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

MATT STRONG,
Plaintiff,

vs.

DIANA E. JOHNSON, TRUSTEE OF
THE DIANA E. JOHNSON TRUST
DATED JULY 25, 2013,
Defendant.

DOROTHY WHITE,
Plaintiff,

vs.

DIANE E. JOHNSON, TRUSTEE OF
THE DIANE E. JOHNSON TRUST
DATED JULY 25, 2013,
Defendant.

CASE NOS. 16cv1289-LAB (JMA) and
16cv2524-LAB (JMA)

**ORDER DISMISSING COMPLAINTS;
ORDER DENYING AS MOOT
MOTIONS TO DISMISS; AND
ORDER REQUIRING PLAINTIFFS TO
SEEK LEAVE TO AMEND**

These consolidated disability discrimination cases concern the accessibility of the same facility, a local shopping center’s parking lot. Because Defendant had renovated the parking lot and it appeared Plaintiffs’ Americans with Disabilities Act (ADA) claims might be moot, depriving the Court of jurisdiction, the Court ordered the parties to file a status report.

1 In particular, Plaintiffs' counsel was required to have a specialist inspect the parking lot and
2 make any measurements. The Court is presumed to lack jurisdiction, and the burden always
3 falls on the party invoking it — in this case, Plaintiffs. See *Kokkonen v. Guardian Life Ins. Co.*
4 *of Am.*, 511 U.S. 375 (1994); *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968,
5 968–69 (9th Cir.1981).

6 The parties have filed their status report in the form of a joint statement with individual
7 sections. According to the report, all barriers identified in the operative complaints in each
8 of the two consolidated cases have been remediated. But it appears Plaintiffs' designated
9 specialist, Mr. Lockman, found new problems that Plaintiffs believe are keeping the
10 controversy alive.

11 **Current Claims**

12 In *Strong*, case 16cv1289-LAB (JMA), the First Amended Complaint identifies the
13 following barriers:

- 14 1. The disabled parking space lacks signage.
- 15 2. No space is designated as van accessible.
- 16 3. "The access aisle has slopes and/or cross slopes that exceed 1:48, which is the
17 maximum slope allowed by the ADA, due mainly to an encroaching built-up curb
18 ramp. Without a level access aisle, it is difficult for Strong to unload/transfer from a
19 vehicle as his wheelchair rolls and/or a lift's platform cannot sit level."

20 In *White*, case number 16cv2524-LAB (JMA), the Complaint identifies the following barriers:

- 21 1. "Both of the disabled parking spaces have slopes and/or cross slopes that are too
22 steep, one of which is due to an encroaching built-up curb ramp. Without a level
23 parking space, it is difficult for White to unload/transfer from a vehicle as her
24 wheelchair rolls and/or a lift's platform cannot sit level;" and,
- 25 2. "At least one of the access aisles has slopes and/or cross slopes that are too
26 steep, due mainly to an encroaching built-up curb ramp. Without a level access aisle,
27 it is difficult for White to unload/transfer from a vehicle as her wheelchair rolls and/or
28 a lift's platform cannot sit level."

1 According to the parties' joint statement, barriers 1 and 2 identified in *Strong* have been
2 corrected. Claims for injunctive relief arising out of those conditions are now moot.

3 Strong's third claim and both of White's claims concern slopes, and their portion of
4 the status report also mentions excessive slopes. But on closer examination, it is clear the
5 slopes are distinct and amount to different barriers.

6 Plaintiffs' current claims concern slopes so steep that they prevent the Plaintiffs from
7 transferring from their vehicles to the parking lot, either because the slopes cause their
8 wheelchairs to roll away, or because a mobility-equipped van's lift platform cannot sit flat
9 when deployed.

10 The newly-identified excessive slopes, though, are different. Plaintiffs' section of the
11 joint statement says that Mr. Lockman visited the parking lot and measured a cross slope
12 of 2.8% at the "head" of the disabled parking space. (Docket no. 28 at 2:16–18.) He also
13 found a "running slope" of 3% at the "International Symbol of Accessibility in the disabled
14 parking space." (*Id.* at 2:17–20.) Neither of these allegedly excessive slopes affect
15 Plaintiffs' ability to load, unload, or transfer from vehicles. Passengers do not load, unload,
16 or transfer into or out of vehicles at the head of a parking space, and vehicular lifts do not
17 deploy there. Neither complaint alleged that either Plaintiff had difficulty traversing the
18 parking lot, and neither action raised that as the basis for a claim.

19 In *White*, in particular, the Court has had the benefit of additional information. In that
20 case, the Court held a jurisdictional hearing, and directed Plaintiff's counsel to familiarize
21 himself with her travel habits and practices. At the hearing, Plaintiff's counsel conceded she
22 would only have difficulty when trying to load or unload from a parked vehicle. Although
23 Though White often traveled by public bus, she had never gone to this facility that way and
24 he could not say she would have difficulty traversing the parking lot if she did.¹ In other
25 words, White's claim was based specifically on her ability to load and unload from a vehicle
26 parked in the parking lot, not her ability to traverse the parking lot.

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28 ¹ At the hearing, White's counsel conceded she had only been to the facility once, in
September of 2016, and on that occasion she arrived by private car. She has not been back
since and has no definite plans to return.

1 Plaintiffs' statement also mentions a new and different problem not alleged before.
2 It says the "diagonal hatch marks in the adjacent access aisle were greater than 36 inches
3 on center," (Docket no. 28 at 2:20–22), but it isn't clear whether Plaintiffs consider this a
4 barrier under the ADA² or any other law. And even if this might be a barrier for someone,
5 Plaintiffs have never said why it would be a barrier for them.

6 Accepting Plaintiffs' version of facts as true, it is clear that they do not need
7 prospective injunctive relief to remedy any of the current ADA violations that form the basis
8 for any of their pending federal claims. Plaintiffs' current ADA claims, in other words, have
9 become moot. And because the ADA claims are moot, the Court has no basis for exercising
10 jurisdiction over supplemental state law claims. *See Rodriguez v. Ralphs Grocery Co.*, 323
11 Fed. Appx. 617, at *1 (9th Cir. 2009) (citing *Herman Family Revocable Tr. v. Teddy Bear*,
12 254 F.3d 802, 805–07 (9th Cir. 2001)) ("[I]f the federal claim is dismissed for lack of subject
13 matter jurisdiction, a district court has no discretion to retain supplemental claims for
14 adjudication, and must dismiss the state law claims without prejudice").

15 **Possibility of Amendment**

16 The new barriers Plaintiffs' specialist identified may form the basis for new claims, but
17 only if Plaintiffs can successfully raise a federal claim, or otherwise invoke the Court's
18 jurisdiction.

19 It is unclear whether either or both Plaintiffs can successfully amend. While excessive
20 slope in the center of a parking space might technically be a violation of some kind, the fact
21 that it is in the middle of the parking space means it would be underneath any vehicle parked
22 there. This strongly suggests it would not be a barrier for either Plaintiff. With regard to the
23 excess 0.8% slope at the head of the parking space, the statement does not say where at
24 the head the slope was measured. It is therefore unclear whether the extra 0.8% is in the
25 lane that either Plaintiff would travel to get to the sidewalk. In the same vein, an extra-wide
26 access aisle might be a technical violation, but nothing in the pleadings suggests it created

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28 ² If the 36" on-center diagonal striping is not required under the ADA or other federal law, it cannot give rise to an ADA claim or other federal claim.

1 a problem for either Plaintiff. In other words, there is no showing the irregularities Mr.
2 Lockman noted are anything other than technical violations that have no effect on Plaintiffs'
3 use of the facilities. In particular, Plaintiff's counsel's representations regarding White's use
4 of the facilities imply they have no effect on her.

5 Furthermore, Defendant's reply says that after Mr. Lockman pointed out the striping
6 irregularities and the slope at the head of the parking space, their contractor fixed them.
7 Plaintiffs are silent as to whether that is true, and apparently have not reinspected the
8 parking lot after repairs were made. Defendants also represent that their contractor is ready
9 to correct any problems, if Plaintiffs' specialist will look at the repaired parking space and
10 point them out.

11 The burden is, as always, on Plaintiffs to establish jurisdiction. It appears they
12 neglected to have their expert reinspect the parking space, and have not taken reasonable
13 steps to confirm that there is still some basis for them to be bringing an ADA claim. Nor is
14 it evident why injunctive relief is needed or available to remedy any of the barriers Plaintiffs'
15 specialist identified.

16 At the same time, the Court cannot say whether the complaint can be saved by
17 amendment. See *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008) (holding
18 that leave to amend should ordinarily be granted, unless it is clear the complaint cannot be
19 saved by amendment).

20 The First Amended Complaint in *Strong* and the Complaint in *White* are therefore
21 **DISMISSED WITHOUT PREJUDICE** for failure to invoke the Court's jurisdiction. The
22 pending motions to dismiss those pleadings (Docket no. 13 in case 16cv1289 and Docket
23 no. 5 in 16cv2524) are **DENIED AS MOOT** and the Clerk shall terminate them.

24 **Order Requiring Plaintiffs to Amend**

25 If Plaintiffs wish to amend to add new viable ADA claims or other federal claims, they
26 should first have their specialist inspect the parking lot again to confirm whether Defendant's
27 representations that all barriers have been removed are correct. If they find barriers that
28 they believe form the basis for an ADA claim, they should inform Defendant.

1 If Plaintiffs believe they can successfully amend to state a claim that the court can
2 exercise jurisdiction over, they should each seek leave to amend by filing an *ex parte* motion,
3 not longer than seven pages, attaching their proposed amended complaints as exhibits.
4 Their motions must be filed no later than **Tuesday, September 12, 2017**. The proposed
5 amended complaints should plead facts showing what the current barriers are and why they
6 why they give rise to an ADA claim or other federal claim for each Plaintiff.

7 Plaintiffs' *ex parte* motions should be supported by declarations stating that Mr.
8 Lockman or another specialist has inspected the facilities after Defendant's contractor made
9 the latest round of repairs and that the new barriers Plaintiffs are now pointing out were not
10 corrected.


11 If Plaintiffs seek leave to amend, Defendant will have **14 calendar** days to file an
12 opposition, after which the matter will be deemed submitted on the papers. The Court may
13 schedule a hearing if appropriate.

14 If Plaintiffs need more time to amend, they should file an *ex parte* motion showing
15 good cause for the extension, well before the deadline. If Plaintiffs do not seek leave to
16 amend within the time permitted, this action will be dismissed without prejudice but without
17 leave to amend further.

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IT IS SO ORDERED.

DATED: August 17, 2017


HONORABLE LARRY ALAN BURNS
United States District Judge