patrons. Instead, as discussed above, the
24 relevant, undisputed evidence shows that the layout of the sales
25 counter is the same for all patrons regardless of disability.
26 See Cable News Network, 742 F.3d at 426 (explaining that a
27 plaintiff typically cannot establish intentional discrimination
28 where all individuals, disabled or not, are subject to the same

1 policy). Plaintiff's evidence does not show willful, affirmative
2 misconduct, and instead focuses on the disparate impact the
3 usable length of the sales counter allegedly has on persons with
4 disabilities. Because that evidence does not support a finding
5 of intentional discrimination, plaintiff has not established an
6 independent violation of the Unruh Act.

7 Accordingly, the court will deny plaintiff's motion for
8 summary judgment as to his Unruh Act claim.

9 IT IS THEREFORE ORDERED that plaintiff's Motion for
10 Summary Judgment (Docket No. 38) be, and the same hereby is,
11 DENIED.

12 Dated: February 20, 2019



13 WILLIAM B. SHUBB
14 UNITED STATES DISTRICT JUDGE
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