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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Jonathan Corbett, Plaintiff v. Insomniac Holdings, LLC, Speedway Motorsports, Inc. Defendants	**16-CV-3604 PSG(JEM)** **OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR RULE 56(d) RELIEF**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. Procedural History

On May 24th, 2016, Plaintiff filed suit against Defendant Insomniac Holdings, LLC ("Insomniac") and Speedway Motorsports, Inc. ("Speedway") for various causes of action relating to allegations of disability discrimination at an event produced by Insomniac and hosted by Speedway. The event, the Las Vegas 2016 edition of Electric Daisy Carnival ("EDC"), was, at the time of filing the complaint, in the future, and Plaintiff's complaint sought equitable remedies to prevent the harm to occur in the future, as well as statutory damages under California's Unruh Civil Rights Act. *See* Complaint, D.E. #1.

Both Insomniac and Speedway, through the same counsel, filed answers to the complaint, and subsequently both amended their answers after Plaintiff notified defense counsel of his intent to move to strike the answers and/or to move for sanctions as a result of the defendants' refusal to admit facts not reasonably in dispute and presentation of affirmative defenses that could have no possible application to this case. *See* Original Answers, D.E. ##24, 35, Amended Answers, D.E. ## 40, 41.

After receiving a joint proposed case management schedule from all parties, the Court ordered that the pleadings could be amended until November 28th, 2016, discovery would remain open until April 11th, 2017, and all motions due by April 25th, 2017. *See* Scheduling Order, Oct. 19th, 2016, D.E. #45. Plaintiff advised defense counsel on November 1st, 2016 that he would be taking advantage of the window for amending his pleadings to, *inter alia*, note that the prospective injuries complaint of have now become partially retrospective. *See* Exhibit A, E-mail from Plaintiff to Defense Counsel. Plaintiff filed for leave to amend his complaint on November 26th, 2016; this motion is pending before the Court.

In the meantime, the parties have begun to engage in discovery. *See* Exhibit B, Corbett Decl., ¶ 4. However, both Insomniac and Speedway have refused to answer *each and every one*

of Plaintiff's interrogatories, have refused to produce *each and every* document Plaintiff has requested, and have refused to allow the deposition of each and every witness to whom Plaintiff had served a Notice of Deposition. *See Id*., ¶¶ 5 – 10; Exhibit C, Defendants' First Discovery Replies. In short, both defendants have refused to meaningfully participate in discovery.

Notwithstanding their knowledge of the impending motion for leave to amend, their failure to provide a scintilla of information during discovery thus far, and the closing dates for discovery and motion practice being 6 months away, Defendants inexplicably have moved for summary judgment. Plaintiff therefore moves this Court to deny defendants' motion under Fed. R. Civ. P. Rule 56(d) or otherwise[1].

II. Standard of Review

"A motion for summary judgment must be granted when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Fed. R. Civ. P. 56(c). A disputed fact is material if it might affect the outcome of the suit under the governing law." *Kohler v. Presidio Int'l, Inc.*, 2016 U.S. Dist. LEXIS 93519 *4, 5 (C.D. Cal. 2016) (Gutierrez, J., *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "The moving party has the burden of establishing the absence of a genuine dispute of material fact." *Bayramoglu v. Cate*, 2016 U.S. Dist. LEXIS 123380 *17 (C.D. Cal. 2016) (Gutierrez, J., *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

[1] Contemporaneous with the filing of this opposition, Plaintiff has served upon Defendants his position under C.D. Cal. R. 37-2.2, in preparation to ask the Court to compel discovery under Fed. R. Civ. P. Rule 37.

Rule 56(d) provides that if the party against which summary judgment is sought "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," then the Court may deny the motion for summary judgment or make other appropriate orders. "If discovery is incomplete, a district court is rarely justified in granting summary judgment, unless the discovery request pertains to facts that are not material to the moving party's entitlement to judgment as a matter of law." *Shelton v. Bledsoe*, 775 F.3d 554, 568 (3rd Cir. 2015). When a party requests additional discovery before ruling on another's summary judgment motion, a court should consider if the party "diligently pursued its previous discovery opportunities, and [if] allowing additional discovery would have precluded summary judgment." *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994).

III. Argument

A. *Defendants' Motion Presents Numerous Material Assertions of Fact For Which Plaintiff Is Entitled to Discovery*

In consideration of Defendants' motion for summary judgment, Defendants present a plethora of assertions of fact for the Court to consider in their Memorandum in Support, beyond even those facts enumerated in their Statement of Uncontroverted Facts. Without allowing Plaintiff any meaningful discovery whatsoever, Defendants ask the Court to assume the following (page numbers referring to Defendants' Memorandum in Support of its motion):

- That Defendants' policy is intended for health and safety purposes (p. 2), rather than for purposes of increasing revenue, especially given that they admit to selling over-the-counter medicines within their festival at their "general stores" (p. 4) after confiscating those same

medications at the festival gate and do not advertise any "free medication" that they now allege is available at their medical tents.

- That Defendants' policy is at all effective against the use of illegal drugs, given that it admits that people die at its festivals from illegal drug overdoses anyway (p. 2), given that it excludes hundreds of performing artists' guests from their typical gate search (Corbett Decl., ¶ 22), and given that no search that does not include sending samples to a chemistry lab will uncover one of the illegal drugs it specifically listed as an issue (LSD) because the drug is a colorless liquid that can be infused into paper, candy, stickers, *etc*., thereby becoming undetectable without specialized equipment. *Chapman v. United States*, 500 U.S. 453, 455 (1991) (single sheet of paper can conceal 100 doses of LSD).
- That the nature of Defendants' treatment of guests who arrived with prescriptions was actually as described by Insomniac Health & Safety Director Maren Steiner (pp. 2, 3), of whom Plaintiff had requested a deposition but Insomniac has refused to present said deponent.
- That the over-the-counter medication available for purchase or at the medical tents was adequate, especially given the massive size of the event – the Las Vegas Motor Speedway's racetrack is 1.5 miles in length – and potential difficulties in finding medical tents or medical staff in large crowds in an emergency.
- That Plaintiff's intent by filing this lawsuit is, as Insomniac implies, to make it easier to bring illegal drugs into music festivals (p. 4), discounting that perhaps Plaintiff is merely tired of being treated as a drug dealer for possessing lawful medication that he needs for his health and wishes to access such events without harassment, discrimination, embarrassment, violation of his privacy, and fear of being denied entry.

- That, despite owning a shell subsidiary that owns a Nevada racetrack, Speedway does not exercise sufficient control of that subsidiary's day-to-day operations to "pierce the corporate shield" and subject the parent to the personal jurisdiction of Nevada (p. 4).
- That Insomniac has not at all considered whether it will apply the same medication policy to EDC Las Vegas in 2017 (p. 5), given that Insomniac has refused to allow Plaintiff to depose individuals within Insomniac who would have such information.
- That Insomniac did not receive the request for accommodation that Plaintiff alleges he sent to them before filing this lawsuit, which was, to this day, ignored (p. 15).
- That Insomniac could not have made a reasonable accommodation to allow Plaintiff to attend the festival (p. 14).
- That Insomniac did not, in fact, publish the discriminatory policies and/or ignore Plaintiff's request for accommodation from California soil (p. 15).

Many of these disputed issues of fact were the subject of Plaintiff's first discovery request, which Defendants, without justification, in bad faith, and using boilerplate objections that have no actual pertinence to the request, refused to answer. *See* Exhibit B, Corbett Decl., ¶¶ 5 – 10, Exhibit C, Defendants' First Discovery Replies. Moreover, Insomniac has refused to allow Plaintiff to depose any of its employees thus far, including the exact same employee, Maren Steiner, who attached a declaration to their motion for summary judgment. *Id*.

Defendants may not avoid discovery by asserting facts in a declaration without giving Plaintiff an opportunity to uncover contradictory facts during discovery when, as here, Plaintiff has "diligently pursued" them yet has thus far has received no fact disclosures from Defendants. Accordingly, Rule 56(d) requires the Court to refuse to grant the relief Defendants request until discovery has been completed.

B. This Court Has Personal Jurisdiction Over Speedway

At the outset, regarding *federal* claims, it is clear that a U.S. District Court has subject matter jurisdiction over claims based on the Americans with Disabilities Act, and Speedway, a domestic corporation, can have no argument that it may not submit to the jurisdiction of the United States. Further, Speedway fails to recognize that if Plaintiff is entitled to sue Insomniac in this jurisdiction (and it is not disputed that Insomniac is headquartered within the boundaries of the Central District of California), and if Speedway played a role in the injury inflicted upon Plaintiff by Insomniac, it may be properly joined to this case, in this district, regardless of in which state(s) Speedway may or may not operate. "A civil action may be brought in — (1) a judicial district in which ***any*** defendant resides…" 28 U.S.C. § 1391(b) ("Venue generally") *(emphasis added); see also Silva v. Gonzales*, No. 14-55898, 2016 U.S. App. LEXIS 14302, at *1 (9th Cir., Aug. 4th, 2016) ("improper venue" only if "***no*** defendant is alleged to reside in the Southern District of California," *emphasis added*).

As Defendants do not question personal jurisdiction as to Insomniac regarding federal claims, there can be no good faith dispute that this Court has personal jurisdiction over Speedway regarding federal claims predicated on the same facts. The only arguable claim that Speedway could possibly make regarding jurisdiction is as to whether it is subject to California or Nevada state law. However, neither the original nor the proposed amended complaint attempt to apply California law *to Speedway*. *See* Complaint, Claims for Relief, Counts 5 – 6, Unruh Civil Rights Act (clearly stating that these charges are against Insomniac only). Thus, Speedway wastes over 2 pages of its memorandum in support of the instant motion arguing that it is not subject to California jurisdiction despite the fact that Plaintiff does not seek to hold Speedway to California law.

Leaving only whether or not Speedway may be held accountable under Nevada law, as the EDC festival itself is physically held in Nevada, Speedway can hardly argue that *the dispute* is not subject to Neveda law. Speedway therefore argues that it is not a party to the dispute because Plaintiff's claim is, it argues, properly against Speedway's wholly-owned subsidiary – Nevada Speedway, LLC – and not against Speedway. But, there are legitimate issues to be uncovered during discovery before the Court should consider this argument. Plaintiff has alleged that Speedway, essentially, creates a shell subsidiary for each of its racetrack properties, including the property at which EDC is held. *See* First Amended Complaint, ¶¶ 11, 16; Exhibit B, ¶¶ 11 – 13. There are facts that may leave a reasonable person to believe that Speedway participates in the day-to-day operations of its subsidiary. For example, the Las Vegas Motor Speedway's Web site's registered owner is not the subsidiary, but Speedway Motorsports, Inc., and each page of the Web site says it is "© 2016 Speedway Motorsports, Inc." *See* Exhibit D, Registration for LVMS.com. In fact, according to Google, the words "Nevada Speedway, LLC" appear on the Web site 7 times, while the words "Speedway Motorsports, Inc." appear about 1,700 times. *See* Exhibit E, Google Results for "Nevada Speedway, LLC" vs. "Speedway Motorsports, Inc." on "LVMS.com." Further, the Web site for Speedway Motorsports, Inc. at http://speedwaymotorsports.com literally says that "Speedway Motorsports, Inc.'s leadership team manages 8 premier properties across the United States. Their experience provides us with marketing, promotional and operational expertise generating the best entertainment experience and marketing value in the motorsports industry." Given that the Las Vegas Motor Speedway is one of their "premier properties," this is an apparent literal admission that they maintain operational control over the subsidiary company. *See* Exhibit F, Speedway Motorsports, Inc. Leadership.

In Nevada, a parent corporation (or any stockholder, for that matter) will be held liable for the child corporation's acts or omissions if: "(a) The corporation is influenced and governed by the stockholder, director or officer; (b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and (c) Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice." Nev. Rev. Stat. § 78.747(2). Discovery will show the extent to which Speedway Motorsports, Inc. controls the Nevada Speedway, Inc. and thus whether Plaintiff will be able to "pierce the corporate veil" to sue Speedway[2]. Accordingly, Rule 56(d) requires the Court to refuse to grant the relief Defendants request until discovery has been completed.

C. *Plaintiff Has Standing Based On His Previous Visits Plus His Intent to Visit In The Future If Defendants Cease Their Discrimination*

Defendants argue that "Plaintiff cannot establish he ever personally suffered injury because EDC already took place and he concededly did not attend. (UMF Nos. 4-5). Therefore, Plaintiff never personally experienced the injury he claims to have alleged." But, the whole point of the ADA is to redress injuries that occur when a plaintiff cannot participate because the unlawful practices of the public accommodation deny his ability to do so. That is, Plaintiff's injury *is* that he could not attend because of Defendants' discriminatory policies. Under these circumstances,

[2] It should be noted that the point is merely academic. If Speedway were dismissed from the case on the grounds that it has insufficient control over its subsidiary to be liable for its torts, Plaintiff could simply amend the complaint to join the subsidiary. Since the subsidiary clearly has sufficient resources to pay any possible judgment relating to this case – it owns a racetrack – and a loss to the wholly-owned subsidiary is in effect a loss to Speedway, Plaintiff is bewildered as to why Speedway raises this as an issue. Defense counsel refuses to enlighten Plaintiff.

Plaintiff is not required to buy a plane ticket, hotel room, and festival tickets and literally walk up to the gate only to be turned away, given that the published policies of Insomniac already unequivocally stated that he would, in fact, be turned away.

A plaintiff has suffered an actual or imminent injury when he alleges: (1) that he visited an accommodation in the past; (2) that he was currently deterred from returning to the accommodation because of ADA violations; and (3) that he would return if the ADA violations were remedied. *Molski v. Arby's Huntington Beach*, 359 F. Supp.2d 938 (C.D. Cal. 2005). Plaintiff's complaint alleged that he had been to EDC festival many times in the past. *See* Proposed Amended Complaint, ¶¶ 3, 19, 20. The complaint also states that Plaintiff was planning to attend again, however was made aware that he could not attend by a publication made by Insomniac on the Internet. *Id*., ¶¶ 22 – 25. This demonstrates Plaintiff's clear intent to return, and that intent is expressly affirmed in Plaintiff's declaration. See Exhibit B, Corbett Decl., ¶ 15; *see also Disabled Americans for Equal Access v. Ferries del Caribe*, 405 F.3d 60 (1st Cir. 2005) (holding sufficient a plaintiff's averment that he "intends to return to the Defendant's place of public accommodation . . . to avail himself of the goods and services offered therein").

Notwithstanding, Defendants cite *Brooke v. Peterson*, 2016 WL 2851440 (C.D. Cal., May 13, 2016) as illustrating that one who does not actually visit the location where the discrimination would occur may not have standing. Mot. for Summary Judgment Memorandum, p. 9. In *Brooke*, the plaintiff could properly be referred to as an "ADA troll." The plaintiff would purposely call hotels, without intent of actually staying in them, and ask questions with the intent of getting an answer that indicated inaccessibility for his particular handicap. In other words, the plaintiff was making these calls for the sole purpose of becoming a lawsuit plaintiff, not for actually finding accommodations.

But Plaintiff *has* visited the location, which was made clear in both the original and proposed amended complaints. Therefore, *Brooke* is not only distinguishable, but *Brooke* actually supports Plaintiff's case, as Plaintiff does meet the standard articulated by *Brooke*. Further, to the extent *Brooke* suggests that a Plaintiff's intent must be to use the accommodation, rather than merely to find a new defendant, Plaintiff: (1) has never before filed an ADA lawsuit, (2) has not, since the filing of this lawsuit, filed another ADA lawsuit, and (3) has no plans to file any further lawsuits at this time. *See* Exhibit B, Corbett Decl., ¶¶ 16, 17. Plaintiff is not an "ADA troll" of the likes of *Brooke* or *Molski*: he is an individual with a disability who filed this suit not because he was searching for a defendant, but because he actually wants equal enjoyment of the EDC music festival. *Id.*, ¶¶ 18, 19.

Further, Plaintiff's injury cannot be negated, for the purposes of considering injunctive relief requiring Defendants to cease their discrimination at future shows, by Defendants' conjecture that it is "possible that Plaintiff's need for medication will change and/or Defendants will accommodate a request from Plaintiff to modify its policy." Defendants' Mem. in Support, p. 14. There is no authority to support a requirement that Plaintiff prove that there is no chance his disability could possibly be cured in the future. Likewise, the fact that Defendants may voluntarily stop discriminating against those who require medications at some point in the future is impertinent. In fact, were Defendants able to defend on that ground, *no* ADA plaintiff would *ever* be able to seek injunctive relief, as any defendant would argue that there is a chance that they will change their ways without court intervention.

Accordingly, to the extent that Plaintiff's standing is at all legitimately in question, Rule 56(d) requires the Court to refuse to grant the relief Defendants request until discovery has been completed.

D. Plaintiff Did Request Accommodation, But This Was Not Required As a Pre-Requisite to Suit

Defendants claim that a pre-requisite to obtaining injunctive relief for Plaintiff's ADA claim is a request for reasonable accommodation that was not honored by the defendant. *See* Defendants' Mem. in Support, pp. 14, 15. In support of this, Defendants cite 3 cases, none of which are binding precedent in this circuit and none of which are on point regardless.

Defendants are correct insofar as *some* types of ADA suits require proof of a request for reasonable accommodation. For example, it may be reasonable to require a request for accommodation when an employee seeks a modification of their work duties, because there is no other way for an innocent employer to know that there is anything to accommodate. And, in the cases cited by Defendantas in *Alumni Cruises, LLC v. Carnival Corp*., 987 F. Supp. 2d 1290 (S.D. Fla. 2013), *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052 (5th Cir. 1997), and *Mannick v. Kaiser Foundation Health Plan,* 2006 WL 2168877, at *12 (N.D. Cal. 2006), those plaintiffs were suing for "failure to" accommodate as per the wording of the statute under which they made their claim (42 U.S.C. § 12182(b)(2)(A)(iv)). Naturally, one must make a request for accommodation before a defendant can be said to have "failed" to accommodate.

But, in this case, Plaintiff is not suing for a *failure* on the part of Defendants. Rather, Plaintiff is suing for their having actively advertised a policy that, on its face, would obviously discriminate against anyone who needs medication on their person. In doing so, Defendants have violated, at the least, § 12182(b)(1)(A)(i) (the "denial" of participation) and § 12182(b)(2)(A)(i) ("the imposition" of criteria tending to screen out). A violation of these sections of the ADA is complete upon a defendant's taking of steps to deny access to the disabled, not upon their failure to act on a request for reasonable accommodation, and Defendants provide no support for an

argument that advertising a facially discriminatory policy entitles them to notice before being sued. In fact, ADA cases are regularly allowed where no notification is made. *See*, for example, *Molski v. Arby's* (visiting a public accommodation and finding deficient access sufficient to state a claim; no "request for accommodation" was made).

Notwithstanding, the proposed amended complaint details that Plaintiff *did* request accommodation and defendants ignored him. *See* Proposed Amended Complaint, ¶ 28. Additionally, Defendants were in possession of the original complaint well in advance of the EDC festival, and were thus indisputably on notice that Plaintiff could not attend without accommodation, but continued to ignore him. In other words, Defendants could have easily mooted Plaintiff's claims when they were served the summons and initial complaint in this action by simply notifying Plaintiff that they would accommodate him. Instead, Defendants seek to simultaneously double-down on their policy by defending its propriety *and* argue that Plaintiff should have asked them to modify it, even though they see nothing wrong with the policy, evidencing that any request for accommodation would have been futile anyway.

It should also be noted that Defendants were notified that Plaintiff made a pre-suit request for accommodation before they filed their motion[3], bringing into question whether arguing that Plaintiff did not make such a request was made in good faith. Regardless, Defendants are not entitled to relief on their allegation of a deficient request for accommodation.

[3] Defendants concede that Plaintiff's first discovery reply stated that he did make such a request for accommodation but allege Plaintiff failed to provide them a copy. *See* Decl. of Bradley J. Leimkuhler in Support of Motion for Summary Judgment, ¶ 3. If Plaintiff did not include such a copy in his first discovery response, he did so inadvertently, and immediately upon reading the declaration's claim of non-receipt Plaintiff provided a copy to Defendants.

E. Plaintiff's Proposed Amended Complaint is Neither Moot nor Lacking in Ripeness

Defendants' claim that Plaintiff's original complaint is now moot to the extent that it requests injunctive relief regarding an event that has already happened. Mem. in Support, pp. 11, 12. Plaintiff agrees. However, had Defendants waited for Plaintiff's amended complaint they would have seen that Plaintiff has removed all requests for injunctive relief regarding the 2016 edition of EDC, leaving requests for money damages and for injunctive relief for future Insomniac events. Plaintiff's new claim, therefore, is not moot.

"In the alternative," Defendants argue, any requests for injunctive relief for future Insomniac events are not ripe because they have not yet been planned. Mem. in Support, pp. 12 – 14. Defendants' ripeness arguments fail for two reasons.

First, the claim is vulnerable to Rule 56(d) because discoverable information may show that Insomniac is indeed planning to whether or not to implement the same policy next year. There are many reasons to suspect that discovery may uncover the same:

1. Logic would dictate that if they were sued over the 2016 policy, there has at least been some discussion within the company as to whether or not the policy would remain, and therefore claims by Insomniac to the contrary are suspect – especially given Insomniac's refusal to produce witnesses for deposition.
2. Plaintiff believes discovery will show that Insomniac continues to use the same, or similar, medical policies for its other events since EDC, including for events that are currently scheduled for future dates, giving rise to an inference that Insomniac's discrimination did not end with EDC 2016, but is continuous. *See* Exhibit G, Continued Advertisement of Medicine Policy for Other Insomniac Events.

3. Settlement negotiations thus far in the matter have indicated no willingness to agree to change their discriminatory policy for future events, giving rise to an inference that Insomniac has already determined that the same policy is desired for future events. *See* Exhibit B, Corbett Decl., ¶ 20.
4. Given the low dollar amount requested in the complaint – $8,000 – it seems clear that Insomniac's concern, for which it has vigorously defended this action, is not money but its ability and desire to continue its discriminatory policy in the future.
5. Indeed, given that the 2014 National Law Journal's attorney rate survey indicates that a partner in Sheppard Mullin, the firm representing Defendants, would bill between $490 and $875 per hour, it would appear that Insomniac has already spent far more defending this action than the $8,000 monetary demand[4].

Second, the prospective relief requested by Plaintiff in his proposed amended complaint is not merely relevant to the 2016 edition of EDC in Las Vegas, but extends to all of their future events. *See* Proposed First Amended Complaint, Prayer for Relief, § c. As Defendants are presently advertising the same, or similar, discriminatory policies for future events, no argument can survive regarding ripeness. *See* Exhibit G. And, given that Plaintiff alleges that he has been to at least 8 Insomniac events over the last 6 years, including 2 events that were not an EDC Las Vegas edition, Plaintiff has standing as a regular patron of Insomniac who is now being discriminated against.

[4] Lead counsel for Defendants, Greg Hurley, is a partner according to the Sheppard Mullin Web site. The 2014 NLJ survey may be retrieved at: http://malightssettlement.com/wp-content/uploads/2016/07/BlaunerAffidavitExhibitD-2014-NLJBillingSurvey-Filed.pdf

F. The Unruh Act Prevents a California Corporation from Using California Soil to Discriminate

Plaintiff has alleged that Insomniac, a California corporation with California headquarters, used its California offices to promulgate a policy that violates the rights of Plaintiff, who learned of the policy while present in California. *See* Proposed Amended Complaint, ¶¶ 10, 21, 32, 33. Despite this clear nexus to California and Insomniac's use of California soil to discriminate, Insomniac feels that California law does not apply to it. Plaintiff disagrees.

Insomniac cites 3 cases which are readily distinguishable. In *Archibald v. Cinerama Hawaii Hotels, Inc.*, 73 Cal. App. 3d 152, 159 (1977), that plaintiff sued a national hotel chain under California law for discrimination perpetrated by one of the chain's hotels located in Hawaii. There was no allegation that the hotel chain was based in Hawaii or planned any of their allegedly discriminatory practices from California soil. *Archibald* merely stands for the fairly obvious proposition that having a California location will not subject a company for liability in California if a non-California location decides to discriminate, not that one may set up offices in California and use those offices to publish a policy of discrimination to California persons.

Next, Insomniac cites *Keum v. Virgin America, Inc.*, 781 F. Supp. 2d 944, 955 (2011). Like *Archibald*, the plaintiff in *Keum* attempted to hold an airline liable under California law merely because the destination of the flight was in California. However, the incident did not happen in California airspace and no allegation was made that the defendant set up offices in California and used those offices to publish a policy of discrimination.

Finally, Insomniac cites *Warner v. Tinder, Inc.*, 105 F. Supp. 3d 1083, 1109 [*sic* – it appears defendants intended to cite page 1099] (C.D. Cal. 2015). Like *Archibald* and *Keum*, the plaintiff

was not physically in California at the time against which he was discriminated. But unlike these cases, Plaintiff *does* allege he was in California at the time he experienced the discrimination. *See* Complaint, ¶ 18; Proposed Amended Complaint, ¶ 21 ("…from within the State of California, CORBETT reviewed the official Web site for EDC…").

As Plaintiff's declaration explains, Plaintiff is a California law student regularly within the State's geographic boundaries and jurisdiction. *See* Exhibit B, Corbett Decl., ¶ 21. On the day Plaintiff intended to purchase tickets, travel reservations, and hotel accommodations to attend the EDC festival, but instead found the discriminatory policy indicating that he could not attend the festival, it happened that he was in California. *Id.* Plaintiff did not "venue shop" or travel to California with the intent to, or any knowledge that he would, be discriminated against. *Id.* Indeed, had Plaintiff been in his home state at the time and therefore able to apply Florida law to Insomniac[5], Plaintiff could have taken advantage of Florida's willingness to allow punitive damages up to $100,000 for disability discrimination by a public accommodation. Fla. Stat. 760.11(5).

Insomniac's violation of the Unruh Act was complete not on the day of the festival, but at the moment Insomniac unreasonably told Plaintiff that his disability would prevent him from attending the festival. That is, the mere advertising of discriminatory policies is sufficient to trigger Unruh's application when that advertising occurs within California. Plaintiff's complaint squarely alleges that the advertising was initiated by Insomniac in California and was delivered to Plaintiff while he was in California. Accordingly, the Court should allow Plaintiff an opportunity

[5] There is no question that were Plaintiff's intent to venue shop, he could have applied Florida law, as Insomniac runs "EDC Orlando," which occurred this year on November 4th and 5th, and had substantially the same medicine policy. *See* Exhibit G.

to discover all of the evidence connecting Insomniac's discrimination within California and deny this motion under Rule 56(d).

G. The Court Should Continue to Exercise Supplemental Jurisdiction

Defendants cite three reasons why the Court should refuse to exercise supplemental jurisdiction over Plaintiff's state law claims: (1) all claims for which original jurisdiction exists have been (or will be) dismissed, (2) there exist "a novel or complex issue of state law," and (3) the state law claims "predominate" over the federal claims. Defendants' Mem. in Support, p. 16, *citing* 28 U.S.C. § 1367(c). However, as discussed *supra*, the Court should not dismiss Plaintiff's federal claims, negating option 1, and Defendants, despite spending nearly 2 pages describing the standard for option 2, provide no rational explanation of what "novel" or "complex" issues it feels exist in this case given that Plaintiff has not presented a "construction," "barrier," or "multiple visit" claim. *Id*, p. 19.

Accordingly, we are left with whether Plaintiff's state law claims sufficiently "predominate" over his federal law claims. Defendants' Mem. in Support, p. 20. However, California district courts tend only to find that Unruh Act claims predominate over ADA claims in the case of known "vexatious litigants" – such as the infamous Jarek Molski who filed over 400 federal suits for disability discrimination and was so designated by another judge of this Court – or when other facts make it clear that money is the main purpose behind the lawsuit. *Molski v. EOS Estate Winery*, 2005 WL 3952249 *1 (C.D. Cal. 2005) ("…Plaintiff's record as a vexatious litigant in this Court counsels in favor of the Court's exercise of discretion to dismiss the supplemental claims…"); *Org. for the Advancement of Minorities v. Brick Oven Rest.*, 406 F.

Supp. 2d 1120, 131 (S.D. Cal 2005) (plaintiff, asking for $56,000, had filed 178 ADA cases in S.D. Cal., never brought any to trial).

In cases where such aggravating circumstances do not exist, judges routinely refuse to dismiss Unruh Act claims attached to ADA claims. *Wilson v. PFS LLC*, 2006 U.S. Dist. LEXIS 94468 (C.D. Cal. 2006) ("…the Court concludes that there are no 'exceptional circumstances' for declining to exercise supplemental jurisdiction over Plaintiff's state law claims. The mere fact that the state claims allow for recovery of monetary damages, whereas the ADA provides for injunctive relief only, does not lead to the conclusion that the state claims substantially dominate the federal claim"); *Chavez v. Suzuki*, 2005 U.S. Dist. LEXIS 40092 *5 (S.D. Cal. 2005) ("...the mere fact that the state claims allow for the recovery of monetary damages, whereas the ADA provides for injunctive relief only, does not compel the conclusion that the state claims 'substantially predominate' over the federal claim."). Some judges appear to state that they flatly disagree that ADA and Unruh act claims should be separated even for suspect plaintiffs. *Moore v. Dollar Tree Stores Inc.*, 85 F. Supp. 3d 1176, 1094 (E.D. Cal. 2015) (rejecting *Molski v. EOS Estate Winery* and similar: "They are not persuasive, though, because they failed to provide meaningful reasons as to how the state law claims 'substantially predominate' over federal claims. Moreover, most failed to address how declining jurisdiction served the values of economy, convenience, fairness, and comity. Finally, most of the cases cited declined jurisdiction because they involved claims stacked across visits; which courts felt presented novel and complex issues of state law."); *Kohler v. Rednap, Inc.*, 794 F. Supp. 2d 1091, 1096 (C.D. Cal. 2011) ("It is clearly more convenient and economical for the ADA claim and state-law claims based on those same ADA violations to be litigated in one suit. Moreover, comity does not counsel in favor of declining jurisdiction here, where state law incorporates the federal substantive standard and simply provides additional

remedies. Finally, the Court does not find it unfair to have the state-law claims litigated in this forum, rather than in a separate, and largely redundant, state-court suit."); *Kohler v. Islands Rests., LP*, 956 F. Supp. 2d 1170 (C.D. Cal. 2013) (same); *see also Kohler v. Presidio Int'l, Inc.* at *6 (Gutierrez, J., exercising supplemental jurisdiction even though ADA claim had been mooted and only statutory damages remained, citing "economy, convenience, fairness, and comity").

IV. Conclusion

For the foregoing reasons, Defendants' Motion for Summary judgment has been mooted by the Proposed First Amended Complaint, is premature per Rule 56(d), and is otherwise without merit, and should be **denied**.

Dated: Los Angeles, CA

December 11th, 2016

Respectfully submitted,

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