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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LARRY McIVER,

Plaintiff,

vs.

PACIFIC CARMEL MOUNTAIN
HOLDINGS, LP,

Defendants.

CASE NO. 09CV1975-LAB (AJB)

**ORDER GRANTING IN PART
PLAINTIFF'S *EX PARTE*
APPLICATION TO WITHDRAW
DAMAGES CLAIMS;

ORDER SETTING BENCH TRIAL;

ORDER OVERRULING
OBJECTIONS TO EXHIBITS; AND

SUPPLEMENTAL ORDER ON
MOTIONS IN LIMINE**

On June 6, after holding a hearing on the parties' motions in limine, the Court issued a written order ruling on most of the motions, but reserving on several. With regard to two motions, the Court directed the parties to submit supplemental briefing: Plaintiff's Motion to Exclude or Prevent Defendants from Offering Irrelevant/Prejudicial Evidence ("Plaintiff's Motion," Docket no. 123), and Defendant Sears' Motion to Exclude Evidence or Testimony re Toilet Tissue Dispenser ("Sears' Motion," Docket no. 130). The parties were directed to file their supplemental briefing, by June 22.

1 **Motion to Withdraw**

2 On June 21, Plaintiff Larry McGiver filed an *ex parte* application to withdraw all claims
3 for damages, leaving only claims for injunctive relief (the “Motion to Withdraw”). Defendants
4 filed a response making clear they don’t oppose the dismissal of Mclver’s claims for
5 damages, but suggesting that sanctions might be in order. The motion to withdraw is
6 therefore **GRANTED** to the extent Mclver seeks to abandon his request for damages, and
7 to abandon any claims for which damages are the only relief he sought. Defendants are not
8 precluded from seeking sanctions or other relief based on Mclver’s prosecution or untimely
9 abandonment of these claims.

10 **Bench Trial**

11 The only remaining claims for trial are claims for which injunctive relief is sought and
12 available. Because the parties are not entitled to a jury trial on these issues, **the entire case**
13 **will therefore be tried to the Court, without a jury.**

14 **Objections to Exhibits**

15 On June 27, Mclver filed objections to certain of Costco’s exhibits. Because this case
16 will now be tried to the Court, no pretrial motions seeking admission or exclusion of evidence
17 are necessary. The objections are therefore **OVERRULED**, without prejudice to Mclver
18 raising them later.

19 **Plaintiff’s Motion**

20 Mclver sought to exclude evidence of his litigation and settlement history, on the
21 grounds that it was irrelevant and unfairly prejudicial. Defendants articulated several theories
22 of relevance, however, including Mclver’s possibly faulty memory of which businesses had
23 which barriers, as well as his good faith intent to purchase products or use the services at
24 a particular business.

25 Defendants cite *Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1224–25 (Cal. App. 4 Dist.
26 2009) and *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1177 (9th Cir. 2010) for
27 the principle that, in order to recover statutory damages under California law, a plaintiff must
28 prove that he actually presented himself at the business on a particular occasion in order to

1 purchase the business' products or use the services it offers to the public. In other words,
2 Defendants' theory is that Mclver may have entered Sears, Costco, and other businesses
3 without the intent to buy anything there or use the services those businesses offer to the
4 public. While this is no longer relevant to the extent Mclver seeks damages for past
5 violations, it may be relevant to the issue of injunctive relief. Before the Court can issue an
6 injunction, it must find some reasonable likelihood Mclver is being deterred from visiting
7 Sears or Costco, and that injunctive relief will remedy that.

8 Although Mclver was asked to address this issue by filing supplemental briefing, he
9 never filed any. Any arguments Mclver might have had in opposition to Defendants' briefing
10 are therefore waived for failure to timely raise them.

11 To the extent Mclver's visits to other businesses, and his litigation and settlement
12 history shed light on this theory, or on his ability to remember and keep facts straight when
13 testifying, they are relevant. The Court also finds they survive the Fed. R. Evid. 403 test and
14 are not unfairly or unduly prejudicial.

15 Mclver is not precluded from renewing his objection if evidence irrelevant to these
16 defense theories is offered. But otherwise, this motion is **DENIED**.

17 **Sears' Motion**

18 In its motion, and at the hearing, Sears argued that Mclver was relying on 1991 ADA
19 Accessibility Guidelines (ADAAG), while it was entitled to comply with either the 1991
20 ADAAG or 2010 ADAAG. Sears argued that because there was no dispute it was in
21 compliance with the 2010 ADAAG regarding placement of the toilet paper dispenser, all
22 testimony concerning this claim was irrelevant and ought to be excluded.

23 At the hearing, Mclver's counsel vigorously disputed this, arguing that Sears did not
24 have the option to comply with the 2010 ADAAG, but was instead required to comply with
25 the 1991 ADAAG. He doesn't dispute that Sears was in compliance with the 2010 ADAAG.
26 The Court directed the parties to submit supplemental briefing on this issue, no later than
27 June 22.

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1 Sears timely filed its supplemental briefing, and the Court finds it correctly construes
2 the 2010 ADAAG. The guideline makes clear the guideline Mclver was relying on was
3 intended to benefit vision-impaired people, not people who must rely on wheelchairs or
4 scooters for mobility. Apparently realizing that he had no claim, Mclver then filed his
5 supplemental briefing two days late. His briefing doesn't at all address the question of which
6 ADAAG governs. Rather, it discusses the California Building Code's requirements for the
7 placement of toilet paper dispensers as giving rise to his claim. Until now, Mclver has
8 characterized this claim as being based on the ADA and ADAAG, not the California Building
9 Code, and the final pretrial order reflects this. (See Final Pretrial Order, Docket no. 120, at
10 6:20–7:11 (characterizing toilet paper dispenser placement as an ADAAG violation).) The
11 basis for his claim, up to this point, has been that the dispenser protruded into the
12 maneuvering space he needed to access the toilet.

13 Because Mclver apparently agrees Sears was permitted, under the ADAAG, to place
14 the toilet paper dispenser where it did, the Court deems this claim abandoned, and Mclver
15 won't be permitted to offer evidence at trial on the issue of whether the toilet paper dispenser
16 placement violated ADAAG. Mclver isn't permitted to surprise Sears with a new claim on the
17 eve of trial. Furthermore, the California Building Code section he attempts to rely on is
18 intended to make sure the toilet paper dispenser is within reach of a disabled person sitting
19 on the toilet, which until now he has never mentioned. Mclver's new claim based on the
20 California Building Code will not be entertained at trial.

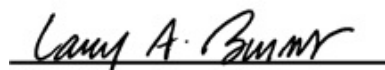
21 The remaining issues will be addressed at trial.

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23 **IT IS SO ORDERED.**

24 DATED: July 2, 2012

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HONORABLE LARRY ALAN BURNS
United States District Judge

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