UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM LAWRENCE TURNER,

Plaintiff,

v.

VEERINDER S. ANAND, ET AL.,

Defendants.

Case No. 14-cv-01147-BAS(PCL)

ORDER:

(1) GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION (ECF NO. 15);

(2) GRANTING IN PART AND DENYING IN PART MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT (ECF NO. 20); AND

(3) DENYING AS MOOT PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF NO. 24)

Plaintiff William Lawrence Turner ("Plaintiff") commenced this action against defendants Veerinder S. Anand, Sandhya Anand, Veerinder S. Anand, M.D., Inc. (collectively, "Defendants") on May 7, 2014 alleging violations of the

Americans with Disabilities Act, the Unruh Civil Rights Act, and the California Disabled Persons Act, and negligence. Presently before the Court are Defendants' motion to dismiss, Plaintiff's motion for leave to file a First Amended Complaint, and Plaintiff's motion for partial summary judgment.

The Court finds these motions suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the reasons set forth below, the Court **GRANTS** Defendants' motion to dismiss, **GRANTS IN PART** and **DENIES IN PART** Plaintiff's motion for leave to file a First Amended Complaint, and **DENIES AS MOOT** Plaintiff's motion for partial summary Judgment.

I. BACKGROUND

Plaintiff is a paraplegic who cannot walk and uses a wheelchair for mobility. (ECF No. 1 ("Compl.") at ¶ 1.) Defendants own and operate a doctor's office in El Centro, California. (*Id*. at ¶¶ 2-3.) In March 2013, Plaintiff was referred to Defendants' office while seeking treatment for a hand injury. (ECF No. 15-3, Exh. A at pp. 9–10, 11, 13:22-25.) Plaintiff visited Defendants' office three additional times over the next few months. (*Id*. at 13:17-19.) He alleges there was no ADA compliant parking space at Defendants' office during any of these visits. (Compl. at ¶ 11.) Plaintiff alleges the parking space designated as handicap accessible was not ADA compliant because the parking space had faded paint, and lacked both a compliant International Symbol of Accessibility ("ISA") sign and a blue border around the adjacent access aisle. (*Id*. at ¶¶ 12, 13, 22.) Plaintiff further alleges there was no "No Parking" warning in the access aisle (or that it had faded) and the access aisle was not sufficiently wide. (*Id*.) Because of this "inaccessible parking," Plaintiff claims he was denied full and equal access to Defendants' office and encountered difficulty. (*Id.* at ¶ 14.) Plaintiff alleges he would like to return to the office. (*Id.* at ¶ 15.)

Plaintiff commenced this suit in May 2014. The Complaint asserts four

causes of action: (1) violation of the Americans with Disabilities Act, (2) violation of the Unruh Civil Rights Act, (3) violation of the California Disabled Persons Act, and (4) negligence. (*See* Compl.) This case is before the Court via federal question jurisdiction under the Americans with Disabilities Act. (*Id.* at ¶ 5.) The remaining causes of action are California law claims brought before the court under supplemental jurisdiction. (*Id.* at ¶ 6.)

Upon receiving the Complaint, Defendants undertook to correct Plaintiff's alleged issues. (ECF No. 15-1 at 3:14-16.) They moved the parking space designated for disabled persons closer to the front door of the clinic, added a wider access aisle, and had a Certified Access Specialist ("CASp") inspect the new space and issue an ISA sign. (*See* ECF No. 15-1 at 1:8-10; ECF No. 17-1 at 2:8-10; ECF No. 17-2 at 2:17-19; ECF No. 15-7, Exh. E.) Defendants alleged in their Answer "that the parking lot was modified in compliance with applicable disability laws." (ECF No. 5 at 7:14-15.)

In August 2014, the parties held a conference pursuant to Federal Rule of Civil Procedure 26(f) and Magistrate Judge Lewis issued a Scheduling Order ("Order"). (*See* ECF No. 14.) The Order, which conformed to Plaintiff's proposed scheduling order, set October 27, 2014 as the final date for amending pleadings. (ECF No. 21-4, Exh. N at 3:7; ECF No. 14 at ¶ 2.) Defendants deposed Plaintiff on September 19, 2014, at which time Plaintiff made the following statements: that he had seen the new parking space (ECF No. 15-3, Exh. A at 16:15-23); that the problem with the parking space was "fixed" (*id.* at 18:1-3); that the noncompliant parking space was the only reason he had filed the suit (*id.* at 15:3-20); that he was referred to Dr. Anand (*id.* at 10:5); and that he had not had any further appointments with Defendants or any other doctors because there was nothing doctors could do to fix the problem with his hand (*id.* at 13:14-16). Defendants filed this motion to dismiss on October 15, 2014. (*See* ECF No. 15). Defendants move to dismiss for lack of subject matter jurisdiction, arguing the federal claim is moot, and also seek

dismissal of the pendant state law claims. (*Id*. at 1:15-21.)

In mid-October 2014, presumably after receiving Defendants' motion to dismiss, Plaintiff sent his own CASp to Defendants' property to inspect the new parking space, as well as the rest of the facilities. (ECF No. 20-2 at ¶ 17.) Plaintiff received the CASp report on approximately November 1, 2014, after the date to amend pleadings set forth in the Scheduling Order. (*See* ECF No. 16-3.) Plaintiff then filed his response to the motion to dismiss on November 3, 2014. (*See* ECF No. 16.) In his response, he included the CASp report, which included evidence that the slope in the new parking space exceeded the 2% maximum allowed under the ADA, as well as evidence of several other violations not previously pleaded in the Complaint. (ECF No. 16-3 at ¶ 13-19.) Upon receiving a copy of Plaintiff's CASp report, Defendants contend they corrected the slope issue in the parking space, put a plan in place to prevent future violations, and submitted evidence of same along with their reply to the motion to dismiss on November 10, 2014. (*See* ECF Nos. 17, 17-1, 17-2, 17-6, 17-7.)

Immediately thereafter, on November 13, 2014, Plaintiff filed a motion for leave to file a First Amended Complaint. (*See* ECF No. 20.) In the proposed First Amended Complaint, Plaintiff references the slope issue in the new parking space, but does not dispute that it has since been corrected. (ECF No. 20-1 at ¶ 18.) Rather, Plaintiff states that, in mid-October, the slope issue and other architectural barriers were discovered, and that "[t]he defendants have claimed that this slope issue has been corrected." (*Id.* at ¶¶ 17, 18.) Plaintiff also lists the additional architectural barriers discovered in the mid-October inspection, but does not claim to have personally encountered any of these. (*Id.* at ¶¶ 19–22.) Defendants filed their response on December 1, 2014, (*see* ECF No. 21) and Plaintiff replied shortly thereafter (*see* ECF No. 22).

In April 2015, Plaintiff filed a motion for partial summary judgment on Plaintiff's state law causes of action before the Court under supplemental

jurisdiction. (*See* ECF No. 24.) Defendants filed an opposition. (*See* ECF No. 27.)

II. LEGAL STANDARD

A. Motion to Dismiss

Under Rule 12 of the Federal Rules of Civil Procedure, a party may move to dismiss a claim based on the court's lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). "Article III of the Constitution confines the federal courts to adjudication of actual 'Cases' and 'Controversies.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.* at 560 (citation omitted). Consequently, a case that lacks Article III standing must be dismissed for lack of subject matter jurisdiction. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). Because standing is essential for a federal court to have subject matter jurisdiction, the issue of standing is properly raised in a 12(b)(1) motion to dismiss. *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (citations omitted).

The "irreducible constitutional minimum" of Article III standing is comprised of three elements: (1) "the plaintiff must have suffered an 'injury in fact'" which is both "concrete and particularized" and "'actual or imminent, not 'conjectural' or 'hypothetical'"; (2) "there must be a causal connection between the injury and the conduct complained of" such that the injury is "'trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court'"; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 (citations omitted). The party soliciting federal jurisdiction has the burden of establishing these elements. *Id.* The doctrines

of ripeness and mootness also relate to a federal court's subject matter jurisdiction, and so challenges to a claim on either ground are properly raised in a 12(b)(1) motion. *Chandler*, 598 F.3d at 1122 (citations omitted).

A jurisdictional attack under can be either facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the challenger asserts that the allegations in the complaint are insufficient to invoke federal jurisdiction, and the court is limited in its review to the allegations in the complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual attack, the challenger provides evidence that an alleged fact in the complaint is false, thereby resulting in a lack of subject matter jurisdiction. *Id*. Therefore, under a factual attack, the allegations in the complaint are not presumed to be true and "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003). However, "[a] court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (citations omitted).

B. Motion for Leave to File First Amended Complaint

Generally, under Rule 15(a) of the Federal Rules of Civil Procedure, "a party may amend its pleading only with the opposing party's written consent or the court's leave" and leave shall be given freely when justice so requires. Fed. R. Civ. P. 15(a)(2). However, after a scheduling order has been issued setting a deadline to amend the pleadings, and a party moves to amend the pleadings after the deadline,

the motion amounts to one to amend the scheduling order and thus is properly brought under Rule 16(b) of the Federal Rules of Civil Procedure rather than Rule 15. *See Johnson v. Mammoth Recreations, Inc*., 975 F.2d 604, 607-08 (9th Cir. 1992).

Under Rule 16, a scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The decision to modify a scheduling order is within the broad discretion of the district court. *Johnson*, 975 F.2d at 607 (citation omitted). If good cause is shown, the court proceeds to consider the requirements of Rule 15(a). *Id*. at 608 (citing approvingly *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987), for its explication of this order of operations); *C.F. v. Capistrano Unified Sch. Dist.*, 656 F. Supp. 2d 1190, 1192 (C.D. Cal. 2009).

III. DISCUSSION

A. Defendants' Motion to Dismiss

1. Americans with Disabilities Act

Plaintiff's lone federal claim is an alleged violated of Title III of the Americans with Disabilities Act ("ADA"). The ADA prohibits discrimination that interferes with disabled individuals' "full and equal enjoyment" of places of public accommodation. 42 U.S.C. § 12182(a). Unlawful discrimination under the ADA occurs when an accommodation "subjects an individual . . . to a denial of the opportunity . . . to participate in or benefit from the . . . accommodations of an entity." 42 U.S.C. § 12182(b)(1)(A)(i). A doctor's office is a place of public accommodation under the ADA. 42 U.S.C. § 12181(7)(F). The ADA Accessibility Guidelines ("ADAAG") provide "the objective contours of the standard that architectural features must not impede disabled individuals' full and equal enjoyment of accommodations." *Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939, 945 (9th Cir. 2011).

Pursuant to the ADAAG, parking spaces designated as reserved for disabled

individuals must be identified by the ISA sign. ADAAG § 4.1.2(7)(a). "At least one accessible route within the boundary of the site shall be provided from . . . accessible parking . . . to the accessible building entrance they serve." ADAAG § 4.3.2(1). Accessible parking spaces must be at least 96 inches wide and adjacent access aisles must be at least 60 inches wide. ADAAG §§ 4.6.3, 4.6.6. Additionally, "[p]arking spaces and access aisles shall be level with surface slopes not exceeding 1:50 (2%) in all directions." ADAAG § 4.6.3.

The only available remedy to private plaintiffs under the ADA is injunctive relief. 42 U.S.C. § 12188(a)(1). Because this is the sole remedy, a plaintiff pursuing injunctive relief must demonstrate, in addition to the traditional elements of standing, a "real and immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In the context of an ADA claim, a plaintiff can satisfy this requirement by "demonstrating deterrence, or by demonstrating injury-in-fact coupled with an intent to return to a noncompliant facility." *Chapman*, 631 F.3d at 944. The Ninth Circuit has also held that if a plaintiff has established standing as to barriers that he did personally encounter, he may sue for injunctive relief as to barriers related to his disability that he did not personally encounter. *Id*. at 951; *See also Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1047 (9th Cir. 2008) (citation omitted) ("An ADA plaintiff who has Article III standing as a result of at least one barrier at a place of public accommodation may, in one suit, permissibly challenge all barriers in that public accommodation that are related to his or her specific disability.").

2. Factual Challenge To Subject Matter Jurisdiction

In the present case, Plaintiff alleges that he went to Defendants' office and that there was no compliant handicap parking in the lot serving the office. (ECF No. 1 at ¶¶ 8, 11.) He further alleges that he personally encountered this barrier and that the inaccessible parking denied him full and equal access. (*Id*. at ¶ 14.) He also alleges that he "would like to return and patronize the [Defendants'] Office but

he will be denied full and equal access" should he return. (*Id*. at ¶ 15.)

Defendants bring a factual challenge to the Court's subject matter jurisdiction. In their motion to dismiss, they assert that the issues with the non-compliant parking space and access aisle have been remedied, thereby rendering Plaintiff's ADA claim moot. (ECF No. 15 at 1:14-16.) Defendants also assert that if this Court finds that Plaintiff's ADA claim is moot, that it does not have discretion to exercise jurisdiction over the pendant state law claims. (*Id.* at 1:19-23.) In support of their motion, Defendants submit several documents, including, but not limited to, the following: Plaintiff's deposition testimony (ECF No. 15-3); a photograph of the new parking space (ECF No. 15-4); an ISA issued by a CASp dated September 26, 2014 (ECF No. 15-7); a signed declaration stating that the slope issue in the new parking space has been corrected (ECF No. 17-1); and several photographs of the new parking space with a level displaying a slope of less than 2% (ECF No. 17-7).

Plaintiff argues that the mere fact that Defendants have remedied the parking space does not render his claim moot. (ECF No. 16 at 9:9-10.) He urges this Court to apply the voluntary cessation doctrine standard, which substantially raises the bar that must be met to dismiss a claim as moot. (ECF No. 16 at 5:8-13.) Under this doctrine, in order to dismiss a claim as moot based on a defendant's voluntary cessation of the complained behavior, the moving party must prove that the alleged wrongful behavior could not reasonably be expected to recur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Plaintiff argues that some problems with the original parking space, such as the faded paint and signage, continually resurface. (ECF No. 16 at 7:6.) Unlike "structural modifications," such as replacing a step with a permanent ramp, paint and signage are by their very nature susceptible to wear and tear that requires regular maintenance. (*Id*. at 6:23-7:11.) Plaintiff therefore urges this Court to deny dismissal based on mootness, as these features make it "very easy for the

defendants to return to their previous ways and not provide a compliant parking lot." (*Id*. at 10:9-10.)

Plaintiff primarily relies on *Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831 (N.D. Cal. 2011), an ADA class action case from the Northern District of California, to support this argument. (*See* ECF No. 16 at pp. 7, 10.)[1] In *Moeller*, the plaintiffs brought suit for common ADA violations, including improperly striped and maintained parking lots. *Moeller*, 816 F. Supp. 2d at 852-53. The defendant challenged some claims on the grounds that those features had been brought into compliance, and so the claims were moot. *Id*. at 851. The court found that the defendant had not met its burden to establish that the problems were unlikely to recur for several reasons. *Id*. at 860. The court first noted that the defendant had its own access policies in place prior to the suit, and that it had a history of not following those policies. *Id*. at 861. "A defendant's 'ongoing history of not following its own stated . . . procedures ma[kes] necessary' an injunction." *Id*. (citing *United States v. Laedral Mfg. Corp.*, 73 F.3d 852, 857 (9th Cir. 1995)). The court further noted that even if the defendant had been following its policies, "the fact that [it] could change these policies . . . means that [it] has not met its burden under the voluntary cessation doctrine." *Id*. at 862. The threat of recurrence in the case was particularly strong "given the length of time required for [the defendant] to remove or remediate the barriers at [one location], and also given [the defendant]'s history of vague and contradictory policies." *Id.*

[1] Plaintiff also relies on an unpublished Fourth Circuit decision in which the Fourth Circuit found that the defendants had not met their burden under the voluntary cessation doctrine. *See Feldman v. Pro Football, Inc*., 419 F. App'x 381, 384, 387 (4th Cir. 2011). In that case, the plaintiff had requested ADA accommodations for three years prior to filing suit, but the defendants did not implement accommodations until after the suit had been filed. *See id*. at 384, 387. However, the Court finds *Feldman* distinguishable because, in this case, Defendants have established a pattern of immediately remedying a claimed ADA violation upon being informed of such violation.

The Southern District of California addressed an ADA claim with a parking space issue similar to this case in *Kohler v. Islands Rests., LP*, 956 F. Supp. 2d 1170 (S.D. Cal. 2013) (Whelan, T.). In *Kohler*, the defendants sought to have the plaintiff's claim mooted on the grounds that they had already remedied the problems with the parking space. *Id.* at 1173. The court noted that if the defendants had remedied the slope issue in the parking space, there would "no longer be a basis to support Kohler's request for relief, and his ADA claim [would be] moot." *Id.* (citing *Grove v. De La Cruz*, 407 F. Supp. 2d 1126, 1130-31 (C.D. Cal. 2005)). The defendants submitted "photographs of a level with a digital slope display" that showed "a slope not exceeding 2%." *Id.* at 1174. However, the court found that a genuine issue of material fact existed as to whether the slope issue had been corrected because the plaintiff submitted a declaration that the slope issue was still present in other sections of the lot, and so the court found that the photographs, which showed only limited portions of the parking lot, were not dispositive. *Id.*

Because Defendants present a factual challenge, this Court is permitted to consider affidavits and other evidence beyond those referred to in the complaint, and is not required to accept as true the allegations in the complaint. *McCarthy*, 850 F.2d at 560. This Court finds that dismissal of Plaintiff's ADA claim appropriate under the reasoning of both *Moeller* and *Kohler*. Plaintiff seeks an injunction "compelling defendants to comply with the Americans with Disabilities Act." (ECF No. 1 at 8:10-11.) However, Defendants assert that they are presently complying with the ADA, and support that assertion with undisputable evidence. (*See* ECF No. 15.)

The Court finds sufficient evidence to conclude that the initial problems with the parking space at issue in the Complaint have since been remedied. Defendants submit a photograph of the new office parking space. (ECF No. 15-4, Exh. B.) In that photograph, the new parking space is freshly painted, the words "No Parking" are visible in the access aisle, an ISA sign has been mounted above the parking

space, and there is a blue border around the access aisle. (*Id.*) Defendants also assert in their motion that the parking space meets the ADA modifications required as of June 2014. (ECF No. 15-1 at 3:19-21.) Plaintiff does not dispute the validity of these assertions and evidence in his opposition. Instead, Plaintiff raises an entirely new issue with the parking space, which was not raised in the Complaint. He claims that the slope in the new parking space exceeds the 2% maximum allowed under the ADA. (ECF No. 16 at 3:25-4:9.) Although this slope issue was not alleged in the Complaint, to the extent Plaintiff claims Defendants did not remedy the alleged problems, but instead created an additional problem, the Court will address the issue. For the reasons discussed below, the Court finds that the slope issue has also been remedied.

As in *Kohler*, Defendants proffer photographs and a declaration demonstrating that the new parking space has already been brought into compliance with respect to the slope issue. (*See* ECF Nos. 17-1, 17-7.) These photographs show that the slope in the access aisle now measures 1.4%, which is less than the maximum allowed slope of 2%. (ECF No. 17-7, Exhs. K, I.) Defendants have also submitted a signed declaration from Larry Libsack, who oversaw all of the modifications in the parking lot, and who states that the slope issue was corrected on November 6, 2014, the day after being contacted by the Defendants. (ECF No. 17-1 at ¶¶ 8-11.) A similar declaration from the property manager, Robert Gonzalez, states that the slope issue was corrected within days of Defendants being notified of same. (ECF No. 17-2 at ¶¶ 8, 9.) Defendants have also submitted evidence that they have spent over $7,000 to make updates and corrections to the parking space. (ECF No. 17-7, Exh. F.)

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Unlike *Kohler*, Plaintiff here does not dispute any of these facts.[2] Additionally, unlike *Moeller*, Defendants did not initially have an access policy in place, and therefore did not have a history of violating that policy. In response to this suit, however, Defendants have created such a policy. (*See* ECF No. 17-7, Exh. J.) Among other things, the policy calls for an annual inspection of the parking lot for painting and signage compliance, and immediate notification should any defects be discovered between inspections. (*Id*.)

This Court finds that the weight of the evidence supports the inference that Defendants, unlike the defendants in *Moeller*, will comply with this newly created policy. Accordingly, the Court finds that the evidence submitted by Defendants establishes that the parking space is compliant, that the behavior cannot reasonably be expected to recur, and dismisses Plaintiff's ADA claim for lack of subject matter jurisdiction.

3. Plaintiff's State Law Claims

Defendants assert in their motion that if the Court dismisses Plaintiff's federal claim as moot, then it must also dismiss the pendent California state law claims. (*See* ECF No. 15 at 9:18-20.) "[D]istrict courts may decline to exercise supplemental jurisdiction over a [] claim if … the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). However, district courts only have discretion "[i]f the district court dismissed all federal claims on the merits." *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001). If, however, the district court "dismisses [all federal

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[2] Although Defendants presented this evidence in their reply, Plaintiff did not request leave to file a sur-reply, did not dispute these facts in his subsequent motion requesting leave to amend, and did not dispute these facts in his proposed amended complaint. In the proposed amended complaint, Plaintiff states that the slope issue and other architectural barriers were discovered in mid-October, and that "[t]he defendants have claimed that this slope issue has been corrected." (ECF No. 20-1 at ¶ 18.) Therefore, the Court concludes that Plaintiff had opportunity to dispute these facts, but did not do so.

claims] for lack of subject matter jurisdiction, it has no discretion and must dismiss all [state law] claims." *Id.*

Because the Court has dismissed Plaintiff's ADA claim for lack of subject matter jurisdiction, it does not have discretion to exercise supplemental jurisdiction over the state law claims.

Accordingly, Defendants' motion to dismiss is **GRANTED.**

B. Plaintiff's Motion for Leave to File First Amended Complaint

The Scheduling Order in this case set forth a pleading amendment deadline of October 27, 2014. (ECF No. 14 at ¶ 2.) This timeline was proposed by Plaintiff and adopted by the Court. (ECF No. 21-4, Exh. N at 3:7.) Plaintiff's motion for leave to amend was not filed until November 13, 2014. (*See* ECF No. 20.)[3] Therefore, Plaintiff is required to demonstrate good cause under Rule 16 for filing an amended complaint. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2010).

1. Rule 16 Analysis

Under the good cause standard of Rule 16(b)(4), the court's primary focus is on the movant's diligence in seeking the amendment. *Johnson*, 975 F.2d at 609. "Good cause" exists if a party can demonstrate that the scheduling order could not or "cannot reasonably be met despite the diligence of the party seeking the extension." *Id.* (citation omitted). "[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id*. "Although the existence or degree of prejudice to the party opposing the modification might supply

[3] The Court notes that Plaintiff failed to move to amend the Scheduling Order prior to filing his motion for leave to file an amended complaint as required by the Ninth Circuit. *See U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099 (9th Cir. 1985), superseded by statute on other grounds (noting that the district court properly denied a summary judgment motion as untimely when the defendants failed to request a modification of the pretrial order after the deadline for filing such a motion had passed). Despite this error, the Court will construe Plaintiff's motion as including a request to amend the Scheduling Order.

additional reasons to deny a motion, the focus of the [Rule 16] inquiry is upon the moving party's reasons for seeking modification." *Id*. (citations omitted). The party seeking to continue or extend the deadlines bears the burden of proving good cause. *See Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *Johnson*, 975 F.2d at 608-09.

In addressing the diligence requirement, one district court in the Ninth Circuit noted:

> [T]o demonstrate diligence under Rule 16's "good cause" standard, the movant may be required to show the following: (1) that [it] was diligent in assisting the Court in creating a workable Rule 16 order..; (2) that [its] noncompliance with a Rule 16 deadline occurred or will occur, notwithstanding [its] diligent efforts to comply, because of the development of matters which could not have been reasonably foreseen or anticipated at the time of the Rule 16 scheduling conference…; and (3) that [it] was diligent in seeking amendment of the Rule 16 order, once it became apparent that [it] could not comply with the order….

Jackson v. Laureate, Inc., 186 F.R.D. 605, 608 (E.D. Cal. 1999) (internal citations omitted). If the district court finds a lack of diligence, "the inquiry should end." *Johnson*, 975 F.2d at 609. If, however, the movant clears the Rule 16 bar, the Court proceeds to consider the motion under the usual standard of Rule 15. *Campion v. Old Republic Home Prot. Co.*, Inc., 861 F. Supp. 2d 1139, 1150 (S.D. Cal. 2012).

The Court finds Plaintiff satisfies the good cause standard in this case. The evidence suggests that Plaintiff's CASp did not submit a report until very close to or after the October 27, 2014 deadline. The declaration from Plaintiff's CASp, Mr. Bishop, is dated November 1, 2014. (*See* ECF No. 16-3 at 13:10.) Defendants' property manager states that he received notice of the slope issue and Mr. Bishop's report in early November. (ECF No. 17-2 at ¶¶ 8, 9.) Mr. Libsack, who made corrections to the parking space also states that he received the report on November 5, 2014. (ECF No. 17-1 at ¶ 8.) Plaintiff then moved for leave to file his first amended complaint approximately two weeks later. (*See* ECF No. 20.) Plaintiff moved for leave to amend in light of the information contained in Mr. Bishop's

report, something not in his possession until very close to or after the last date to amend pleadings adopted in the Scheduling Order.[4]

Additionally, it appears Plaintiff was diligent in assisting the Court in creating a workable Scheduling Order, complied with the Scheduling Order in all other respects, and was diligent in seeking to amend the Complaint shortly after he discovered the new facts at issue. Moreover, there is no suggestion Plaintiff knew of the allegations prior to filing the Complaint or made a tactical decision at the outset of the litigation not to include the allegations in his initial Complaint. *Cf Trans Video Elecs., Ltd. v. Sony Elecs., Inc.*, 278 F.R.D. 505, 508 (N.D. Cal. 2011). Accordingly, the Court finds Plaintiff has sufficiently demonstrated "good cause" to amend the Scheduling Order. Because the Court finds that Plaintiff satisfies the requirements of Rule 16(b), the Court proceeds to consider the requirements of Rule 15(a).

2. Rule 15 Analysis

"Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so requires.'" *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (quoting Fed. R. Civ. P. 15(a)); *see also Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (noting the "strong policy in favor of allowing

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[4] The proposed amended complaint alleges the following ADA barriers, none of which were included in the Complaint: (1) the gripping surface of the handrails on the walkway outside are 40 inches above the ramp surface, and the maximum height allowed by the ADAAG is 38 inches; (2) the handrails only extend for 10 inches beyond the top and bottom of the ramp runs, and the ADAAG requires that they extend 12 inches; (3) the transaction counters in the front and rear lobbies do not have 36 inch high wheelchair accessible surfaces; (4) the sink in the public restroom does not provide any knee clearance, and the ADAAG requires that all sinks provide knee clearance at least 27 inches high, 30 inches wide, and 19 inches deep; (5) the sink hardware is a twisty style knob, and the ADAAG requires that faucets be lever-operated, push-type, touch-type, or electronically controlled; and (6) the mirror in the public restroom is mounted 48 inches above the ground, and the maximum height permitted by the ADAAG is 40 inches. (ECF No. 20-2 at ¶¶ 19-22.)

amendment"). However, "a district court need not grant leave to amend where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile." *AmerisourceBergen Corp.*, 465 F.3d at 951. These factors are not of equal weight as prejudice to the opposing party has long been held to be the most crucial factor in determining whether to grant leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). The Court considers each of these factors in turn.

i. Prejudice to the Opposing Party

The most critical factor in determining whether to grant leave to amend is prejudice to the opposing party. *Eminence Capital*, 316 F.3d at 1052 ("Prejudice is the touchstone of the inquiry under rule 15(a)") (internal quotes and citation omitted)). The burden of showing prejudice is on the party opposing an amendment to the complaint. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1986). Prejudice must be substantial to justify denial of leave to amend. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Under Rule 15(a), "[a]bsent prejudice, or a strong showing of any of the remaining [] factors," there is a presumption in favor of granting leave to amend. *Eminence Capital*, 316 F.3d at 1052.

Defendants claim they would be prejudiced if leave to amend were granted because "[t]he Anands relied upon the Complaint, took the deposition of Mr. Turner (who did *not* identify any additional architectural barriers), remedied the parking lot at an initial cost of $6,634 paid to the paving company, had a CASp inspection performed as to the entire premises, and incurred the additional expense of filing a motion to dismiss." (ECF No. 21 at 13:1-6, alteration in original.)

Plaintiff argues that Defendants would not be prejudiced because, although the assertions by Defendant are true, Plaintiff's deposition "is still entirely valid and

complete," and so they can still rely on it. (*See* ECF No. 22 at 2:14-15.) Plaintiff's proposed amended complaint does not allege new visits to Defendants' site, and there are no new facts alleged regarding his prior visits. (*Id.* at 2:15-16.)

The Court is not persuaded that Defendants will suffer substantial prejudice should Plaintiff be permitted to file an amended complaint. Although permitting the amendment may result in the necessity of re-deposing Plaintiff, the Court does not find that this prejudice so substantial as to warrant denial of the motion. Accordingly, this factor favors amendment.

ii. Undue Delay

"Undue delay is a valid reason for denying leave to amend." *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1454 (9th Cir. 1990). Delay, by itself, however, does not always justify denying leave to amend. *DCD Programs, Ltd.*, 833 F.2d at 186–87. "Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *Jackson*, 902 F.2d at 1388. Considerable delay with no reasonable explanation is relevant where a proposed amendment would cause prejudice to the other party or would significantly delay resolution of the case. *Id*. However, delay caused by the parties waiting until they had sufficient evidence of conduct upon which they could base claims of wrongful conduct is a reasonable explanation. *DCD Programs, Ltd.*, 833 F.2d at 187.

Plaintiff argues that he did not engage in undue delay because the motion was "filed within three weeks of the plaintiff's expert site inspection." (ECF No. 22 at 2:2-4.) Moreover, because this suit is in the early stages of litigation, the Court should follow the liberal policy of granting leave to amend in such circumstances. (ECF No. 20 at 5:4-5.) Defendants, in response, assert that a determination of delay depends on "whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." (ECF No. 21 at 14:3-5 (citing *AmerisourceBergen Corp.*, 465 F.3d at 953).) While Plaintiff arguably

should have known the facts and theories raised in the proposed amended complaint, the Court finds that there is no evidence that Plaintiff acted strategically in waiting to hire as CASp to discover the additional violations, and that he acted diligently by seeking leave to amend within three weeks of discovering these new facts. Accordingly, this factor weighs in favor of amendment.

iii. Bad Faith

A bad faith motive is a proper ground for denying leave to amend. *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987). Defendants assert that "there is no explanation" for Plaintiff to contend that Defendants' clinic has additional barriers. (ECF No. 21 at 13:7-9.) They also draw the Court's attention to the Ninth Circuit's decision in *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903 (9th Cir. 2011). In *Oliver*, the plaintiff intentionally withheld information about additional barriers so as to prevent the defendant from removing all barriers and therefore moot the entire case. *Id.* at 906, n.7. Defendants appear to suggest some similarly sinister actions by Plaintiff in this case. Plaintiff fails to address the bad faith factor apart from the claim in his reply that "[t]he defense never makes any argument that plaintiff is involved in bad faith." (ECF No. 22 at 2:6-8.)

Though not clearly articulated, Defendants do make such an argument. However, the Court finds the argument less than compelling. The Court finds it plausible that Plaintiff did not know of these additional barriers until his CASp conducted an inspection and produced the report identifying those barriers. This interpretation is bolstered by the fact that Plaintiff, as noted by Defendants in their response, did not complain about those barriers in his deposition, which took place prior to Plaintiff's CASp inspection. (*See* ECF No. 21 at 13:9-10.) Contrary to Defendants' assertion, seeking leave to amend the complaint does not have the effect of changing Plaintiff's sworn testimony. (*Id.* at 13:7-9.) As previously stated, the law permits an ADA plaintiff to challenge architectural barriers related to his disability, even if he did not personally encounter those barriers, provided that

he personally encountered at least one barrier at the place of public accommodation. *Chapman*, 631 F.3d at 944. Therefore, this factor weighs in favor of granting Plaintiff leave to file an amended complaint.

iv. Futility of Amendment

"Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1393 (9th Cir. 1997) (citation omitted).

Defendants argue that granting leave to amend would be futile for two reasons. First, they have already remedied the parking lot issue and hired a CASp to inspect the entire property, including the path of travel as well as the interior and common areas. (ECF No. 21 at 14:8-12.) Second, after reviewing the CASp report and consulting with contractors, they have set forth a plan to remedy all existing barriers identified in the report. (*Id.* at 14:13-18.) Defendants also assert that Plaintiff has failed to establish intent to return as required under *Chapman*. *See Chapman*, 631 F.3d at 944. "[Plaintiff] has not evidenced any intent to make another appointment with Dr. Anand. . . ." (ECF No. 21 at 16:6-7.) Plaintiff argues in his motion that an amendment would not be futile because he seeks only to update facts and identify additional barriers, and the relevant claims have not been adjudicated or preempted. (ECF No. 20 at 5:27-6:3.) In his reply, Plaintiff asserts that "[t]his is not the 'futility' that is contemplated by the courts." (*Id.* at 3:24-25.)

As previously noted, Plaintiff made statements in his deposition suggesting that his visits to Defendants' office were few and are now over. Plaintiff testified that Dr. Anand is not his primary care physician. (ECF No. 15-3, Exh. A at 10:11-14.) Plaintiff also testified that he was referred to Dr. Anand for a hand injury (*id.* at 10:5) and that he has not sought any further medical assistance with regard to his

hand because he "figured three doctors were enough." (*Id.* at 13:14-16). He stated that he had seen the new parking space after Defendants' undertook to correct the problems in the Complaint (*id.* at 16:15-23) and that he "saw that it was fixed and thought that was great." (*Id.* at 19:2-3). When asked to describe the reason he was suing Defendants, Plaintiff testified that it was "[f]or not having proper handicap parking" (*id.* at 15:3-5). Defendants' attorney then asked if there were any additional reasons for the suit, to which Plaintiff replied "[t]hat's it." (*Id.* at 15:6-11.)

Plaintiff's statements in his deposition suggests amendment would be futile, as the proposed amended complaint attached to Plaintiff's motion appears deficient for several reasons. First, the proposed amended complaint fails to allege facts sufficient to establish that Plaintiff has standing to pursue injunctive relief. In order to seek an injunction against unencountered barriers, Plaintiff must establish that he has standing as to a barrier that he physically encountered. *Chapman*, 631 F.3d at 951. In the proposed amended complaint, Plaintiff alleges that he personally encountered the parking space, but does not allege a personal encounter with any of the newly alleged barriers. Now that Plaintiff no longer has standing as to the parking space, Plaintiff must establish standing as to some other barrier in order to pursue injunctive relief.

Second, although Plaintiff alleges that he "would like to be able to return and patronize the services of this Doctors Office" but "is deterred from doing so due to his previous experiences and his knowledge of the additional barriers," the statements he made in his deposition appear to contradict this allegation. (ECF No. 20-2 at ¶ 23.) A plaintiff pursuing injunctive relief must demonstrate, in addition to the traditional elements of standing, a "real and immediate threat that the plaintiff will be wronged again." *City of Los Angeles*, 461 U.S. at 111. For an ADA claim, a plaintiff can satisfy this requirement by "demonstrating deterrence, or by demonstrating injury-in-fact coupled with an intent to return to a noncompliant

facility." *Chapman*, 631 F.3d at 944. Plaintiff testified that Dr. Anand is not his primary care physician and that he has not sought any further treatment for his hand. (ECF No. 15-3, Exh. A at 10:11-14; 13:14-16.) Thus, Plaintiff's testimony suggests amendment would be futile.

Despite these potential issues, however, the Court is unable to conclude that "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Sweaney*, 119 F.3d at 1393. Therefore, this factor weighs in favor of amendment.

Weighing all the factors, the Court finds that Plaintiff should be given leave to file an amended complaint. However, the Court also finds that the proposed amended complaint attached to Plaintiff's motion is deficient for the reasons discussed above. While it is not clear from the record whether Plaintiff can allege standing, Plaintiff is given leave to amend if he can plausibly do so. Accordingly, Plaintiff's motion for leave to amend is **GRANTED IN PART** and **DENIED IN PART**.

C. Plaintiff's Motion for Partial Summary Judgment

Plaintiff moves for partial summary judgment on the state law claims in the Complaint. As discussed above, however, the entire Complaint has now been dismissed. Therefore, Plaintiff's motion for partial summary judgment is **DENIED AS MOOT**.

IV. CONCLUSION & ORDER

In light of the foregoing, the Court **GRANTS** Defendants' motion to dismiss the Complaint (ECF No. 15). The Court further **GRANTS IN PART** and **DENIES IN PART** Plaintiff's motion for leave to file an amended complaint (ECF No. 20). Plaintiff is given leave to file a First Amended Complaint, but not in the proposed form attached to his motion. If Plaintiff if able to allege facts consistent with the discussion above, and he chooses to do so, Plaintiff may file a First Amended Complaint no later than **August 7, 2015**. However, Plaintiff may not assert any

causes of action not present in his proposed amended complaint. As Plaintiff's Complaint has been dismissed in its entirety, the Court **TERMINATES AS MOOT** Plaintiff's motion for partial summary judgment (ECF No. 24).

IT IS SO ORDERED.

DATED: July 21, 2015

Hon. Cynthia Bashant
United States District Judge