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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 VICTOR DALFIO, an individual,
12 Plaintiff,
13 v.
14 J.G. MGMT PROPERTIES IV, LLC, a
15 California limited liability company;
16 MZM FOODS, INC., a California
17 corporation; and DOES 1-10,
Defendants.

Case No.: 21-CV-0652-GPC-RBB

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
MZM FOODS, INC.’S MOTION TO
DISMISS PURSUANT TO FRCP
12(b)(1)**

[ECF No. 13]

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19 On March 30, 2022, Defendant MZM Foods, Inc. (“Defendant” or “MZM”) filed a
20 Motion to Dismiss pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(1), on the
21 grounds that this Court lacks subject matter jurisdiction over Plaintiff’s claim. ECF No.
22 13. Further, the motion seeks an order declining to exercise supplemental jurisdiction over
23 the Unruh Civil Rights Act claim presented by the Plaintiff. The parties have fully briefed
24 the matter. ECF Nos. 15, 16. The Court GRANTS in part and DENIES in part MZM’s
25 motion to dismiss, GRANTS MZM’s motion to decline supplemental jurisdiction over the
26 Unruh state claim, and GRANTS Dalfio’s motion for leave to amend the FAC.
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1 On March 30, 2022, MZM contracted with a third-party California state Certified
2 Access Specialist, Craig Lobnow, to confirm whether the Property complied with current
3 federal ADA and state standards. ECF No. 13-1 at 10-11. Lobnow has over 25 years of
4 construction management and inspection experience and is the principal consultant for
5 ProCASp. ECF No. 13-2, Declaration of Craig Lobnow (“Lobnow Decl.”) ¶ 2. Lobnow’s
6 declaration explains that, after he reviewed Dalfio’s FAC, he conducted an inspection of
7 MZM’s Property, which he detailed in his final report. *Id.* ¶ 3-4; *see also* ECF No. 13-3,
8 Lobnow CASp Report – March 30, 2022 (“Lobnow Report”). Lobnow’s report provides
9 written analysis and photographs of each of the violations alleged in Dalfio’s FAC. *See*
10 Lobnow Decl.; Lobnow Report. Lobnow’s report goes into great detail for each violation
11 alleged in Dalfio’s FAC and provides photographic evidence to contradict each of Dalfio’s
12 allegations. *See, e.g., id.* at 18-22 (providing photographs showing a marked and accessible
13 route from the access aisle to the curb ramp compliant with relevant standards); *id.* at 23-
14 24 (providing photographs of clearly placed tow-away signs in compliance with relevant
15 standards); *id.* at 25-26 (providing photographs of “minimum fine \$250” signage at the
16 designated disabled parking space); *id.* at 27-46 (providing photographs with
17 measurements showing accessible routes to the Property’s entrance without slopes in
18 excess of 2%). For example, Dalfio’s FAC alleges that the Property does not have an
19 accessible route of travel to all entrances. ECF No. 10 at 5-6. Lobnow’s report provides
20 multiple photographs demonstrating that the Property’s entrance is compliant with the
21 ADA and California’s Business Code (“CBC”). ECF No. 13-3 at 3-17.

22 Ultimately, Lobnow’s report concluded that “the Property targeted by Plaintiff’s
23 Amended Complaint are compliant under the current federal and applicable state
24 standards.” Lobnow Decl. ¶ 4-5, 7. MZM argues that because all the alleged barriers have
25 been remedied, the case is moot and must be dismissed for lack of subject matter
26 jurisdiction.

1 In response, Dalfio submits a declaration from Marc Friedlander, an investigator
2 who was hired by The Law Office of Hakimi & Shahriari. ECF No. 15-1, Declaration of
3 Marc Friedlander (“Friedlander Decl.”) ¶ 1. Friedlander explains that he inspected the
4 Property on April 7, 2022, took photographs and/or measurements of various remaining
5 violations, and provided a summary of his findings to Dalfio. *Id.* ¶ 2; *see also* ECF Nos.
6 15-2, 15-3, 15-4, 15-5, 15-6. Friedlander states that five violations remain on the Property,
7 including “cross slopes in the route/path of travel [] that exceed two percent (2%)”,
8 “changes in level in the route/path of travel [] greater than one-half inch (1/2”)”, and that
9 the “front door entrance threshold and weather strip [] have changes in level greater than
10 one-half inch (1/2”).” ECF No. 15 at 7. Dalfio argues that because these violations
11 have not been remedied, his claims are not mooted and the case should not be
12 dismissed.

13 On reply, MZM submitted a supplemental report from its CASp inspector, Craig
14 Lobnow. ECF No. 16-1, Supplemental Declaration of Craig Lobnow (“Lobnow Supp.
15 Decl.”); *see also* Lobnow CASp Report – April 20, 2022 (“Lobnow Supp. Report”).
16 Lobnow’s supplemental report addresses each issue raised in Dalfio’s response and
17 represents that these concerns have also been remedied. *See* Lobnow Supp. Report.
18 Lobnow states that on his return to the Property on April 20, 2022, he “took measurements
19 and, where indicated, work was done to level the points that were claimed to exceed 2.0%
20 [] so that the resulting measurements demonstrated compliance with applicable
21 accessibility standards. Lobnow Supp. Decl. ¶ 4. For example, Dalfio provided
22 photographs showing that the path of travel between the accessible parking and the
23 walkway exceeded 2.0% in certain places. ECF No. 15-2. In turn, Defendant machined
24 those same areas down to reduce the slope to 2.0% or less and provided photographs with
25 new measurements of the path of travel’s slope. ECF No. 16-2 at 3-10. Likewise, MZM
26 machined down other areas of the Property to address Dalfio’s allegations that the slopes
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1 and cross slopes in the designated disabled parking space exceeded 2.0% and that the
2 surface slopes in the loading and unloading access aisle exceeded 2.0%. *See* ECF Nos. 15-
3 5; 15-6; 16-2 at 18-35.

4 MZM's report also provides evidence contradicting the photographs and
5 measurements for the remaining two violations alleged in Dalfio's response. In fact,
6 Lobnow testified that "the methods of measurement and documenting of the property
7 conditions by [Dalfio's investigator] [] violate fundamental practices related to
8 accessibility inspections." *Id.* ¶ 6. For example, Dalfio provides photographs and
9 measurements suggesting that there are changes in level in the route of travel that exceed
10 one-half inch. ECF Nos. 15 at 7; 15-3 at 2. However, MZM argues that Dalfio's evidence
11 is misleading and does not actually measure the slope of the route of travel, but instead
12 depicts the placement of a tape measure within a crack in the pavement. ECF No. 16-1 at
13 3. *Compare* ECF No. 15-3 at 2 *with* ECF No. 16-2 at 11-15. Similarly, Dalfio alleges that
14 the weather strip at the entrance of MZM's Business has a change in level greater than one-
15 half inch. ECF No. 15 at 7. However, the evidence provided by Dalfio is similarly
16 challenged by Lobnow. According to Lobnow, Dalfio's photograph is positioned to
17 suggest a change in level; however, the photographs and evidence provided by MZM's
18 inspector show that no such change in level exists. *Compare* ECF No. 15-4 *with* ECF No.
19 16-2 at 16-17.

20 **II. LEGAL STANDARD**

21 Federal Rule of Civil Procedure 12(b)(1) allows for dismissal of a complaint for lack
22 of subject matter jurisdiction. "[F]ederal courts are courts of limited jurisdiction." *Owen*
23 *Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "A federal court is presumed
24 to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock*
25 *West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th
26 Cir. 1989) (citing *Cal. Ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979)).
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1 Subject matter jurisdiction must exist when the action is commenced. *Morongo Band of*
2 *Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988)
3 (citing *Mollan v. Torrance*, 22 U.S. 9 Wheat. 537, 538 (1824)). Further, subject matter
4 jurisdiction may be raised “at any stage of the litigation.” *Arbaugh v. Y&H Corp.*, 546
5 U.S. 500, 506 (2006); *see also* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any
6 time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

7 A Rule 12(b)(1) jurisdictional attack may be “facial” or “factual.” *White v. Lee*, 227
8 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). A facial attack asserts that the
9 allegations contained in a complaint are insufficient on their face to invoke federal
10 jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A
11 factual attack raises a challenge to the truth of the factual basis upon which federal
12 jurisdiction is predicated. *Id.*

13 When evaluating a factual attack on jurisdiction, a district court may review
14 evidence beyond the pleadings without converting the motion to dismiss into a motion for
15 summary judgment. *Id.* (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039
16 n.2 (9th Cir. 2003)). “Once the moving party has converted the motion to dismiss into a
17 factual motion by presenting affidavits or other evidence properly brought before the court,
18 the party opposing the motion must furnish affidavits or other evidence necessary to satisfy
19 its burden of establishing subject matter jurisdiction.” *Id.*

20 However, jurisdictional dismissals in cases premised on federal question jurisdiction
21 are exceptions rather than the rule, and must satisfy the standard set out by the Supreme
22 Court in *Bell v. Hood*: that jurisdictional dismissals are warranted “where the alleged claim
23 under the constitution or federal statutes clearly appears to be immaterial and made solely
24 for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial
25 and frivolous.” *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). The Ninth Circuit has held
26 that “a jurisdictional finding of genuinely disputed facts is inappropriate when the
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1 jurisdictional issue and substantive issues are so intertwined that the question of
2 jurisdiction is dependent on the resolution of factual issues going to the merits of an action.”
3 *Safe Air*, 373 F.3d at 1039 (citing *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d
4 138, 139 (9th Cir. 1983)). “The question of jurisdiction and the merits of an action are
5 intertwined where a statute provides the basis for both the subject matter jurisdiction of the
6 federal court and the plaintiff’s substantive claim for relief.” *Id.*

7 **III. DISCUSSION**

8 Based on twenty-one alleged accommodation deficiencies, Dalfio brings two causes
9 of action: (1) violation of the ADA; and (2) violation of the Unruh Act. ECF No. 10 at 21-
10 26. MZM argues this case should be dismissed for lack of standing, and that the ADA
11 claim is moot. MZM also asserts the Court should decline to exercise supplemental
12 jurisdiction over Dalfio’s state law claim. Dalfio contends that if the Court grants MZM’s
13 motion to dismiss that he be allowed to amend his FAC pursuant to Federal Rule of Civil
14 Procedure 15(a)(2).

15 **A. Standing**

16 “[T]o invoke the jurisdiction of the federal courts, a disabled individual claiming
17 discrimination must satisfy the case or controversy requirement of Article III by
18 demonstrating his standing to sue at each stage of the litigation.” *Chapman v. Pier 1*
19 *Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011). “Under the oft-repeated standing
20 formulation, [the plaintiff] must demonstrate that he has suffered an injury-in-fact, that the
21 injury is traceable to the [defendant’s] actions, and that the injury can be redressed by a
22 favorable decision.” *Id.* “In addition, to establish standing to pursue injunctive relief,
23 which is the only relief available to private plaintiffs under the ADA, [the plaintiff] must
24 demonstrate a ‘real and immediate threat of repeated injury’ in the future.” *Id.* (quoting
25 *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004)). An ADA
26 plaintiff can meet this requirement “either by demonstrating deterrence, or by
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1 demonstrating injury-in-fact coupled with an intent to return to a noncompliant facility.”
2 *Id.* at 944. As noted in *Chapman*, a disabled person can establish Article III standing to
3 pursue injunctive relief by showing “he is deterred from visiting a noncompliant public
4 accommodation because he has encountered barriers related to his disability here.” *Id.*

5 MZM argues Dalfio’s allegations are insufficient to show injury because “Plaintiff
6 makes no attempt to explain how those conditions affected his ability to ‘visit’ the property,
7 [] whether in the parking lot or other portions of the targeted property not just once but
8 multiple times.” ECF No. 13-1 at 18. Dalfio provides examples throughout his FAC
9 explaining how each of the alleged barriers affect his ability to patronize MZM’s business.
10 *See, e.g.*, FAC at 5-6 (explaining how the absence of an exterior travel route makes it
11 difficult and dangerous for Plaintiff to safely and fully access the premises); *id.* at 9-10
12 (explaining how uneven ground surfaces exceeding certain standards affect Dalfio’s ability
13 to fully access the premises). Contrary to MZM’s argument, Dalfio’s allegations are
14 sufficient to establish injury for the purpose of standing.

15 **B. Mootness**

16 MZM’s second argument in support of its motion to dismiss is that Dalfio’s ADA
17 claim is moot because the violations alleged in the FAC have been remedied. “‘Mootness
18 is a jurisdictional issue, and federal courts have no jurisdiction to hear a case that is moot.’”
19 *Johnson v. Oishi*, 362 F.Supp.3d 843, 848 (E.D. Cal. 2019) (quoting *Foster*, 347 F.3d at
20 745). “A claim is moot ‘when the issues presented are no longer live or the parties lack a
21 legally cognizable interest in the outcome.’” *Id.* (quoting *Powell v. McCormack*, 395 U.S.
22 486, 496 (1969)). In ADA cases, in particular, “because a plaintiff can only obtain
23 injunctive relief under the ADA, the defendant’s voluntary cessation of an ADA violation
24 may effectively moot a plaintiff’s ADA claim.” *Id.* (citing *Oliver v. Ralphs Grocery Co.*,
25 654 F.3d 903, 905 (9th Cir. 2011)).

1 “The voluntary cessation of challenged conduct does not ordinarily render a case
2 moot because a dismissal for mootness would permit a resumption of the challenged
3 conduct as soon as the case is dismissed.” *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th
4 Cir. 2015) (quoting *Knox v. Serv. Employees Int’l Union, Local 1000*, 567 U.S. 298, 307
5 (2012)). But voluntary cessation can yield mootness if a “stringent” standard is met: “A
6 case might become moot if subsequent events made it absolutely clear that the allegedly
7 wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc.*
8 *v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The party asserting
9 mootness bears a “heavy burden” in meeting this standard. *Id.*

10 To determine whether a danger of future violations warrants an injunction in an ADA
11 lawsuit, courts consider “the bona fides of the expressed intent to comply, the effectiveness
12 of the discontinuance and, in some cases, the character of the past violations.” *Watanabe*
13 *v. Home Depot USA, Inc.*, No. CV-02-5088-RGK, 2003 WL 24272650, at *4 (C.D. Cal.
14 July 14, 2003) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Courts
15 are more likely to find a matter moot on the basis of a voluntary cessation where the
16 defendant remedies a “structural modification.” *Zaldivar v. City of San Diego*, No. 15-CV-
17 67-GPC, 2016 WL 5118534, at *10 (S.D. Cal. Sept. 21, 2016). Such modifications are
18 limited to physical alterations to the property at issue. *See, e.g., Lopez v. AND Grp. Corp.*,
19 No. CV 18-4855-PSG, 2019 WL 6434493, at *3 (C.D. Cal. July 30, 2019) (the re-grading
20 and re-painting a parking lot); *Sharp v. Rosa Mexicano, D.C., LLC*, 496 F. Supp. 2d 93, 98
21 (D.D.C. 2007) (the installation of a wheelchair accessible sink); *Grove v. De La Cruz*, 407
22 F. Supp. 2d 1126, 1130 (C.D. Cal. 2005) (the installation of grab bars).

23 Dalfio first contends that it would be an error to allow MZM “to introduce extrinsic
24 evidence regarding the [] non-existence of access barriers at the motion to dismiss stage.”
25 ECF No. 15 at 5-6 (citing *Acevedo v. C & S Plaza Ltd. Liab. Co.*, No. 20-56318, 2021 WL
26 4938124, at *2 (9th Cir. 2021) (quotations omitted). However, the facts of *Acevedo* do not
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1 support this proposition. In *Acevedo*, the plaintiff’s FAC alleged that multiple aisles in the
2 defendant’s store were so “cramped, narrow and stocked with items” that her ability to
3 navigate throughout the store was limited, in violation of the ADA. *Acevedo*, 2021 WL
4 4938124 at *2. Defendant moved to dismiss for lack of subject matter jurisdiction on the
5 grounds that its store aisles had been ADA complaint since 1998, and as such, did not
6 violate the ADA. *Acevedo*, No. 20-56318, 2021 WL 4938124, at *2 (9th Cir. 2021). The
7 Ninth Circuit held that the district court erred because “[a] reasonable fact finder could
8 conclude [] notwithstanding [defendant’s] photo’s, and inspector’s opinion, that the aisle
9 widths at the store do in fact violate the ADA, or that the alleged violations, *if currently*
10 *remedied, are likely to recur in the future.*” *Id.* at 2. (emphasis added). The Ninth Circuit
11 concluded that extrinsic evidence of cleaning the overstocked and overcrowded aisles did
12 not make it absolutely clear that the alleged wrongful behavior could not be reasonably
13 expected to recur. *See Friends of the Earth*, 528 U.S. at 189.

14 Here, the violations alleged by Dalfio do not have such transient remedies. *See, e.g.*,
15 ECF No. 10 at 8 (missing signage); *id.* at 9 (cross slopes greater than two percent); *id.* at
16 11 (width of designated disabled parking spaces); *id.* at 12 (inadequate parking space
17 ground surface signage). As such, the Court can consider the extrinsic evidence presented
18 by MZM in its motion to dismiss. *Compare Langer v. Nenow*, No. 18-cv-01670-GPC-
19 BGS, 2020 WL 708144, (S.D. Cal. Feb. 12, 2020) (finding a defendant’s construction of a
20 second, van-accessible, ADA-compliant parking stall sufficiently moots plaintiff’s ADA
21 cause of action) *with Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831, 860 (N.D. Cal.
22 2011) (finding the adoption of policies that could be rescinded at any time insufficient to
23 moot a plaintiff’s ADA claim); *and Marquez v. Western Inv. Corp.*, 8:20-cv-0726-JLS-
24 DFM, 2020 WL 6595206, at *3 (C.D. Cal. Sept. 28, 2020) (finding that “[m]erely denying
25 everyone access to [a] night check-in window is not the type of permanent, structural
26 changes that would support a finding of mootness at [the motion to dismiss stage]”).

1 though it is premised on a violation of federal law.” Defendant seeks an order declining
2 supplemental jurisdiction over the state under the view that there exist compelling reasons
3 to do so.

4 Under 28 U.S.C. § 1367(c), a court can decline to assert supplemental jurisdiction
5 over a pendant claim if one of the following four categories applies: (1) the claim raises a
6 novel or complex issue of State law, (2) the claim substantially predominates over the claim
7 or claims over which the district court has original jurisdiction, (3) the district court has
8 dismissed all claims over which it has original jurisdiction, or (4) in exceptional
9 circumstances, there are other compelling reasons for declining jurisdiction. Underlying
10 the § 1367(c) inquiry are consideration of judicial economy, convenience and fairness to
11 litigants, and comity. “[I]f it appears that the state issues substantially predominate,
12 whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness
13 of the remedy sought, the state claims may be dismissed without prejudice and left for
14 resolution to state tribunals.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966).

15 The ADA and the Unruh Act have significantly different pleading requirements and
16 remedies. The Unruh Act allows plaintiffs both injunctive relief and monetary damages.
17 *See* Cal. Civ. Code §§ 52, 55.56. It permits an award of attorney’s fees and a \$4,000
18 mandatory minimum for “each particular occasion that the plaintiff was denied full and
19 equal access.” *Id.* Meanwhile, under the ADA, monetary damages are not available and
20 only injunctive relief is available. 42 U.S.C. § 12188(a)(2); *Wander v. Kaus*, 304 F.3d 856,
21 858 (9th Cir. 2002) (ADA is a purely injunctive statute that does not permit an award of
22 monetary damages).

23 In his FAC containing twenty-one alleged violations, Dalfio seeks \$84,000 in
24 statutory damages and injunctive relief under the Unruh Act. This alone is enough to find
25 that Dalfio’s monetary damages substantially predominate. *See, e.g., Molski v. EOS Estate*
26 *Winery*, 2005 WL 3952249, at *4 (C.D. Cal. 2005) (“Even though Plaintiffs have submitted
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1 a notice of voluntary limitation of damages, seeking only an award of \$4,000 to [plaintiff],
2 it is still clear that the claim for damages is the predominant focus of this lawsuit.”).

3 Finally, “district courts [should] deal with cases involving pendent claims in the
4 manner that best serves the principles of economy, convenience, fairness, and comity
5 which underlie the pendent jurisdiction doctrine.” *City of Chicago v. Int’l Coll. of*
6 *Surgeons*, 522 U.S. 156, 172–73 (1997) (citation omitted). The state of California has
7 implemented heightened pleading requirements for litigants filing claims under the Unruh
8 Act. The pleading mandates require litigants to verify their allegations, include the exact
9 dates they encountered alleged violations, and to explain the specific way in which the
10 violations denied them full and equal use. *See* Cal. Civ. Proc. Code § 425.50 (effective
11 January 1, 2013). In 2015, the Unruh Act added procedural requirements for “high-
12 frequency litigants”, which required qualifying individuals to pay additional filing fees and
13 plead even more specific information in their complaints. *See* Cal. Civ. Proc. Code §
14 425.50 (a)(4)(A) (effective October 10, 2015). These unique pleading requirements were
15 imposed in order to “deter baseless claims and vexatious litigation,” an issue of particular
16 importance in California because of the unique availability of statutory damages available
17 under the Unruh Act. *See Schutza v. Cuddeback*, 262 F. Supp. 3d 1025, 1031 (S.D. Cal.
18 2017).¹ Given Dalfio has filed at least 37 cases as a plaintiff in this district since April
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21 ¹ Several district courts have declined to exercise supplemental jurisdiction over Unruh
22 Act claims as a matter of comity and in deference to California's compelling state
23 interests. *See, e.g., Schutza*, 262 F. Supp. 3d at 1031 (finding California's substantial
24 interest in discouraging unverified disability discrimination claims to be a compelling
25 reason for declining supplemental jurisdiction over state claims); *see also Marquez v.*
26 *KBMS Hospitality Corporation*, 492 F. Supp. 3d 1058, 1062 (C.D. Cal. 2020) (declining
27 supplemental jurisdiction over an Unruh Act claim because California “deserves the
28 opportunity to enforce” its detailed statutory scheme regarding damages under the Unruh
Act); *Langer v. Kiser*, 516 F. Supp. 3d 1066, 1090 (S.D. Cal. 2021) (finding comity to be
a compelling reason for declining supplemental jurisdiction over state claims). Declining

1 2021, it is clear he is a “high-frequency litigant” and is aware of California’s heightened
2 standard and intends to avoid it. The Court finds that comity and deference to California’s
3 interest in monitoring and regulating Unruh Act complaints present compelling reasons to
4 decline to exercise supplemental jurisdiction.

5 The Court declines to extend jurisdiction over Dalfio’s state law claim because they
6 substantially predominate over his ADA claim and because there are compelling reasons
7 to decline supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(2).

8 As such, the Court DECLINES jurisdiction over Dalfio’s second cause of action and
9 DISMISSES it.

10 **D. Opportunity to Amend Under F.R.C.P. 15(a)(2)**

11 Finally, Dalfio requests an opportunity to file a second amended complaint should
12 the Court grant MZM’s motion to dismiss. ECF No. 15 at 7. Under Federal Rule of Civil
13 Procedure (“Rule 15”), “[a] party may amend its pleading once as a matter of course ...
14 only with the opposing party’s written consent or the court’s leave,” and courts “should
15 freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371
16 U.S. 178, 182 (1962) (“Rule 15(a) declares that leave to amend ‘shall be freely given when
17 justice so requires’; this mandate is to be heeded.”). In assessing the propriety of an
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20 to exercise supplemental jurisdiction, moreover, is consistent with how courts of this
21 district have addressed comparable situations arising in similar cases. *See, e.g., Dalfio v.*
22 *Cuatro Caballeros LLC*, No. 21-cv-672-MMA (AGS), 2021 WL 5178595, at *2-4 (S.D.
23 Cal. Nov. 8, 2021); *Dalfio v. Simco-Robinson, LLC*, No. 21-cv-647-MMA (DEB), 2021
24 WL 5178525 (S.D. Cal. Nov. 8, 2021); *Dalfio v. Assef*, No. 21-cv-1696-CAB-RBB,
25 2021 WL 4480639, at *1-2 (S.D. Cal. Sept. 30, 2021); *Dalfio v. SECVD & I, Inc.*, No.
26 21-cv-929-MMA (AGS), 2021 WL 4197203, at *2-3 (S.D. Cal. Sept. 15, 2021); *Dalfio v.*
P.I.D. University, Inc., No. 21cv911-CAB-JLB, 2021 WL 1923180, at *1-2 (S.D. Cal.
27 May 13, 2021).

1 amendment, courts consider several factors: (1) undue delay; (2) bad faith or dilatory
2 motive; (3) repeated failure to cure deficiencies by amendments previously permitted; (4)
3 prejudice to the opposing party; and (5) futility of amendment. *Foman*, 371 U.S. at 182;
4 *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). These factors do
5 not carry equal weight; the possibility of delay alone, for instance, cannot justify denial of
6 leave to amend, *DCD Programs, Ltd. V. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987), but
7 when combined with a showing of prejudice, bad faith, or futility of amendment, leave to
8 amend will likely be denied. *Bowles v. Reade*, 198 F.2d 752, 758 (9th Cir. 1999). The
9 single most important factor is whether prejudice would result to the non-movant as a
10 consequence of the amendment. *William Inglis & Sons Baking Co. v. ITT Continental*
11 *Baking Co.*, 668 F.2d 1014, 1053 (9th Cir. 1981). The burden of demonstrating prejudice
12 falls on the party opposing leave to amend. *DCD Programs, Ltd.*, 833 F.2d at 187.

13 Dalfio makes no specific argument why the Court should allow him to file a Second
14 Amended Complaint, nor does MZM make any argument why the Court should not allow
15 it. However, only two of the twenty-one alleged violations listed in Dalfio's FAC appear
16 to have potentially violated the ADA—and only minimally at best. The report provided
17 by MZM's inspector clearly shows that most of the alleged violations were either remedied
18 within one month's time or never existed. Further, the photographs provided by Dalfio in
19 his opposition to MZM's motion to dismiss appear questionable. *See, e.g.*, ECF Nos. 15-3,
20 15-4 at 2. Given that the Defendant has not opposed the motion to amend the ADA claim,
21 the Court GRANTS leave to amend the first cause of action. However, leave is DENIED
22 as to the supplemental state cause of action because amendment would be futile.

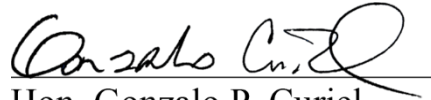
23 **IV. CONCLUSION**

24 In light of the foregoing reasons, the Court GRANTS in part and DENIES in part
25 MZM's motion to dismiss. All of Dalfio's alleged ADA violations are DISMISSED as
26 MOOT except for the two listed above. *See supra* III.B at 11-12. The Court GRANTS
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1 MZM's motion to decline supplemental jurisdiction over the Unruh Civil Rights Act and
2 this state claim is DISMISSED WITHOUT PREJUDICE to refile in state court. The Court
3 GRANTS Dalfio's motion for leave to amend the ADA claim. Dalfio may file an amended
4 complaint on the ADA claim or before June 30, 2022.

5 **IT IS SO ORDERED.**

6 Dated: June 9, 2022

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8 Hon. Gonzalo P. Curiel
9 United States District Judge
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