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

SCOTT SCHUTZA,  
vs.  
ROBERT ZULKOSKI, et al.,  
Plaintiff,  
Defendants.

CASE NO. 14cv116-LAB (WVG)  
**ORDER DENYING MOTION FOR  
LEAVE TO AMEND; AND  
ORDER TO SHOW CAUSE RE:  
DISMISSAL**

Plaintiff Scott Schutza, proceeding through counsel, filed his complaint in this case, bringing Americans with Disabilities Act claims and supplemental state claims. Defendants answered. Pursuant to the parties' joint motion, all Defendants except County Motor Parts Co., Inc. were dismissed. Schutza then filed a motion for leave to amend his complaint. The motion acknowledges that the original complaint alleged that County Motor Parts did not have wheelchair-accessible transaction counters that Schutza could use, but he has now discovered that there are such counters. The motion said his new claim would be based on the fact that "the policies and procedures of the business made it unavailable or accessible to him." Because it was unclear what this meant, the Court required Schutza to file a copy of his proposed amended complaint as an exhibit.

The ADA claim is the only federal claim, and forms the basis for this Court's exercise of jurisdiction. The Court is under a continuing obligation to confirm its own jurisdiction, *sua*

1 *sponte* if necessary. See *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d  
2 960, 966 (9th Cir. 2004). Injunctive relief is the only form of relief available under Title III of  
3 the ADA. *Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir. 2002). If Schutza no longer needs  
4 that relief, the Court would lack authority to grant meaningful relief and the ADA claim is  
5 moot. See *Center for Bio. Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007).

6 Ordinarily, leave to amend is freely granted. See Fed. R. Civ. P. 15. But leave may  
7 be denied if amendment would be futile or the amended complaint would not withstand a  
8 motion to dismiss. See *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998).  
9 When determining whether a complaint should be dismissed for failure to state a claim, the  
10 Court accepts all allegations of material fact in the complaint as true and construes them in  
11 the light most favorable to the non-moving party. *Cedars–Sinai Medical Center v. National*  
12 *League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir.2007) (citation omitted). But the  
13 Court is “not required to accept as true conclusory allegations which are contradicted by  
14 documents referred to in the complaint,” and does “not . . . necessarily assume the truth of  
15 legal conclusions merely because they are cast in the form of factual allegations.” *Warren*  
16 *v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.2003) (citations and quotation  
17 marks omitted).

18 Schutza’s proposed amended complaint (Docket no. 24, Ex. 1 (Propd Am. Compl.))  
19 says he has a “regular history of shopping at this store” and that he plans to continue  
20 shopping there. (*Id.*, ¶ 16.) On the day in question, he says he looked for a wheelchair-  
21 accessible transaction counter but saw none. (*Id.*, ¶ 11.) He asked a store employee who  
22 was at the counter whether there was a lowered transaction counter he could use, but the  
23 employee “was unable or unwilling to identify a lowered transaction counter where the  
24 plaintiff could be serviced.” (*Id.*) On this basis, he alleges the business has “failed to

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1 implement and carry out a policy and practice of handling transactions with wheelchair users  
2 at a lowered, accessible counter.” (*Id.*, ¶ 13.)<sup>1</sup>

3 Although the brief in chief clearly says that the County Motor Parts has handicapped-  
4 accessible counters, the proposed amended complaint expresses uncertainty about whether  
5 there was or is one there at all:

6 [T]here was no wheelchair accessible transaction counter on the dates of his  
7 visits either because one does not exist on the property or because it was  
not made available for use.

8 (Propd Am. Compl., ¶ 12.)

9 Installing a wheelchair accessible counter and implementing a policy of  
10 keeping the wheelchair transaction counter in use is easily accomplished and  
11 carried out without much difficulty or expense. If a wheelchair counter existed,  
12 the implementation of a policy to maintain it in useable condition for  
wheelchair users costs almost nothing. If a wheelchair counter did not exist,  
the installation of a lowered section of counter is an inexpensive and  
common construction task, not even requiring building permits.

13 (*Id.*, ¶ 15.)

14 [T]he plaintiff will continue to patronize the store and continue to suffer the  
15 discrimination alleged above until the defendants install an accessible  
counter . . . .

16 (*Id.*, ¶ 16; *see also id.* at ¶¶ 21–22 (alleging the transaction counter is too high and a lower  
17 one is needed).)

18 In view of Schutzza’s representations in his brief in chief, the Court concludes these  
19 are drafting errors, probably inadvertently not omitted when revising the complaint, and that  
20 Schutzza in fact knows the business has a wheelchair-accessible transaction counter.  
21 Apparently what the proposed amended complaint means is that Schutzza asked to use the  
22 counter (which he did not, at the time, know existed) but the employee did not tell him where

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25 <sup>1</sup> This allegation differs somewhat from Schutzza’s representations in his brief in chief.  
26 In that brief, he says there were policies or procedures, and that those policies or procedures  
27 made the counter unavailable. Had the proposed amended complaint included such an  
28 allegation, however, it would have been merely conclusory. No factual allegations suggest  
that the employee’s failure to direct Schutzza to the wheelchair-accessible counter was  
anything other than an isolated incident. And in any case, there is nothing to suggest that  
if Schutzza pointed out the wheelchair-accessible counter, which he now knows is there, there  
would be any problem with his using it.

1 it was, either because the employee either did not know about it or did not want to make  
2 inquiries about where it was, or perhaps just did not tell him for some other reason. But the  
3 motion makes clear that Schutza now knows that one exists, and where it is.

4 Even assuming County Motor Parts failed to put in place a policy under which store  
5 employees would be educated about where the wheelchair-accessible transaction counter  
6 is and would direct customers to it when asked, Schutza would not benefit from an injunction  
7 requiring such a policy to be put in place. He now knows there is such a counter, and where  
8 it is, and no longer needs anyone to tell him these things. There is no allegation that he ever  
9 pointed it out, asked or attempted to use it, and was refused. Nor are there any facts alleged  
10 suggesting any reasonable likelihood that this would happen in the future. The proposed  
11 amended complaint therefore does not plead any facts suggesting that injunctive relief is  
12 available to him on this claim, or that the Court would have the power to grant it. *See Friends*  
13 *of the Earth, Inc. v. Laidlaw Env'tl. Serv. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (holding  
14 that federal courts have jurisdiction only where it is "likely, as opposed to merely speculative,  
15 that the injury will be redressed by a favorable decision"); *Gest v. Bradbury*, 443 F.3d 1177,  
16 1181 (9th Cir. 2006) (a plaintiff seeking declaratory or injunctive relief must show she is  
17 "realistically threatened by a repetition of the violation"). *See also Castagnola v. Hewlett-*  
18 *Packard Co.*, 2012 WL 2159385, at \*6 (N.D.Cal., June 13, 2012) (citing cases for the  
19 proposition that plaintiffs had not shown a realistic threat of harm to support an injunction,  
20 where they already knew information that an injunction would have required to be disclosed).

21 The original complaint, and the proposed amended complaint both attempt to allege  
22 that there are other barriers on the premises:

23 In addition, and even though plaintiff did not personally encounter this  
24 barrier, defendants place moveable obstructions (like barrels where  
25 merchandise is stored) about the sales floor, which reduces the clear space  
and path of travel in front of merchandise below that permitted by the ADA  
and creating impediments to use by wheelchair users.

26 (Propd. Am. Compl., ¶ 17.) While an ADA claim may rely on barriers the plaintiff did not  
27 personally encounter but which nevertheless deter him from using the premises, or deny him  
28 equal access, *Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d 939, 951 (9<sup>th</sup> Cir. 2011) (en

1 banc), injunctive relief is limited to barriers that deny the plaintiff “full and equal enjoyment”  
2 of the facilities, *id.*, at 947, and the plaintiff is “likely to encounter on future visits,” *id.* at 951.  
3 In other words, barriers that are the same for everyone — whether handicapped or not ----  
4 are not remediable under the ADA. For example, if the barrels and other items reduced the  
5 available space so that everyone, and not just people in wheelchairs, had to take another  
6 path, it would not amount to an ADA violation.

7 But more seriously, the allegations make clear Schutzka has been to the premises  
8 regularly, yet has never personally encountered any of these obstructions on the sales floor.  
9 This suggests the items are there only temporarily or rarely, or else were placed in areas  
10 Schutzka has never wanted to go. It is possible the items are placed in the aisles while being  
11 moved from one place to another, or for purposes of restocking the shelves. Temporary  
12 barriers or obstacles of this type do not give rise to cognizable injuries under the ADA. See  
13 *Chapaman v. Pier 1 Imports (U.S., Inc.)*, 870 F. Supp. 2d 995, 1014 (E.D.Cal., 2012). See  
14 also *Cohen v. City of Culver City*, 754 F.3d 690, 699 (9<sup>th</sup> Cir. 2014) (holding that “temporary  
15 obstructions do not violate the ADA,” unless they “persist beyond a reasonable period of  
16 time”). If the barrels and other items are anything other than temporary or transitory  
17 obstructions, the proposed amended complaint has failed to plead any facts that would  
18 support such an inference.

19 Because the proposed amended complaint does not state a cognizable federal claim,  
20 the Court would not exercise supplemental jurisdiction over the state law claims, see *United*  
21 *Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (“if the [plaintiffs'] federal  
22 claims are dismissed before trial, the state claims should be dismissed as well”), and the  
23 entire complaint would be subject to dismissal. Permitting Schutzka to file the proposed  
24 amended complaint would be futile, and the motion for leave to amend (Docket no. 19) is  
25 **DENIED.**

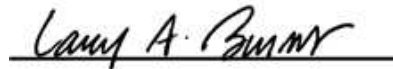
26 For the reasons set forth above, it appears the Court lacks jurisdiction over this case.  
27 No later than **October 20, 2014**, Schutzka must take one of the following three steps: 1) He  
28 may, together with the remaining Defendant, jointly move to dismiss; 2) If County Motor Parts

1 does not agree to a joint motion, he may move *ex parte* to dismiss the action; or 3) He must  
2 show why the Court has jurisdiction. If he opts for the third choice, he must show cause by  
3 filing a memorandum of points and authorities, which must not exceed five pages (not  
4 including any lodged or attached material), and he must attach a proposed amended  
5 complaint to it as an exhibit. The memorandum and proposed amended complaint must  
6 clearly show why the Court has jurisdiction. If he files a memorandum, County Motor Parts  
7 may file a response in opposition within **7 calendar days**. No hearing will be held unless the  
8 Court deems it necessary. If Schutza fails to do any of these three things, this action will be  
9 dismissed without leave to amend.

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**IT IS SO ORDERED.**

DATED: October 10, 2014



**HONORABLE LARRY ALAN BURNS**  
United States District Judge