

1 For the reasons stated below, the undersigned recommends that Defendants’ motions to
2 dismiss be DENIED. The stay on Plaintiff’s motion for sanctions will remain in place pending
3 consideration of these Findings and Recommendations by the Honorable Anthony W. Ishii, United
4 States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

5 **THE COMPLAINT**

6 According to the complaint, Plaintiff is a California resident with physical disabilities. He is
7 a level C-5 quadriplegic. He cannot walk and has significant manual dexterity impairments. He uses
8 a wheelchair for mobility and has a specially equipped van.

9 The complaint relates to the Antojitos-Subway restaurant at 7154 McCracken Road,
10 Westley, California. Of the two “possible” handicap parking spaces that exist, neither is van
11 accessible, and the access aisle for the handicap parking stalls is not level with the parking stall.
12 Plaintiff alleges that the failure to remove these barriers was intentional.

13 Plaintiff has personally encountered these violations. He has “been to the Antojitos-Subway
14 on at least three occasions during the 2013 calendar year,” and “[t]hese violations denied [him] full
15 and equal access to facilities, privileges and accommodations offered.” He states that the restaurant
16 “is in a desirable location for him and he will continue to patronize the businesses there and will
17 continue to encounter the unlawful barriers and discriminatory conditions there so long as they
18 remain.”

19 Plaintiff’s first cause of action is for a violation of the Americans with Disabilities Act of
20 1990 (42 U.S.C. § 12101, *et seq.*), arising from Defendants’ failure to provide a van accessible
21 parking space and the failure to provide an access aisle level with the adjacent parking stall. His
22 second and third causes of action incorporate these same allegations as violations of California’s
23 Unruh Civil Rights Act (Cal. Civ. Code §§51-53) and Disabled Persons Act (Cal. Civ. Code §§
24 54.1). Both causes of action allege that Plaintiff seeks civil penalties because he was caused
25 “difficulty, discomfort, or embarrassment.” The fourth cause of action is for negligence.

26 **DEFENDANTS’ MOTIONS TO DISMISS¹**

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28 ¹ The Court here summarizes the motion filed by Triple S Golden State Corporation. The motion filed by Defendants Carlos Roque and Magdalena Fernandez is virtually identical.

1 Defendants begin with general remarks about the ADA. They note that “ADA violations are
2 largely unregulated [and] ... not corrected,” and that “[t]his has created a big business for Plaintiff
3 and others like him ... to sue for ADA violations after they have been damaged.” Defendants Roque
4 and Fernandez ask the court to take judicial notice of public records which, they say, show “the
5 similarity of the claims” in four cases that Plaintiff has filed, as well as to take notice of the fact that
6 Plaintiff is or has been a party in thousands of cases. Doc. 11.

7 Defendants’ substantive objection to the ADA claim is that Plaintiff has failed to allege that
8 he has visited the place of business. But, Defendants immediately modify this argument,
9 acknowledging that Plaintiff does *allege* “that he visited at least three times in the last eight
10 months;” yet, instead, he fails to “support his claims with dates and times.” These, Defendants state,
11 are “*a minimum evidentiary showing necessary to make his boilerplate complaint valid*” (emphasis
12 in original). They assert, without authority, that it is “now well known” that Plaintiff’s “*modus*
13 *operandi*” is not to personally visit the “majority of businesses he sues.” They then explain that
14 they want the dates and times “to ascertain the veracity of Plaintiff’s claims and possibly move *for*
15 *summary judgment*” (emphasis added).

16 As to all four claims, Defendants also argue that Plaintiff cannot show damages. For the
17 ADA claim, this is because Plaintiff “does not allege that he was unable to enter the restaurant” and
18 because he omits the amount of damage claimed. As to the remaining claims, Defendants take issue
19 with Plaintiff’s allegation that he suffered “difficulty, discomfort or embarrassment.” This, they
20 say, represents emotional or special damages which must be “specifically stated.” FRCP 9(g). In
21 this context, they assert, Plaintiff must plead the dates of his visit. Apart from giving definitions of
22 the term “special damages,” Defendants offer no authorities for any of these claims.

23 **RULE 12(b)(6) STANDARD**

24 A motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) is a challenge to the sufficiency of
25 the pleadings set forth in the complaint. A Fed.R.Civ.P. 12(b)(6) dismissal is proper where there is
26 either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a
27 cognizable legal theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990).
28 Under Fed. R. Civ. P. 8(a), a pleading that states a claim for a relief must include a statement

1 It is also not relevant here that Plaintiff did not identify the time and date of his visits to
2 Defendants' place of business. "[W]hen notice of a claim is given that satisfies Rule 8, concerns
3 about specificity in a complaint are properly addressed through discovery devices under Rules 26,
4 27, 33, and 36, and, if applicable, the pre-trial order entered pursuant to Rule 16." *Skaff v. Meridien*
5 *North America Beverly Hills, LLC*, 506 F.3d 832, 842 (9th Cir. 2007). *See also O'Campo v. Chico*
6 *Mall, LP*, 758 F. Supp. 2d 976, 983 (E.D. Cal. 2010) (rejecting request to dismiss ADA claim for
7 failure to plead date of visit, because affirmative defense of statute of limitations need not be
8 anticipated in complaint). Defendants apparently recognize this fact, because they state that they
9 want this information for a *summary judgment* motion. If so, then the argument does not belong in
10 this motion to dismiss. Their concerns can be addressed in discovery.

11 Next, Defendants argue that the complaint should be dismissed because Plaintiff "does not
12 allege that he was unable to enter the restaurant." They provide no legal authority for this
13 proposition. In fact, under the ADA, "when a disabled person encounters an accessibility barrier
14 violating its provisions, it is not necessary for standing purposes that the barrier completely
15 preclude the plaintiff from entering or from using a facility in any way." *Chapman v. Pier 1*
16 *Imports (U.S.) Inc.*, 631 F.3d 939, 947 (9th Cir. 2011). "A disabled individual also suffers a
17 cognizable injury if he is deterred from visiting a noncompliant accommodation because he has
18 encountered barriers related to his disability there." *Id* at 949. *See also Doran v. 7-Eleven, Inc.*, 524
19 F.3d 1034, 1040-41 (9th Cir. 2008) (finding that plaintiff suffered an imminent harm because the
20 ADA violations barred him from patronizing a convenience store and plaintiff demonstrated an
21 intent to return annually once the barriers were removed); *Pickern v. Holiday Quality Foods Inc.*,
22 293 F.3d 1133, 1138 (9th Cir. 2002) (holding that plaintiff has standing because the alleged ADA
23 violations prevented plaintiff from shopping at his preferred grocery store, causing plaintiff to
24 suffer an "imminent injury").

25 As for Plaintiff's failure to state the amount of damages in his ADA claim, damages are not
26 recoverable under Title III of the ADA—only injunctive relief is available for violations of Title III.
27 *See* 42 U.S.C. § 12188(a)(1)(providing that remedies under Title III are the same as those outlined
28 in 42 U.S.C. § 2000a-3(A), which do not permit recovery of monetary damages); *Wander v. Kaus*,

1 304 F.3d 856, 858 (9th Cir. 2002). The complaint does indeed seek “injunctive relief, compelling
2 defendants to comply with the Americans with Disabilities Act.” Complaint at 6.

3 Finally, Defendants mistakenly characterize Plaintiff’s allegation of suffering “difficulty,
4 discomfort or embarrassment” as a form of special damages. It is clear from the complaint that
5 Plaintiff’s purpose in using this language is to supply the necessary basis to seek statutory damages
6 under the Unruh Act. He alleges:

7 Because the violation of the Unruh Civil Rights Act resulted in difficulty, discomfort or
8 embarrassment for the plaintiff, the defendants are also each responsible for statutory
damages, i.e., a civil penalty for each offense. (Civ. Code § 55.56(a)-(c).)

9 In short, the complaint clearly states that Plaintiff’s “difficulty, discomfort, or embarrassment” is
10 significant precisely because it makes Plaintiff eligible for statutory damages. The complaint
11 further elucidates the nature of these statutory damages by providing the relevant statute. As
12 California Civil Code 55.56 elaborates, “Statutory damages ... may be recovered ... only if a
13 violation or violations ... denied the plaintiff full and equal access to the place of public
14 accommodation on a particular occasion ... [meaning that] the plaintiff experienced difficulty,
15 discomfort, or embarrassment because of the violation.” The Court therefore rejects this argument.

16 **CONCLUSION**

17 Defendants’ motions to dismiss (docs. 8 & 10) are DENIED. The stay on Plaintiff’s motion
18 for sanctions (doc. 15) will remain in place pending consideration of these Findings and
19 Recommendations by the Honorable Anthony W. Ishii, United States District Judge, pursuant to the
20 provisions of 28 U.S.C. § 636(b)(1).

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1 On or before **FOURTEEN DAYS from the entry of this decision**, any party may file
2 written objections with the Court. The document should be captioned “Objections to Magistrate
3 Judge’s Findings and Recommendations.” Plaintiff is advised that, by failing to object within the
4 specified time, he may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951
5 F.2d 1153 (9th Cir. 1991).

6
7 IT IS SO ORDERED.

8 Dated: **December 11, 2013**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE