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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRANCIE E. MOELLER et al,

Plaintiffs,

v.

TACO BELL CORP.,

Defendant.

Case No. C 02 5849 MJJ ADR

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT TACO BELL CORP.'S MOTION FOR RECONSIDERATION OF AUGUST 8, 2007 ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Introduction

On August 8, 2007, this Court issued its Order Denying in Part and Granting in Part Plaintiffs' Motion for Partial Summary Judgment ("PSJ Order"). Defendant's motion for reconsideration of that Order should be denied because: (1) It goes beyond the issues for which leave was granted pursuant to Local Rule 7-9(a) and repeats arguments from its earlier briefing, in violation of Local Rule 7-9(c); (2) it presents no new law or facts or other grounds that undermine the soundness of this Court's rulings on mootness, the significance of certificates of occupancy, and the irrelevance of the "readily achievable" standard to Plaintiffs' Motion for Partial Summary Judgment; and (3) Defendant has provided no grounds for this Court to decline supplemental jurisdiction over Plaintiffs' state claims.

Plaintiffs respectfully request that Defendant Taco Bell Corp.'s Motion for Reconsideration of August 8, 2007 Order Granting in Part Plaintiffs' Motion for Partial Summary Judgment ("Motion for Reconsideration" or "Mot. for Recon.") be denied.

I. Standard of Review and Request to Limit Review to Issues as to Which Leave was Granted.

Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (internal citation omitted). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." Id. (internal citation omitted); see also N.D. Cal. Civil L.R. 7-9(b) (standards for moving to reconsider are "a material difference in fact or law" that the moving party did not know through the exercise of reasonable diligence; "the emergence of new material facts or change of law," or "[a] manifest failure by the Court to consider material facts or dispositive legal arguments . . ."). Civil Local Rule 7-9(a) requires leave of court to file a motion for reconsideration; subparagraph (c) of that Rule expressly prohibits repetition of any argument that the moving party made in support of the order it requests the Court to reconsider. "Any party who violates this restriction shall be subject to appropriate sanctions." Id.

"Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge." Nolan v. Heald Coll., No. 05-03399-MJJ, 2007 WL 878946, at *8 (N.D. Cal. Mar. 21, 2007).[1]

In its portion of the September 12, 2007 Joint Status Conference Statement ("Joint Statement"), Defendant sought leave pursuant to Local Rule 7-9 to file a motion for reconsideration on a broad range of questions. (Id. at 7-34.) During the September 18 status conference, this Court indicated that it would review the two cases mentioned in Defendant's portion of the Joint Statement: Sanford v. Del Taco, Inc., No. 2:04-cv-2154-GEB-EFB, 2006 WL 2669351 (E.D. Cal. Sept. 18, 2006) (Burrell, J.); and Sharp v. Rosa Mexicano, D.C., LLC, 496 F. Supp. 2d 93 (D.D.C. 2007) (Bates, J.). (See Tr. of Proceedings (Sept. 18, 2007) at 15-16.) Defendant's Motion for Reconsideration addresses these two cases and makes a number of additional arguments for which leave was not granted.

Plaintiffs' responses to Defendant's arguments on the Sanford and Sharp cases are contained in sections II and III below. Plaintiffs respectfully request that this Court limit its review of Defendant's motion to those two issues. Should the Court elect to review matters as to which leave was not granted, Plaintiffs address those arguments in Section IV below.

II. The Sanford Case Is Not Relevant Either to the Questions Raised in Plaintiffs' Motion for Partial Summary Judgment or to this Case in General.

The Unruh Civil Rights Act ("Unruh") and California Disabled Persons Act ("CDPA") make a violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., a violation of those statutes. Cal. Civ. Code §§ 51(f), 54(c). The allegedly novel question at issue in the Sanford case is whether this has the effect of incorporating the ADA's "readily achievable" standard, 42 U.S.C. § 12182(b)(2)(A)(iv), into Title 24 of the California Building Code, Cal. Code Regs. tit. 24 ("Title 24"), for buildings built before Title 24 took effect and not altered since. Sanford, 2006 WL 2669351, at *5-6. Because, as this Court correctly

[1] While Rule 59(e) applies to final judgments, courts may look to the standards governing that Rule as "helpful guides" in evaluating a request to reconsider an interlocutory order. See McConnell v. Lassen County, No. CIV. S-05-0909 FCD DAD, 2007 WL 2345009, at *1 n.4 (E.D. Cal. Aug. 15, 2007).

recognized, Plaintiffs' Motion for Partial Summary Judgment relied only on new construction standards under both the ADA and Title 24, see PSJ Order at 5, 27-28, this argument is irrelevant to the resolution of that motion. Because Plaintiffs do not -- anywhere else in this case -- rely on the alleged standard put forward by the plaintiff in Sanford, this argument is also irrelevant to this case as a whole.

In evaluating the accessibility of a building, the ADA applies one of three standards; Title 24, one of only two.

Under the ADA,

1. facilities built after January 26, 1993 are governed by 42 U.S.C. § 12183(a)(1);
2. those built before that time but altered since January 26, 1992 are governed by § 12183(a)(2); and
3. those built before that time but not altered since -- "existing facilities" -- are governed by the "readily achievable" standard in § 12182(b)(2)(A)(iv).

Under Title 24,

1. buildings built after the effective date of any given version of that code must comply, see, e.g., Title 24 (1981) § 2-105(b)(11)(B)(1); Title 24 (2002) § 101.17.11; and
2. alterations to existing buildings made while a given version of the code is in effect must comply, see, e.g., Title 24 (1981) §§ 2-105(b)(11)(A)(5), (B)(4); Title 24 (2002) §§ 101.17.11; 1134B.1.

There is no requirement under Title 24 that existing unaltered buildings be brought into compliance; that is, there is no "readily achievable" requirement in Title 24. This Court accurately summarized these standards in the PSJ Order as to which reconsideration is requested, see id. at 7-10, and in its Order Granting Plaintiffs' Motion for Class Certification. Moeller v. Taco Bell Corp., 220 F.R.D. 604, 606-07 (N.D. Cal. 2004).

The plaintiff in Sanford argued that the provisions of Unruh and the CDPA making a violation of the ADA a violation of those statutes had the effect of rewriting Title 24 to create a third -- "readily achievable" -- standard in that code that would require building owners to bring existing facilities into compliance even when no alterations have taken place. This

argument reflects confusion concerning the effect of Unruh and the CDPA's reference to the ADA. Prior to 1992, to prove that architectural barriers violated Unruh, a plaintiff would have to prove a violation of Title 24. Wilson v. Pier 1 Imports (US), Inc., 439 F. Supp. 2d 1054, 1065 (E.D. Cal. 2006). The statute was amended in 1992 to add this language: "[a] violation of the right of any individual under the [ADA] shall also constitute a violation of this section." Cal. Civ. Code § 51(f) (emphasis added); see also CDPA, Cal Civ. Code § 54(c). Following this amendment, then, there were two different paths to proving an architectural violation of Unruh or the CDPA: by showing a violation of the ADA; or by showing a violation of Title 24. For example, showing that an element is out of compliance with Title 24 new construction or alterations standards provides grounds for Unruh and CDPA liability, and a showing that barrier removal in an existing facility is "readily achievable" constitutes a violation of the ADA and thus now Unruh and the CDPA. There is no evidence, however, that the 1992 amendment was intended to rewrite Title 24 to incorporate the readily achievable standard into that code.[2]

Because such an argument is unsupported by the language of California law and regulations, Plaintiffs here do not rely on it, either in their Motion for Partial Summary Judgment or elsewhere, and thus this argument simply does not arise in the present litigation.[3]

III. The Sharp Case Is Similar to Other Decisions Rejected by this Court and Is Distinguishable from this Case.

The Sharp case alleged that a single feature -- the sink -- in a single restroom of a single restaurant violated Title III of the ADA. Id., 496 F. Supp. 2d at 95. The state of the undisputed record before the court was that, at the time of the defendant's motion for summary judgment,

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[2] Defendant's reliance on Bass v. County of Butte, 458 F.3d 978 (9th Cir. 2006) and Presta v. Peninsula Corridor Jt. Powers Bd., 16 F. Supp. 2d 1134 (N.D. Cal. 1998) is unavailing. The Bass court limited the reach of Unruh and the CDPA to exclude employment discrimination claims. Id., 458 F.3d at 982. The Presta court held that, because intent was not an element of a violation of the ADA, it was not an element of a violation of Unruh. Id., 16 F. Supp. 2d at 1135-36. Neither case provides grounds to rewrite Title 24 to incorporate the ADA's barrier removal standard.

[3] Defendant's introduction of the Sanford "readily achievable" argument is puzzling, given that Plaintiffs do not espouse it and that, if accepted by the Court, it would be prejudicial to Defendant's interests.

the sink in question complied. Id. at 98. On that ground, the court held that the plaintiff's claim under the ADA was moot. Id.

Sharp is distinguishable from the present case on a number of grounds. First of all, the plaintiffs brought suit only under the ADA; there were no state law claims for damages as there are here. Furthermore, as this Court noted in distinguishing similar cases, there is no evidence in Sharp "that the element[ ] in question remained subject to 'frequent change.'" PSJ Order at 12 n.13. That is, in contrast to the present case, there was no evidence in the Sharp case that the defendant's personnel testified -- and the defendant confirmed in its legal briefs -- that the sink in question changed frequently. In contrast, one of the elements that the Facility Leader for Taco Bell's Northern California Territory identified as being "subject to frequent change" in the stores at issue here was the "[l]ocation/position of sink" in the restroom. (Decl. of Jaime de Beers in Supp. of Def.'s Mot. for Modification of Class Definition ("de Beers Decl.") ¶¶ 2, 6(a)(viii).)

In addition, because the Sharp case involved one element in one restaurant, the fact that that one element had been remedied "afford[ed] [the] plaintiff the substance of the relief" he requested. Id., 496 F. Supp. 2d at 98. In contrast, Plaintiffs here challenge multiple violations in multiple restaurants, many of which have not been remedied. (See Decl. of Richard H. Hikida in Supp. of Def. Taco Bell Corp.'s Mot. for Reconsideration of August 8, 2007 Order Granting in Part Pls.' Mot. for Partial Summ. J. ¶ 8, Table 1.)

Furthermore, Defendant's statements and actions demonstrate that an injunction is required to ensure continued compliance. For example, four of the restaurants that Taco Bell's Director of ADA Compliance testified, in his May 10, 2007 declaration, were either scheduled to be remedied by May 2007 or had already been remedied are now described, in Taco Bell's September 21, 2007 Motion for Reconsideration, as "currently scheduled to be modified in 2008 or shortly thereafter." (Compare Decl. of Steve Elmer in Support of Def. Taco Bell Corp.'s Sur-Reply Mem. of Points and Authorities in Opp'n to Pls.' Mot. for Partial Summ. J., Ex. 2 at 5 (store 2933), 7 (store 3208), 8 (store 3473), 10 (store 4284) with Mot. for Recon. at 3 n. 5 (store 3208), 4 n.7 (stores 2933, 3473 and 4284). See also Pls.' Reply Br. in Supp. of

Their Mot. for Partial Summ. J. ("Pls.' Reply") at 26-28 (describing the efforts required to secure Taco Bell's compliance with the court-approved settlement in Colo. Cross-Disability Coal. v. Taco Bell Corp., No. 97-cv-2135-LTB (D. Colo.)).)

Taco Bell's filings also make clear that the franchise status of Taco Bell restaurants can fluctuate. Store 15319 was a corporate-owned restaurant in 2004 when Taco Bell presented a list of such restaurants to the Special Master and, because of this, was surveyed by the Special Master. In its portion of the Joint Statement, however, Taco Bell explained, "[a]t the time of the filing of plaintiffs' motion and the subsequent May 17, 2007 court hearing, store number 15319 was operated by a franchisee. It is currently operated by Taco Bell." Id. at 11 n.3. That is, during the pendency of this litigation, store 15319 has been a corporate store, then a franchised store, then a corporate store again. This demonstrates the need for injunctive relief to ensure compliance in new and acquired restaurants.

For these reasons, the Court was correct to hold "Defendant cannot satisfy its heavy burden to show that the past and existing ADA violations will not recur," and that the Court "may order effective relief as to [the elements at issue in Plaintiffs' motion] in the form of an injunction requiring Defendant to (1) remedy the remainder of these elements that are out of compliance; (2) maintain those elements in a compliant state; and (3) ensure that those elements comply in any new or acquired restaurants." PSJ Order at 12.

* * *

The discussion above addresses the two issues as to which this Court granted Defendant leave to move for reconsideration. Plaintiffs respectfully request that, based on the above, Defendant's Motion for Reconsideration be denied.

IV. The Remainder of Defendant's Arguments Are Without Merit.

A. Defendant is Not Permitted to Re-argue Previous Arguments.

Defendant's Motion for Reconsideration repeats a number of arguments that it made in its opposition and/or sur-reply. For example, it devotes five pages to rearguing evidence concerning modifications to its restaurants. (Compare Mot. for Recon. at 1-5 with Sur-Reply in Supp. of Taco Bell Corp.'s Mem. of Points and Authorities in Opp'n to Mot. for Partial

Summ. J. ("Def.'s Sur-Reply") at 5-7.) Similarly, Defendant reiterates that some stores addressed by Plaintiffs' Motion for Partial Summary Judgment were operated by franchisees (compare Mot. for Recon. at 6 with Def.'s Sur-Reply at 8-9), and reasserts its reliance on its door force policy (compare Mot. for Recon. at 7-8 with Def.'s Sur-Reply at 13, 16). Finally, Defendant repeats its argument that this Court lacks supplemental jurisdiction. (Compare Mot. for Recon. at 15 with Def.'s Sur-Reply at 18-20.)

Defendant's conjecture that the Court failed to consider evidence or arguments before it is not grounds for reconsideration. In addition, these arguments violate Civil Local Rule 7-9(c), which prohibits a party moving for reconsideration from "repeat[ing] any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered." These arguments constitute a classic attempt by "an unhappy litigant [at] one additional chance to sway the judge." See Nolan, 2007 WL 878946, at *8.

B. The Court's Holding on Mootness Was Proper.

Sections A, B and C of Defendant's Motion for Reconsideration argue that recent changes to its stores or their franchise status render Plaintiffs' ADA claims moot. The Court's holding on mootness -- that Defendant had not satisfied its heavy burden to demonstrate that the violations would not recur and that an injunction was still warranted -- did not turn on the percentage of each element that had or had not been remedied or its franchise status. Instead, it turned on the facts -- conceded by Defendant and still true today -- that some elements had not yet been remedied and that many elements were subject to frequent change. See PSJ Order at 12. Furthermore, as Taco Bell's filings demonstrate, a restaurant's franchise status may fluctuate over a fairly short period of time. See supra at 6.

Defendant's reliance on its door force policy is similarly unavailing. As Plaintiffs explained when Defendant first made this argument, "implementation of a new policy does not eliminate the possibility of future violations." Clavo v. Zarrabian, No. SACV03864CJCRCX, 2004 WL 3709049, at *4 (C.D. Cal. May 17, 2004); see also Pls.' Reply at 31-32 (citing cases).

C. The Court's Reliance on Statements in Defendant's Earlier Brief, Especially Supported by Testimony of Defendant's Facilities Leader, was Proper.

This Court properly considered statements from Defendant's brief -- relying on the testimony of Defendant's Facility Leader -- in reaching the conclusion that Defendant had not satisfied its heavy burden of demonstrating mootness. See PSJ Order at 11 (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)). There was no need to deem the statement in Defendant's brief a "judicial admission" -- nor do Plaintiffs read the Court's decision as having done so -- in order to conclude that these statements -- unrebutted by Defendant -- demonstrate that Defendant did not satisfy its heavy burden.

Defendant relied, in arguing for mootness, on assertions that certain elements in its restaurants had been brought into compliance with the ADA and that others would be in the future. In rebuttal, Plaintiffs introduced the testimony of the Facility Leader for Taco Bell's Northern California Territory that many elements in Taco Bell restaurants were "subject to frequent change" (de Beers Decl. ¶¶ 2, 6), as well as language from an earlier Taco Bell brief that "virtually every accessibility element [in a Taco Bell store] is subject to change over time so that evidence that an element is or is not in compliance today (for purposes of determining injunctive relief) is not dispositive of whether the same element was in compliance" at the time of any class member visit. (Def.'s Mot. for Modification of Class Definition ("Class Modification Brief") at 3, see also id. at 9-10 (citing de Beers Decl.), 16, cited in Pls.' Reply at 26.) In light of this "frequent change," an injunction will be required to ensure continued compliance.

Now, in asking the Court to reconsider its decision on partial summary judgment, Defendant -- ignoring Ms. de Beers's testimony entirely -- argues that the Court improperly deemed the statement in Defendant's Class Modification Brief to be a binding judicial admission. (See Mot. for Recon. at 8-14.) There is no evidence, however, that this is what the Court did. Rather, Plaintiffs read the decision to have held that -- in light of the evidence of "frequent change" -- Defendant had not borne its "heavy burden" of demonstrating that the

challenged conduct would not recur. See PSJ Order at 12. Because the premise of Section F of Defendant's Motion for Reconsideration is inaccurate, that argument should be rejected.

Defendant argues -- for the first time on reconsideration -- that any future changes that render elements inaccessible will be isolated or temporary and that the efforts it claims to have made to date demonstrate its ability to keep its stores in compliance. (Mot. for Recon. at 11-12.) However, this ignores the heavy burden of proof on Taco Bell. Taco Bell's promises of future action -- and its prediction that future violations will be isolated and temporary -- cannot satisfy that burden (see Pls.' Reply at 31-32 (citing cases)), especially in light of its incomplete remedies, its extensive record of noncompliance, its Facility Leader's testimony (reiterated in its Class Modification Brief) of frequent changes, and the fact that a threat of arbitration was required to get it to comply with an earlier court-ordered settlement. Indeed, Taco Bell announces that it "does not need indefinite Court supervision or monitoring in the form of a permanent injunction to ensure future compliance" because "[t]he mere threat of another class action lawsuit and its attendant costs is ample incentive to ensure future compliance." (Mot. for Recon. at 13.) Once again, its own conduct rebuts this assertion: the litigation and settlement -- in early 2000 -- of a class action brought against it in Colorado under Title III of the ADA did not provide any incentive to Taco Bell to bring its California stores into compliance, an effort that was apparently not undertaken until late 2006, four years into the present litigation. (See Sur-Reply at 9-10.)

D. The Antoninetti Case Is Consistent with this Court's Holding Concerning Certificates of Occupancy.

Taco Bell asserts that the decision denying the defendant's motion for summary judgment in Antoninetti v. Chipotle Mexican Grill, Inc., No. 3:05-cv-01660-J-WMC (S.D. Cal. June 14, 2007) (attached as an Appendix hereto) constitutes subsequent case authority on the question of the evidentiary value of certificates of occupancy. To the contrary, as quoted by Taco Bell, the Antoninetti court merely held that "[c]ompliance with a state building code creates a rebuttable

presumption of compliance with the ADA."[4] Id., slip op. at 19 (emphasis added), quoted in Mot. for Recon. at 15. Taco Bell submitted no evidence that the elements addressed in Plaintiffs' Motion for Partial Summary Judgment complied with Title 24 at the time they were surveyed by the Special Master. Taco Bell reads the Antoninetti case as if it had stated that a certificate of occupancy creates a rebuttable presumption of compliance. (See Mot. for Recon. at 15.) Even if this were an accurate reading, again, Plaintiffs fully rebutted the presumption with their evidence of ADA and/or Title 24 violations (see Pls.' Mot. for Partial Summ. J., Exs. 1-8), which evidence, again, Defendant did not attempt to refute. See Antoninetti, slip op. at 19 (evidence of violations rebuts the presumption).

Ultimately, the Antoninetti case is consistent with this Court's holding that "[b]ecause building inspector discretion is bounded by [Title 24], to avoid summary judgment Defendant must show that the architectural elements at issue either: (1) complied with Title 24; or (2) that the building inspector applied a statutory or regulatory exception to the requirements of Title 24. Defendant concedes that the measurements are in violation of Title 24," and failed to present evidence that an unreasonable hardship exception was granted or merited. PSJ Order at 30, 31. That is, in the face of evidence that its restaurants were out of compliance with Title 24, Defendant cannot stand idle and point to the certificate of occupancy as evidence of compliance. Nothing in the Antoninetti case merits reconsideration of the PSJ Order.

E. It Is Appropriate for this Court to Assert Supplemental Jurisdiction Over Plaintiffs' State Claims.

Given the advanced state of this litigation and the certainty of duplicative and expensive state court litigation should the Court dismiss Plaintiffs' state claims, retaining supplemental jurisdiction of those claims "would most sensibly accommodate the values of economy,

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[4] Plaintiffs disagree that this is an accurate statement of the law. Only once a state building code has been certified by the United States Department of Justice would it create such a presumption. 28 C.F.R. § 36.602. California is currently at the "preliminary" stage of this process. ADA Certification of State Accessibility Requirements (October 1, 2004), *available at* http://www.dsa.dgs.ca.gov/Access/adacert.htm (accessed September 24, 2007).

convenience, fairness, and comity." See Executive Software N. Am., Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1554 (9th Cir. 1994) (internal citations omitted).

Defendant has challenged this Court's supplemental jurisdiction over Plaintiffs' state claims under 28 U.S.C. § 1367(c)(1) and (2), arguing that the case raises a novel issue of state law and that state claims substantially predominate over federal claims. (Def.'s Sur-Reply at 18-20.) Neither provision provides proper grounds for declining supplemental jurisdiction in the present case. In the alternative, even if either provision should apply, the values of economy, convenience, fairness, and comity dictate that supplemental jurisdiction is appropriate.

1. This Court is Required to Follow the Ninth Circuit's Unambiguous Holding on the State Law Question Defendant Claims is Novel and Complex.

Defendant asserts that the question whether intent is a required element of an Unruh claim premised on the ADA is novel and complex and thus provides grounds for this Court to decline supplemental jurisdiction under section 1367(c)(1).[5] However, the Ninth Circuit has ruled definitively that a showing of intent is not required under those circumstances. Lentini v. Cal. Ctr. for the Arts, 370 F.3d 837, 847 (9th Cir. 2004). Although a California appellate court has ruled to the contrary, see Gunther v. Lin, 144 Cal. App. 4th 223, 232 (Cal. Ct. App. 2006), this Court is bound by the holding of the Ninth Circuit. "[T]he conflict internal to the Unruh Act is not novel -- it has been litigated and decided by the Ninth Circuit in Lentini, and this court is legally bound to follow Ninth Circuit authority." Johnson v. Barlow, 2007 WL 1723617, at * 2 (E.D. Cal. 2007) (citing Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001) (emphasis in original)); see also Pooshs v. Altria Group, Inc., 331 F. Supp. 2d 1089, 1094 (N.D. Cal. 2004) ("To the extent that there is any conflict between the California Court of Appeal and the Ninth Circuit, this court must follow [the Ninth Circuit] where it is applicable.").

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[5] Defendant also appears to argue that the question at issue in Sanford plays a similar role. However, as explained above, that question does not arise in this litigation. See supra at 3-4.

Ultimately, whether the Court follows Gunther or Lentini, the analysis is straightforward and the question, neither novel nor complex. As this Court observed during oral argument on the Motion for Partial Summary Judgment, this no different from "any other common law or statutory claim that arises under state law where a federal appeals court has spoken one way and the state appeals court speaks another way and then the Court reads those cases and makes some determination." (Tr. of Proceedings (May 17, 2007) at 19.) Indeed, Judge Karlton of the Eastern District took this approach in Wilson v. Haria and Gogri Corp., analyzing Lentini and Gunther and the underlying statute and concluding that intent was not required. 479 F. Supp. 2d 1127, 1135-41 (E.D. Cal. 2007). In so doing, that court noted that "the issue of state law presented by the instant action is not particularly novel or complex in light of the overwhelming body of case law finding that proof of intent is not required." Id. at 1138 n.15; see also Hannah v. W. Gateway Reg'l Recreation Park & Dist., No. CIV S-06-571 LKK/DAD, 2007 WL 2795769, at *2 (E.D. Cal. Sept. 25, 2007) ("[T]he issues presented by plaintiff's state law claims are neither novel nor complex: the issue of whether intent is required to obtain damages for disability discrimination under the Unruh Act has already been extensively litigated and ruled upon by courts. . . . The fact that there is now an outlier case in an otherwise uniform body of case law does not transform an old issue into a 'novel' one."); Johnson, 2007 WL 1723617, at *2 ("This conflict does not represent the sort of 'novel and complex issue of unresolved state law' contemplated by 28 U.S.C. § 1367(c)(1)."); Schwarm v. Craighead, 233 F.R.D. 655, 659 (E.D. Cal. 2006) ("Courts have considered claims to be complex when they address issues of first impression that are numerous or of constitutional magnitude.")

Section 1367(c)(1) does not provide grounds to decline supplemental jurisdiction.

2. State Claims Do Not Predominate Over Federal Claims.

The state and federal claims in this case are thoroughly intertwined, and will require much of the same evidence and legal analysis. State claims thus in no way predominate over federal claims.

Plaintiffs bring claims under the federal Americans with Disabilities Act, and two state statutes, Unruh and the CDPA. Because this case addresses barriers to individuals who use wheelchairs at a chain of restaurants, it will largely require analysis of the accessibility codes that each of those statutes makes applicable to places of public accommodation: under the ADA, the Department of Justice Standards for Accessible Design ("DOJ Standards"), 28 C.F.R. pt. 36, app. A; and under Unruh and the CDPA, Title 24 (for stores built since December 31, 1981) or "ANSI A117.1-1961: American National Standard Specifications for Making Buildings and Facilities Accessible to and Usable by, The Physically Handicapped" ("ANSI-1961") (for stores built between July 1, 1970 and December 31, 1981). See People ex rel. Deukmejian v. CHE, Inc., 197 Cal. Rptr. 484, 491 (Cal. Ct. App. 1983). The way that these codes apply to new, altered, and existing buildings is described above. See supra at 3-4; see also Moeller, 220 F.R.D. at 606-07.

Defendant argues that state claims substantially predominate over federal claims in this case because California access regulations will affect the type and quantum of evidence at trial. (Def.'s Sur-Reply at 19.) However, analysis of most if not all of the restaurants at issue in this litigation will require application of both state and federal law, so both sets of claims will have "a significant impact at to the facts at issue." (See id.) For example, Taco Bell restaurants built after January 26, 1993, are required to comply with both the DOJ Standards and Title 24. All of the restaurants built between July 1, 1970 and January 26, 1993 were altered in some way after 1992. In those stores, the entire facility must comply with the applicable versions of Title 24 or ANSI-1961 in effect when they were constructed, and the altered portions (and potentially the path of travel and restrooms) must comply with the alterations provisions of the ADA, 42 U.S.C. § 12183(a)(2), and Title 24, see, e.g., Title 24 (1981) §§ 2-105(b)(11)(A)(5), (B)(4); Title 24 (2002) §§ 101.17.11; 1134B.1. Finally, all of the stores built before July 1, 1970 were altered after 1992. Those stores are subject to the ADA's readily achievable provision, 42 U.S.C. § 12182(b)(2)(A)(iv), and the alterations provisions of the ADA and Title 24.

Underscoring the appropriateness of supplemental jurisdiction in this case is the fact that, although the standards have evolved over the years and some state and federal standards differ, in many cases, the standards imposed by the state guidelines since 1981 or even 1970 are identical to those of the federal guidelines. For example, the minimum width of a door is consistent from the earliest state standards, ANSI-1961 § 5.3.1 (requiring 32 inch minimum), through the DOJ Standards, id. § 4.13.5 (same), to the most recent state standards, Title 24 (2002), § 1133B.1.1.1.1 (same). The same is true of the maximum permissible slope of a sidewalk. See ANSI-1961 § 4.2.1 (limiting the slope of walks to no more than 5%); DOJ Standards § 4.3.7 (same); Title 24 (2002) § 1133B.5.1 (same). Such basic building blocks of restaurant access as clear floor space,[6] reach range,[7] and interior door force[8] have been subject to the same standards under Title 24 -- for more than 20 years -- and the DOJ Standards for the last 14 years. Thus, far from state law predominating over federal, the two standards are intertwined in most restaurants, and for many elements a single evidentiary determination will serve to demonstrate noncompliance with both standards.

"The mere fact that a plaintiff's state claims outnumber his federal claims, without more, is insufficient to satisfy the 'substantially predominate' standard. Economy and convenience would be poorly served by severing the state law claims solely on this basis." LiveOps, Inc. v. Teleo, Inc., No. C05-03773 MJJ, 2006 WL 83058, at *4 (N.D. Cal. Jan. 9, 2006) (citing Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 790 (3rd Cir.1995)). Similarly, given the extensive overlap of state and federal claims here, economy and convenience would be equally poorly served by declining supplemental jurisdiction.

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[6] Compare Title 24 (1984) § 2-1722(a) (requiring 30 inches by 48 inches) with Title 24 (2002) § 1118B.4.1 (same) and DOJ Standards § 4.2.4.1 (same).

[7] Compare Title 24 (1981) § 2-1722(c)-(d) (minimum 48 inches for front approach and 54 inches for side approach) with Title 24 (2002) §§ 1118B.5 - .6 (same) and DOJ Standards §§ 4.2.5 - 4.2.6 (same).

[8] Compare Title 24 (1981) § 2-3303(l)(4) (maximum five pounds) with Title 24 (2002) § 1133B.2.5 (same) and DOJ Standards § 4.13.11(2)(b)(same).

Where none of the exceptions in section 1367(c) apply, supplemental jurisdiction is mandatory. Executive Software, 24 F.3d at 1556 ("[U]nless a court properly invokes a section 1367(c) category in exercising its discretion to decline to entertain pendent claims, supplemental jurisdiction must be asserted.") Since neither of the section 1367(c) grounds asserted by Defendant apply in this case, this Court has supplemental jurisdiction of the pendent state law claims.

3. Even If this Court Should Hold That Section 1367(c)(1) or (2) Applies, it Should Exercise its Discretion to Retain Supplemental Jurisdiction of Plaintiffs' State Claims.

Even if the Court should determine that one of the section 1367(c) categories applies, supplemental jurisdiction is still appropriate here. That section provides that "district courts may decline to exercise supplemental jurisdiction" if one of its provisions applies. 28 U.S.C. § 1367(c) (emphasis added). As this Court has held, "[h]aving identified that a claim falls into a [section 1367(c)] category, the exercise of discretion 'is informed by whether remanding the pendent state claims comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity.'" LiveOps, 2006 WL 83058, at *4 (quoting Executive Software, 24 F.3d at 1557 (internal citations omitted)).

In this case, the values of economy, convenience, fairness, and comity favor retention of supplemental jurisdiction.

Central to the application of these values here is the fact that, should this Court dismiss Plaintiffs' state law claims, Plaintiffs will file those claims in state court. In exercising discretion, a district court is to take into account the fact that dismissal under section 1367(c) would result in parallel proceedings in state and federal court. Borough of West Mifflin, 45 F.3d at 787. The Ninth Circuit "frequently has upheld decisions to retain pendent claims on the basis that returning them to state court would be a waste of judicial resources." Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303, 1309 (9th Cir. 1992) (citing Schneider v. TRW, Inc., 938 F.2d 986, 994 (9th Cir. 1991)).

The present case has been actively litigated for almost five years, involving discovery of hundreds of thousands of pages of documents, surveys of over 220 restaurants by a court-appointed Special Master, the exchange of hundreds of pages of legal and factual analysis by each party concerning the alleged violations, multiple depositions, and extensive motions practice, including two fully briefed and decided motions concerning class certification, and three summary judgment motions. Were Plaintiffs forced to file their state claims in state court, it would commence a parallel proceeding that would address the same stores as the present case, and duplicate much of the work the parties have accomplished here. Most if not all of the restaurants at issue would be evaluated by this Court under federal law, and then the same restaurants would be evaluated by the state court under both state law and -- because Unruh and CDPA violations can be predicated on ADA violations -- under federal law as well. While some of the evidence developed in this case might be admissible in a state court proceeding, the parties would start from scratch procedurally, and the overlap and duplication of the work of the two courts would be an enormous waste.

The potential for waste and inefficiency if Unruh and CDPA claims are dismissed from an ADA case and pursued in state court has led at least four courts to retain supplemental jurisdiction. As one court explained, in considering the same claims as are at issue here:

> [T]he competing principles of judicial economy and convenience weigh strongly in favor of asserting supplemental jurisdiction. Plaintiff's state and federal law claim involve the identical nucleus of operative fact, and require a very similar, if not identical, showing in order to succeed. If this court forced plaintiff to pursue his state law claim in state court, the result would be two highly duplicative trials, constituting an unnecessary expenditure of plaintiff's, defendants', and the courts' resources.

Johnson, 2007 WL 1723617, at * 5; see also Hannah, 2007 WL 2795769, at *2 ("[I]t would hardly be economical or convenient to conduct a trial on all the elements of plaintiff's ADA claim in federal court but then require plaintiff to seek relief separately on the issue of damages in state court"); Pinnock v. Solana Beach Do It Yourself Dog Wash, Inc., No. 06cv1816 BTM (JMA), 2007 WL 1989635, at *3 (S.D. Cal. July 3, 2007) (holding, in a case involving ADA, Unruh and CDPA claims, that "the Court's exercise of supplemental jurisdiction would best

advance economy, convenience, fairness, and comity. . . . . To [decline supplemental jurisdiction] would create the danger of courts rushing to judgment, increased litigation costs, and wasted judicial resources."); Yates v. Belli Deli, No. C07-01405 WHA, 2007 WL 2318923, at *7 (N.D. Cal. Aug. 13, 2007) (holding, in a case involving ADA, Unruh and CDPA claims, that "[i]t would be inefficient to try the claims separately, so the exercise of supplemental jurisdiction is appropriate.")[9]

Because of the certainty of waste and duplication should this Court dismiss the state claims -- and especially in light of the advanced stage of this litigation -- Plaintiffs respectfully urge this Court to retain supplemental jurisdiction.

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[9] Although Defendant has cited to cases that decline supplemental jurisdiction over Unruh and CDPA claims, in each case, a comparison of the case number and the date of the decision reveals cases that have been pending approximately one year, in many instances less. See Morgan v. El Torito Rests., Inc., No. 07 CV 0223 DMS (BLM) (S.D. Cal. July 11, 2007); Morgan v. Am. Stores Co. LLC, No. 06 CV 2437 JM (RBB) (S.D. Cal. June 29, 2007); Cross v. Plaza Camino Real, No. 07-CV-318-IEG (RBB) (S.D. Cal. June 22, 2007) (S.D. Cal. June 22, 2007); Equal Access Ass'n Suing on Behalf of Roy Davis Gash v. PFS, LLC, No. 07 CV 158 WQH (LSP), 2007 U.S. Dist. LEXIS 40672 (S.D. Cal. June 4, 2007); Kohler v. Mira Mesa Marketplace W., LLC, No. 06cv2399 WQH (POR), 2007 WL 1614883 (S.D. Cal. June 4, 2007); Wilson v. PFS, LLC, No. 06CV1046 WQN (NLS), 493 F.Supp.2d 1122 (S.D. Cal. 2007); Cross v. Boston Market Corp., No. 07cv486 J (LSP) (S.D. Cal. May 29, 2007); Cross v. Pac. Coast Plaza Investments, L.P., No. 06 CV 2543 JM (RBB), 2007 WL 951772 (S.D. Cal. Mar. 6, 2007); Triple AAA Ass'n for Children with Developmental Disabilities v. Del Taco Inc., No. 06cv2199 DMS (WMC) (S.D. Cal. Feb. 26, 2007).

Plaintiffs also submit that these cases improperly disregarded the potential for duplication and waste when a plaintiff is forced to pursue similar claims in parallel state and federal proceedings.

Conclusion

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendant's Motion for Reconsideration.

Respectfully submitted,

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BY: /s/ Amy F. Robertson
Amy F. Robertson

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