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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHRIS KOHLER,

Plaintiff,

v.

ISLANDS RESTAURANTS, LP;
BARBARA ECKE WINTER,
surviving trustee of the RAY &
BARBARA WINTER TRUST,

Defendants.

CASE NO: 11-CV-2260 W (JMA)

**ORDER DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT [DOC.
32]**

Pending before the Court is Defendants' second motion for summary judgment under Federal Rule of Civil Procedure 56. (*Defs.' MSJ* [Doc. 32]; *see Reply* [Doc. 34].) The Court decides the matters on the papers and without oral argument. See Civ. L. R. 7.1(d.1). For the reasons discussed below, the Court **DENIES** Defendants' motion.

I. BACKGROUND

Plaintiff Chris Kohler is paraplegic and requires a wheelchair to travel in public. (*Compl.* [Doc. 1] 3; *First Kohler Decl.* [Doc. 20-1] 2.) On September 22, 2011, Kohler

1 visited Defendant Islands Restaurant (“Islands”)¹ and purportedly encountered several
2 physical and intangible barriers to his use and enjoyment of the premises. (*Compl.* 3.)
3 A week later, Kohler filed suit against Islands in this Court, alleging numerous
4 violations of the Americans with Disabilities Act (“ADA”) of 1990 (42 U.S.C. § 12101
5 *et seq.*), California’s Disabled Persons Act (“DPA”) (Cal. Civil Code § 54 *et seq.*), the
6 Unruh Civil Rights Act (“UCRA”) (Cal. Civil Code § 51), and the Health and Safety
7 Code (“HSC”) (specifically, §19955(a)). (*Id.* 5-10.) In his complaint, Kohler alleges
8 the following barriers common to all causes of action:

- 9
- 10 • The slope of at least one disabled parking space exceeds two
- 11 percent.
- 12 • The signage in front of at least one of the accessible parking spaces
- 13 is blocked by foliage.
- 14 • The signage at the van accessible parking space is incorrect.
- 15 • The lowered seating at the bar area is inaccessible and faces a wall
- 16 less than two feet away.
- 17 • The toilet tissue dispenser is more than 12 inches from the front of
- 18 the water closet.
- 19 • The back grab bar does not extend 24 inches past the centerline of
- 20 the water closet.
- 21 • There is insufficient clear knee and floor space beneath the
- 22 accessible lavatory.
- 23 • The pipes beneath the lavatory are incompletely wrapped.
- 24 • There is insufficient strike side clearance when exiting the
- 25 restroom.

21 (*Id.* 3-4.) Kohler seeks injunctive and declaratory relief for his ADA claims, and actual
22 and statutory damages for his California claims. (*Id.* 8-10.) Kohler also seeks attorney’s
23 fees and costs for all claims. (*Id.*)

24 The parties filed cross-motions for summary judgment. (*See Defs.’ First MSJ*
25 [*Doc.* 16]; *Pl.’s X-MSJ* [*Doc.* 23]). On July 2, 2012, the Court granted in part and
26 denied in part Defendant’s motion for summary judgment and denied Plaintiff’s cross-
27

28 ¹ The Court will refer to Defendants collectively as “Islands.”

1 motion for summary judgment. (*See MSJ Order* [Doc. 31]). As a result, all ADA
2 barrier claims except for excessive parking space slopes were dismissed as moot. (*Id.*)

3 Islands now moves for summary judgment on the grounds that Kohler’s
4 remaining ADA claim regarding the slopes of the disabled parking spaces is now also
5 moot, and that the Court should decline to exercise supplemental jurisdiction over his
6 state-law claims. (*Defs.’ MSJ* 1.) Kohler, on the other hand, argues that the slope of
7 Islands’s disabled parking spaces still exceeds two percent, in violation of the Americans
8 with Disabilities Act Accessibility Guidelines (“ADAAG”). (*Opp’n* [Doc. 33] 2.)
9 Kohler contends that this makes summary judgment for Islands improper, and also that
10 the court has proper jurisdiction over his state-law claims and should retain jurisdiction
11 over them regardless of whether the Court finds the remaining ADA claim moot. (*Id.*
12 2-8.)

13 14 **II. LEGAL STANDARD**

15 Summary judgment is appropriate when the moving party demonstrates the
16 absence of a genuine issue of material fact and entitlement to judgment as a matter of
17 law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A
18 fact is material when, under the governing substantive law, it could affect the outcome
19 of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute
20 about a material fact is genuine if “the evidence is such that a reasonable jury could
21 return a verdict for the nonmoving party.” *Id.* “Disputes over irrelevant or unnecessary
22 facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac.*
23 *Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

24 The party seeking summary judgment always bears the initial burden of
25 establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.
26 The moving party can satisfy this burden in two ways: (1) by presenting evidence that
27 negates an essential element of the nonmoving party’s case, or (2) by demonstrating
28 that the nonmoving party failed to make a showing sufficient to establish an element

1 essential to that party's case on which that party will bear the burden of proof at trial.
2 Id. at 322-23. If the moving party fails to discharge this initial burden, summary
3 judgment must be denied and the court need not consider the nonmoving party's
4 evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970).

5 On the other hand, if the moving party meets this initial burden, the nonmoving
6 party cannot defeat summary judgment merely by demonstrating "that there is some
7 metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v.
8 Zenith Radio Corp., 475 U.S. 574, 586 (1986); Triton Energy Corp. v. Square D Co.,
9 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere existence of a scintilla of evidence in
10 support of the nonmoving party's position is not sufficient."). Rather, the nonmoving
11 party must "go beyond the pleadings" and by "the depositions, answers to
12 interrogatories, and admissions on file," designate "specific facts showing that there is
13 a genuine issue for trial." Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

14 "The district court may limit its review to the documents submitted for the
15 purpose of summary judgment and those parts of the record specifically referenced
16 therein." Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001).
17 Thus, the court is not obligated "to scour the record in search of a genuine issue of
18 triable fact." Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing Richards v.
19 Combined Ins. Co. of Am., 55 F.3d 247, 251 (7th Cir. 1995)). When conducting this
20 analysis, the court must view all inferences drawn from the underlying facts in the light
21 most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. "Credibility
22 determinations, the weighing of evidence, and the drawing of legitimate inferences from
23 the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a
24 motion for summary judgment." Anderson, 477 U.S. at 255.

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1 **III. DISCUSSION**

2 **A. Mootness of Kohler’s Remaining ADA Claim**

3 First, Islands moves for summary judgment on the ground that Kohler’s
4 remaining ADA claim regarding the slope of the parking spaces is moot. (*Defs.’ MSJ*
5 1-3.) With the exception of attorney’s fees, the only remedy available to Kohler under
6 the ADA is injunctive relief. Grove v. De La Cruz, 407 F. Supp. 2d 1126, 1130 (C.D.
7 Cal. 2005). If Islands has remedied the slope of the parking spaces, then there is no
8 longer a basis to support Kohler’s request for relief, and his ADA claim is moot. *Id.* at
9 1130-31.

10 In support of its motion, Islands attaches a declaration from Lewis Jackson
11 (“Jackson”), Vice-President of Real Estate & Development for Islands, explaining
12 Islands’ compliance with Americans with Disabilities Act Accessibility Guidelines
13 (“ADAAG”) and providing photographic evidence of the same. (*Jackson Decl.* [Doc.
14 32-4].) Jackson declares that Islands “completely redid the parking lot in late
15 September 2012 and ha[s] installed a concrete slab so that there can be no question
16 that the slopes of the disabled parking spaces and access aisles do not currently exceed
17 2%.” (*Id.*) In Exhibit A, Islands presents photographs of a level with a digital slope
18 display at various locations in Islands’s disabled parking spaces. (*Id. Ex. A.*) In each
19 photograph, the digital display shows a slope not exceeding 2%. indicates a slope less
20 than two percent. (*Id.*) This evidence does not entitle Islands to summary judgment.

21 Islands’ evidence merely demonstrates that certain areas within the parking spots
22 are under a 2% grade. Absent a showing that their methodology in measuring the slope
23 of the parking spaces is sufficient to demonstrate compliance with the ADAAG, namely
24 that the entire parking spot in question is below 2% grade, the Court finds genuine
25 issues of material fact exist as to whether Islands handicap parking spots, in their
26 entirety, exceed 2%. Thus, the Court DENIES must deny summary judgment on
27 Islands’ mootness argument. Celotex, 477 U.S. at 323.

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1 **B. Supplemental Jurisdiction over Kohler’s State Law Claims**

2 Where a district court has original jurisdiction over a claim, it “shall have
3 supplemental jurisdiction over all other claims that are so related to claims in the action
4 ... that they form part of the same case or controversy” 28 U.S.C. § 1367(a).
5 However, a court may decline to exercise supplemental jurisdiction in four instances
6 under 28 U.S.C. § 1367(c).

7 Islands next argues that the Court should decline to exercise supplemental
8 jurisdiction over Kohler’s state law claims. Specifically, Islands suggests that three of
9 the four bases for dismissal apply in this case: (1) the district court has dismissed all
10 claims over which it has original jurisdiction; (2) the claims raise novel and complex
11 issues of state law; and (3) the claims substantially predominate over the claim or claims
12 over which the district court has original jurisdiction. See 28 U.S.C. § 1367(c); (*Defs.’*
13 *MSJ* 3-7.)

14
15 1. *Dismissal is Not Warranted Based On Dismissal of Federal Claim*

16 As discussed, the Court denies summary judgment on Islands’s argument that
17 Kohler’s ADA claim is moot. Consequently, Islands’s contention that Kohler’s
18 supplemental claims should be dismissed based on the dismissal of his ADA claim is
19 unavailing. Therefore, Islands’ motion for summary judgment on this ground is
20 **DENIED.**

21
22 2. *Kohler’s Claims Do Not Raise Novel and Complex Issues of State Law*

23 Islands also contends that Kohler’s claims under the UCRA and the DPA raise
24 novel and complex issues of state law and thus warrant their dismissal. (*Defs.’ MSJ* 5-
25 6.) However, Islands relies primarily on a distinguishable case, Grutman v. The Regents
26 of the University of California, 807 F. Supp. 2d 861 (N.D. Cal. 2011). In that case, the
27 court dismissed plaintiff’s state law claims due to the complex question of whether or
28 not the plaintiff was entitled to daily damages where she was continuously affected by

1 a barrier at her dormitory multiple times per day for several weeks. Id. at 863, 870. The
2 court stated, “[t]he critical issue raised by the parties is the meaning of the words ‘each
3 ... offense’ in Cal. Civ. Code Section 52 *in the context of the facts of this case.*” Id. at 867
4 (emphasis added). Thus, the court found that the law as it applied to the plaintiff’s
5 unique situation raised novel and complex issues of state law.

6 Here, Kohler was not continuously affected by a barrier in his daily life, and
7 Islands does not point to any language in Kohler’s Complaint to indicate that Kohler
8 is seeking damages for each and every day after his first visit to Islands². In this case,
9 the meaning of the words “each offense” is not in question and cannot be said to raise
10 novel and complex issues of state law. In fact, case law supports Kohler’s contention
11 that federal courts routinely exercise supplemental jurisdiction over UCRA and DPA
12 claims where a plaintiff complains about encountering barriers during a few visits to one
13 establishment. For example, in McCune v. 628 Harvard Cameron, LLC, No.
14 2:10-cv-02011-GEB-GGH, slip op. (E.D. Cal. Nov. 29, 2012), the plaintiff encountered
15 disabled parking spaces that exceeded 2% slope at a shopping complex on five
16 occasions. Id. at 2. The court in that case exercised jurisdiction over the plaintiff’s
17 claims under the UCRA and the DPA. Id. at 4. The court stated, “[s]tatutory damages
18 under both laws are available for each ‘offense,’ *i.e.*, visit, wherein Plaintiff suffered
19 discrimination.” Id. It then awarded the plaintiff damages for each of his five visits.
20 Id. at 5.

21 Furthermore, the Ninth Circuit affirmed a district court’s award of damages
22 under the UCRA for each of the seven incidences the plaintiff was deterred from
23 visiting a concert hall due to barriers in violation of the ADA. See Lentini v. California
24 Center for the Arts, Escondido, 370 F. 3d 837, 847 (9th Cir. 2004). Therefore,
25 contrary to Islands contentions, courts routinely exercise jurisdiction over supplemental

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27 ² Regardless, in 2008, the relevant California Civil Code sections were amended to
28 resolve the daily damages issue. Kohler v. Rednap, Inc., 794 F. Supp. 2d 1091, 1094 (C.D. Cal.
2011) (“Indeed, a later amendment to the statutes in 2008 makes clear that damages are not
available on a daily basis.”).

1 claims under the UCRA and the DPA, as these types of claims do not generally raise
2 novel or complex issues of state law.

3 Because Islands has not shown that Kohler’s UCRA and DPA claims raise novel
4 or complex issues of state law, the Court **DENIES** Islands’ motion for summary
5 judgment on these grounds.

6
7 **3. Kohler’s State Law Claims Do Not Substantially Predominate Over his**
8 **Federal Claim**

9 “If it appears that the state issues substantially predominate, whether in terms of
10 proof, of the scope of the issues raised, or of the comprehensiveness of the remedy
11 sought, the state claims may be dismissed without prejudice and left for resolution to
12 state tribunals.” United Mine Workers v. Gibbs, 2 383 U.S. 715 (1966). However, the
13 Ninth Circuit clarifies that once a factual predicate corresponding to one of the
14 categories of 28 U.S.C. § 1367(c) is identified, “the exercise of discretion . . . still is
15 informed by whether remanding the [supplemental] state claims comports with the
16 underlying objective of most sensibly accommodat[ing] the values of economy,
17 convenience, fairness, and comity.” Executive Software North America, Inc. v. U.S.
18 Dist. Court for Cent. Dist. of California, 24 F.3d 1545, 1552 (9th Cir. 1994) (overruled
19 on separate grounds) (citing Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303, 1309
20 (9th Cir.1992)) (internal quotations omitted).

21 Lastly, Islands moves for summary judgment on the basis that Kohler’s state law
22 claims “substantially predominate” over his ADA claim. Neither party cites to binding
23 law addressing this particular issue, and pertinent Ninth Circuit district court opinions
24 conflict.³ Compare Jankey v. Beach Hut, 2005 WL 5517235 at *5 (C.D. Cal. Dec. 8,
25 2005) (stating that state law claims substantially predominated over federal ADA claim
26 where the plaintiff sued under the ADA, DPA, UCRA, and California Health and
27

28 ³ Kohler cites three 9th Circuit cases, but none address the issue of whether state law
claims substantially predominate over federal claims. (*Opp’n* 5.)

1 Safety Code) and Molski v. Mandarin Touch Restaurant, 359 F. Supp. 2d 924 (C.D.
2 Cal. 2005) (same) and Org. for Advancement of Minorities with Disabilities v. Brick
3 Oven Rest., 406 F. Supp. 2d 1120 (S.D. Cal. 2005) (same) with Delgado v. Orchard
4 Supply Hardware Corp., 826 F. Supp. 2d 1208, 1221 (E.D. Cal. 2011) (stating that state
5 law claims did *not* substantially predominate over the federal ADA claim where the
6 plaintiff sued under the ADA, DPA, UCRA, and California Health and Safety Code)
7 and Moore v. Anaya, 2012 WL 1657205 (E.D. Cal. May 10, 2012) (same) and Lerma
8 v. NTT McKee Retail Center, LLC, 2011 WL 4948667 (N.D. Cal. Oct. 18, 2011)
9 (same).

10 This Court finds the reasoning in Kohler v. Rednap, Inc., 794 F. Supp. 2d 1091
11 (C.D. Cal. 2011) instructive. In Rednap, Kohler alleged he encountered barriers to his
12 access of a Denny’s restaurant and asserted the same four claims he asserts here. Id. at
13 1092. There, the court held Kohler’s state law claims did not substantially predominate
14 in terms of proof because they were predicated on ADA violations and thus, “the proof
15 for those claims is identical to that needed to prove violation of the ADA.” Id. at 1096.
16 Although “the availability of damages under state law means that the state-law claims
17 present a slightly larger scope of issues and offer more comprehensive remedies,” this
18 does not warrant declining supplemental jurisdiction. Id.; see also Chavez v. Suzuki,
19 2005 WL 3477848 at *2 (“[T]he mere fact that the state claims allow for the recovery
20 of monetary damages, whereas the ADA provides for injunctive relief only, does not
21 compel the conclusion that the state claims ‘substantially predominate’ over the federal
22 claim.”).

23 Furthermore, even were the Court to find that Kohler’s state law claims
24 substantially predominate over his federal claim, it would retain jurisdiction based on
25 the “values of economy, convenience, fairness, and comity.” See Executive Software,
26 24 F.3d at 1552. The reasoning in a substantially similar case, Delgado v. Orchard
27 Supply Hardware Corp., 826 F. Supp. 2d 1208 (E.D. Cal. 2011), is instructive. There,
28 the court stated, “[i]f this court forced plaintiff to pursue his state law claims in state

1 court, the result would be two highly duplicative trials, constituting an unnecessary
2 expenditure of plaintiff's, defendant's, and the two courts' resources." Id. at 1221.
3 Furthermore, if this Court were to remand the plaintiff's state law claims, it would
4 "effectively preclude a district court from ever asserting supplemental jurisdiction over
5 a state law claim under the Unruh Act." Id.

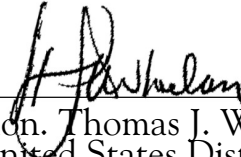
6 In light of the foregoing, the Court **DENIES** Islands' motion for summary
7 judgment on this ground.

8
9 **IV. CONCLUSION**

10 For the reasons above, the Court **DENIES** Islands's motion for summary
11 judgment.

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13 **IT IS SO ORDERED.**

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15 DATED: July 24, 2013

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18 _____
19 Hon. Thomas J. Whelan
20 United States District Judge