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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SCOTT JOHNSON,
Plaintiff,

v.

5530 MONTEREY ROAD LLC, et al.,
Defendants.

Case No. [20-cv-04740-WHO](#)

**ORDER DENYING MOTION TO
DISMISS**

Dkt. No. 13

INTRODUCTION

Plaintiff Scott Johnson is a California resident with physical disabilities. Dkt. No. 1 Complaint (“Compl.”) ¶ 1. He is a level C-5 quadriplegic, cannot walk, and has significant manual dexterity impairments. Id. He uses a wheelchair for mobility and a specially equipped van. Id. Defendants 5530 Monterey Road LLC and Travel Inn Gilroy LLC own the real property and a motel located at 5530 Monterey Road in Gilroy, California (the “Property”), which is a place of public accommodation and business establishment open to the public. Id. ¶¶ 2-5, 11. Plaintiff alleges that the Property has various physical barriers that do not comply with disability access laws. Based on these alleged physical barriers, on July 15, 2020, plaintiff filed this action, asserting claims against the defendants under (1) the Americans with Disabilities Act (“ADA”); and (2) California’s Unruh Civil Rights Act. See Compl. ¶¶ 27-44.

On August 14, 2020, defendants moved to dismiss this action under Rule 12(b)(1), arguing that the alleged physical barriers identified in plaintiff’s Complaint have been resolved, as indicated in their concurrently filed expert declaration, and that plaintiff’s claims are moot. Dkt. No. 13-1, Motion to Dismiss (“Motion”) at 7-8. Defendants also argued that, given the mootness of the ADA claims, this Court should exercise its discretion to decline to hear plaintiff’s

1 supplemental state claims. *Id.* at 10. On August 28, 2020, plaintiff opposed defendant’s motion to
 2 dismiss, arguing that the motion improperly asks this Court to determine the merits of plaintiff’s
 3 claims in order to assess jurisdiction. Dkt. No. 14, Opposition (“Opp.”) at 1-4. Plaintiff also
 4 argued that defendants’ expert declaration was insufficient to establish that the physical barriers
 5 described in plaintiff’s Complaint were fully resolved. *Id.* at 4-8.

6 On September 14, 2020, I issued an Order stating, in part, that plaintiff could file a
 7 supplemental substantive response to defendants’ motion to dismiss, by October 28, 2020,
 8 following the parties’ joint on-site inspection of the Property, and that defendants could file a
 9 supplemental reply by November 4, 2020. Dkt. No. 16-1. On October 27, 2020, plaintiff filed a
 10 supplemental opposition to defendants’ motion to dismiss along with the declaration of Tim
 11 Wegman, which identifies several remaining physical barriers still present at the Property. See
 12 Dkt. No. 19, Supplemental Opposition (“Supp. Opp.”); Dkt. No. 19-1, Wegman Decl. On
 13 November 4, 2020, defendants filed a supplemental reply, arguing that these alleged remaining
 14 barriers either do not exist, or have now been remedied. See Dkt. No. 20, Supplemental Reply
 15 (“Supp. Reply”). On November 5, 2020, defendants submitted a supplemental Lobnow
 16 declaration in support of this supplemental reply. See Dkt. No. 21 Supp. Lobnow Decl.

17 For the reasons outlined below, I conclude that there are facts in dispute regarding whether
 18 the alleged physical barriers at the Property have been resolved. Accordingly, defendants’ motion
 19 to dismiss on mootness grounds is DENIED. Further, I decline to use my discretion to dismiss
 20 plaintiff’s state claims and defendants’ motion to dismiss these claims is also DENIED. Because
 21 some of the alleged barriers plaintiff describes in his briefing are not clearly alleged in the
 22 Complaint, plaintiff will have 20 days leave to amend his Complaint to allege facts regarding
 23 these barriers.

24 **BACKGROUND**

25 **I. COMPLAINT ALLEGATIONS**

26 In October 2019, January 2020, and February 2020, plaintiff traveled to the Property with
 27 the intention of using the Property’s services and, in part, to determine whether the Property
 28 complies with disability access laws. Compl. ¶ 10. He alleges that when he visited the Property,

1 the defendants “failed to provide wheelchair accessible parking in conformance with the ADA
2 Standards as it relates to wheelchair users like the plaintiff” and that the Property still does not
3 have wheelchair accessible parking. Id. ¶¶ 12-13. He further alleges, on information and belief,
4 that at the times he visited, and presently, the Property did not and does not have (1) a wheelchair
5 accessible guestroom; (2) wheelchair accessible door hardware at the lobby entrance; and (3)
6 wheelchair accessible transaction counters. Id. ¶¶ 14-19.

7 **II. DEFENDANTS’ LOWNOW DECLARATION**

8 In support of their motion to dismiss, defendants submitted a declaration from Craig
9 Lobnow. Dkt. No. 13-2, Lobnow Decl. Lobnow declares that he visited the Property on August
10 10, 2020, inspected the alleged physical barriers described in plaintiff’s Complaint, and prepared a
11 report of his findings. Id. ¶ 4. Based on his inspection, Lobnow declares that the Property’s
12 accessible parking is ADA compliant because (1) the accessible parking space is 108 inches wide;
13 (2) the access aisle is 96 inches wide; (3) the parking space and access aisle are the same length;
14 (4) the parking space and aisle have correct painted markings; and (5) the running slopes of the
15 parking space and access aisle are not greater than 2.0%. Id. ¶¶ 5-6. Further, Lobnow declares
16 that the Property’s guestrooms are ADA compliant because the Property has one accessible
17 guestroom out of 24, and the accessible guestroom interior, toilet, and bathroom meet ADA
18 requirements for entrances, doors, and doorways. Id. ¶¶ 7-8. Finally, Lobnow declares that the
19 lobby entrance door hardware complies with the ADA, noting that it can be operated with one
20 hand; is within 15-48 inches from a front or side approach; does not require tight grasping,
21 pinching, or twisting of the wrist, and does not require a force to activate of more than five
22 pounds. Id. ¶¶ 9-11.

23 **III. PLAINTIFF’S WEGMAN DECLARATION**

24 In support of his supplemental opposition, plaintiff submitted the declaration of Tim
25 Wegman. In his declaration, Wegman declares that he participated in a joint site inspection of the
26 Property on October 21, 2020. Wegman Decl. ¶ 21. Wegman declares that, using a digital level,
27 he determined the slope of the parking space at the Property was 2.4% and 2.3% at various points.
28 Id. ¶ 3. He further declares that he took multiple measurements and made various observations

1 regarding the accessible guestroom shower noting that: (1) the shower measured 60 inches wide
 2 by 30 inches deep; (2) the shower contains a grab bar that can be moved up and down from a
 3 maximum low point of 52 inches to a high of 71 inches; (3) the shower seat is bolted and affixed
 4 to the wall and cannot be folded up; and (4) the shower seat is rectangular in design and measures
 5 13.5 inches from the side wall to the front edge of the seat. *Id.* ¶¶ 3-6.

6 **IV. DEFENDANTS' SUPPLEMENTAL LOBNOW DECLARATION**

7 On November 5, 2020, defendants submitted a supplemental declaration of Craig Lobnow
 8 addressing the barriers described in the Wegman declaration. See *Supp. Lobnow Decl.* In this
 9 declaration, Lobnow explains that (1) he measured the slope of the parking space at various points
 10 and that all points now have less than a 2% slope; (2) the guestroom bathroom shower seat
 11 measures 15 inches from the side wall to the front edge of the seat; (3) the shower grab bar is now
 12 48 inches from the shower floor; and (4) the shower seat can be folded up. *Supp. Lobnow Decl.*
 13 ¶¶ 5, 7, 9-10.

14 **LEGAL STANDARD**

15 **I. RULE 12(b)(1)**

16 A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure is a
 17 challenge to the court's subject matter jurisdiction. See *Fed. R. Civ. P. 12(b)(1)*. "Federal courts
 18 are courts of limited jurisdiction,' and it is "presumed that a cause of action lies outside this
 19 limited jurisdiction." *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). The
 20 party invoking the jurisdiction of the federal court bears the burden of establishing that the court
 21 has the authority to grant the relief requested. *Id.*

22 A challenge pursuant to Rule 12(b)(1) may be facial or factual. See *White v. Lee*, 227 F.3d
 23 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the
 24 allegations pled in the complaint. See *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).
 25 The challenger asserts that the allegations in the complaint are insufficient "on their face" to
 26 invoke federal jurisdiction. See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
 27 2004). To resolve a facial challenge, the court assumes that the allegations in the complaint are
 28 true and draws all reasonable inferences in favor of the party opposing dismissal. In contrast, with

1 a factual attack, a court may “look beyond the complaint to matters of public record without
2 having to convert the motion into one for summary judgment” and “need not presume the
3 truthfulness of the plaintiffs’ allegations.” White, 227 F.3d at 1242. “Once the moving party has
4 converted the motion to dismiss into a factual motion by presenting affidavits or other evidence
5 properly brought before the court, the party opposing the motion must furnish affidavits or other
6 evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” Savage v.
7 Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

8 “Jurisdictional finding of genuinely disputed facts is inappropriate when ‘the jurisdictional
9 issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the
10 resolution of factual issues going to the merits’ of an action.” Safe Air for Everyone, 373 F.3d at
11 1039 (quoting Sun Valley Gas., Inc. v. Ernst Enters., 711 F.2d 138, 140 (9th Cir. 1983).

12 **II. SUPPLEMENTAL JURISDICTION**

13 Under 29 U.S.C. §1367(a), a district court has supplemental jurisdiction over claims that
14 “are so related to claims in the action within such original jurisdiction that they form part of the
15 same case or controversy under Article III.” 29 U.S.C. §1367(a). A district court may decline to
16 exercise supplemental jurisdiction where “(1) the claim raises a novel or complex issue of State
17 law, (2) the claim substantially predominates over the claim or claims over which the district court
18 has original jurisdiction, (3) the district court has dismissed all claims over which it has original
19 jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining
20 jurisdiction.” Id. (c)(4).

21 **DISCUSSION**

22 **I. MOOTNESS**

23 Defendants move to dismiss plaintiff’s claims under 12(b)(1), arguing that all the
24 complained of barriers have been remedied. See Motion. Defendants rely on the declaration of
25 their expert, Craig Lobnow, to establish that the Property is now ADA compliant. See generally,
26 Lobnow Decl. A district court is “ordinarily free to hear evidence regarding jurisdiction and to
27 rule on that issue prior to trial,” Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983),
28 including on a Rule 12(b)(1) motion to dismiss. However, the Ninth Circuit has cautioned that it

1 is inappropriate to resolve factual disputes on a motion to dismiss where “the jurisdictional issue
2 and substantive issues are so intertwined that the question of jurisdiction is dependent on the
3 resolution of factual issues going to the merits of an action.” *Safe Air for Everyone*, 373 F.3d at
4 1039 (internal quotation marks and citation omitted).

5 In ADA cases, the continuing existence of physical barriers is both a jurisdictional and
6 substantive issue and accordingly, courts generally decline to dismiss ADA claims on mootness
7 grounds unless there is no factual dispute that the alleged barriers have been remedied. See,
8 e.g. *Ngoc Lam Che v. San Jose/Evergreen Cmty. Coll. Dist. Found.*, Case No. 17-cv-00381-BLF,
9 2017 WL 2954647, at *3 (N.D. Cal. July 11, 2017) (denying Rule 12(b)(1) motion where the
10 parties submitted competing expert declarations); *Alcazar v. Bubba Gump Shrimp Co.*
11 *Restaurants, Inc.*, Case No. 20-cv-02771-DMR, 2020 WL 4601364, at *4 (N.D. Cal. Aug. 11,
12 2020) (denying motion to dismiss ADA claims for mootness where parties submitted competing
13 declarations regarding remedial measures); *Powers v. Mad Vapatory LLC*, Case No. 19-cv-05642-
14 VKD, 2020 WL 3402245, at *6 (N.D. Cal. June 19, 2020) (“the Court will not dismiss the action
15 at this juncture because the jurisdictional analysis is coextensive with the merits of Mr. Powers’s
16 ADA claim”); *Johnson v. Case Ventures, LLC*, Case No. 5:19-cv-02876-EJD, 2020 WL 4747908
17 (N.D. Cal. Aug. 17, 2020) (applying summary judgment standard to evidence re mootness of ADA
18 claims); see also *Langer v. Nenow*, Case No. 18-cv-01670-GPC-PGS, 2020 WL 708144, at *4
19 (S.D. Cal. Feb. 12, 2020) (finding that a plaintiff’s ADA claim was moot where a defendant
20 submitted evidence and an expert report that the alleged violations had been cured and plaintiff did
21 not submit competing evidence).

22 Here, there are facts in dispute regarding the current state of the Property. Defendants’
23 expert Lobnow states in his declaration that the cross and running slopes of the Property’s
24 accessible parking space and access aisle are not greater than 2.0%, as required by the ADA.
25 Lobnow Decl. ¶¶ 5-6. In contrast, plaintiff’s investigator, Wegman, declares that the space’s slope
26 reaches 2.4% and 2.3%. Wegman Decl. ¶ 3. In his supplemental declaration, Lobnow again
27 disputes this finding, declaring that the parking space and access aisle slopes do not exceed 2.0%.
28 Supp. Lobnow Decl. ¶ 5. This is a direct factual dispute regarding the slope of the Property’s

1 parking space. In addition, in his declaration Lobnow declares that the Property’s accessible
2 guestroom and bathroom “meet[] the requirements for entrances, doors, and doorways” and are
3 compliant with accessibility codes. Lobnow Decl. ¶¶ 7-8. But the Wegman declaration submitted
4 by plaintiff identifies three remaining issues with the guestroom’s shower: (1) the shower spray
5 unit reaches a maximum low point of 52 inches – but ADA standards require such units to be no
6 higher than 48 inches above the shower floor; (2) the shower seat is bolted and fixed to the wall
7 and cannot be folded up – but ADA standards require roll-in shower seats to fold; and (3) the
8 shower seat measures 13.5 inches from the side wall to the front edge of the seat – but ADA
9 standards require such seats to measure between 15 and 16 inches from the seat wall. Wegman
10 Decl. ¶¶ 3-6; Supp. Opp. at 3-4. The supplemental Lobnow declaration disputes these findings,
11 instead concluding that (1) the shower spray unit has been lowered so that it reaches the required
12 48 inches above the shower floor height; (2) the shower seat is foldable; and (3) the shower seat is
13 15 inches, not 13.5 inches, from the shower wall. Supp. Lobnow Decl. ¶¶ 7, 9-10. Again, there is
14 a direct factual dispute between the parties’ submitted declarations regarding the shower’s
15 compliance with ADA standards.

16 In addition, defendants’ declarations and briefing do not address or rebut plaintiff’s
17 allegation that the Property does not have accessible transaction counters. See Compl. ¶ 19.
18 Defendants have not attempted to argue or put forth facts demonstrating that this alleged barrier
19 has been cured and thus, even absent the factual disputes described above, I cannot conclude that
20 plaintiff’s claims are moot.

21 Because there appears to be a legitimate factual dispute as to whether the Property is
22 currently ADA compliant, and because defendants have not rebutted plaintiff’s allegation that the
23 Property does not have accessible transaction counters, defendants’ motion to dismiss plaintiff’s
24 ADA claim for mootness is denied.

25 **II. SUPPLEMENTAL JURISDICTION**

26 As defendants acknowledge, this Court has discretion to decline to exercise supplemental
27 jurisdiction over plaintiff’s state law claims under various circumstances. However, because I
28 conclude that plaintiff’s ADA claim is not moot, I decline to dismiss the state law claims.

1 Plaintiff's claims will be most efficiently litigated together in one forum and defendants do not
2 identify any strong justification for declining jurisdiction of the state claims.

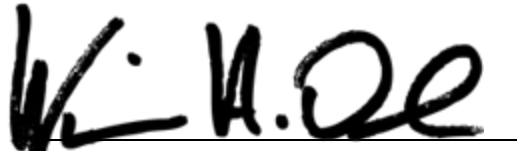
3 **CONCLUSION**

4 For the reasons outline above, defendants' motion to dismiss is DENIED. Because
5 plaintiff's briefing and submitted expert declaration discuss physical barriers that are not clearly
6 alleged in the Complaint, plaintiff will have 20 days leave to amend his Complaint to add factual
7 allegations regarding these barriers.

8 The parties are reminded of their responsibilities under General Order 56. If they have not
9 held their in person settlement meeting, they should do so (at the site or virtually) within the next .
10 20 days. Within 35 days, they shall file the Notice of Need for Mediation as required by General
11 Order 56 if the case has not resolved.

12 **IT IS SO ORDERED.**

13 Dated: November 16, 2020

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16 William H. Orrick
United States District Judge

United States District Court
Northern District of California

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