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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ABDUL NEVAREZ, ET AL.,
Plaintiffs,
v.
SUMAVISION SFO LLC,
Defendant.

Case No. [17-cv-03137-BLF](#)

**ORDER DENYING DEFENDANT’S
MOTION TO DISMISS THE
COMPLAINT**

Before the Court is Defendant Sumavision SFO LLC’s (“Defendant”) motion to dismiss Plaintiffs Abdul Nevarez and Priscilla Nevarez’s (collectively, “Plaintiffs”) Complaint in this action brought pursuant to the Americans with Disabilities Act (“ADA”) and the California Unruh Civil Rights Act (“Unruh Act”). *See* ECF 13 (“Mot.”). The Court previously found this motion suitable for disposition without oral argument pursuant to Civil Local Rule 7-1(b) and vacated the hearing scheduled for February 1, 2018. *See* ECF 24. For the reasons that follow, Defendant’s motion to dismiss the Complaint is DENIED.

I. BACKGROUND

The following facts are taken from Plaintiffs’ Complaint and are accepted as true on a motion to dismiss. *See* ECF 1 (“Compl.”). Plaintiff Abdul Nevarez is a right leg above-the-knee amputee who requires use of a wheelchair for mobility. Compl. ¶ 8. Prior to his injury that rendered him disabled, Abdul Nevarez was an avid golfer and has continued to golf after his injury. *Id.* ¶ 2. Abdul’s wife, Priscilla Nevarez, is not disabled but accompanies her husband golfing and assists him with making golf arrangements. *Id.* ¶¶ 2, 8. Defendant is the owner and operator of Coyote Creek golf course. *Id.* ¶ 9.

Plaintiffs allege that Defendant’s golf course is a public accommodation that is subject to the requirements of Title III of the ADA. *Id.* ¶ 12. Plaintiffs further allege that through its operation of Coyote Creek, Defendant has denied persons with mobility disabilities the full and

1 equal enjoyment of its facilities. *Id.* ¶ 14. For example, on or about October 13, 2016, Priscilla
2 Nevarez called Coyote Creek to book a tee time for herself and Abdul Nevarez. *Id.* ¶ 16. Priscilla
3 spoke with Defendant’s employee, booked a tee time, and requested a ParaGolfer adaptive golf
4 cart for Abdul to use. *Id.* The employee responded that Coyote Creek only has regular golf carts,
5 not adaptive golf carts. *Id.* On March 21, 2017, Priscilla attempted to follow up with Defendant’s
6 management via e-mail regarding Coyote Creek’s lack of golf carts for disabled players. *Id.* ¶ 17.
7 Priscilla emailed an address listed on Defendant’s website, but the email as returned as
8 undeliverable. *Id.*

9 Priscilla made several attempts to e-mail Defendant’s management at Coyote Creek
10 regarding her husband’s access to the golf course but has not received any response. *Id.* ¶¶ 18, 19.
11 Plaintiffs also refer to the existence of other barriers at Coyote Creek that violate the ADA but that
12 Plaintiffs have not yet encountered because they are unable to play golf at Coyote Creek due to
13 Abdul’s disability. *Id.* ¶¶ 20, 21.

14 Plaintiffs filed this action against Defendant on May 31, 2017 alleging disability
15 discrimination in violation of (1) Title III of the ADA; and (2) the Unruh Act. *See Compl.*
16 Defendant timely moved to dismiss the Complaint. *See generally Mot.*

17 **II. LEGAL STANDARD**

18 A motion to dismiss under Rule 12(b)(6) concerns what facts a plaintiff must plead on the
19 face of the complaint. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint
20 must include “a short and plain statement of the claim showing that the pleader is entitled to
21 relief.” Any complaint that does not meet this requirement can be dismissed pursuant to Rule
22 12(b)(6). A “short and plain statement” demands that a plaintiff plead “enough facts to state a
23 claim to relief that is plausible on its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007),
24 which requires that “the plaintiff plead factual content that allows the court to draw the reasonable
25 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,
26 678 (2009). The Court must “accept factual allegations in the complaint as true and construe the
27 pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire &*
28 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

1 **III. REQUEST FOR JUDICIAL NOTICE**

2 The Court first addresses Defendant’s request for judicial notice in support of its motion to
3 dismiss. *See* ECF 14 (“RJN”). Although a district court generally may not consider any material
4 beyond the pleadings in ruling on a Rule 12(b)(6) motion, the Court may take judicial notice of
5 documents referenced in the complaint, as well as matters in the public record, without converting
6 a motion to dismiss into one for summary judgment. *See Lee v. City of LA.*, 250 F.3d 668, 688-89
7 (9th Cir. 2001), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119,
8 1125-26 (9th Cir. 2002). In addition, the Court may take judicial notice of matters that are either
9 “generally known within the trial court’s territorial jurisdiction” or “can be accurately and readily
10 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

11 Defendant requests that the Court take judicial notice of the “fact” that the ParaGolfer
12 adaptive golf cart is a wheelchair. *See* RJN at 2. To authenticate this fact, Defendant requests
13 judicial notice of screenshots from three websites demonstrating that the ParaGolfer is marketed to
14 the public as a wheelchair, and is identified as a wheelchair by the manufacturer and sellers of the
15 device. *See* RJN Exh. A-C. Defendant also requests judicial notice of a “510(k) Summary of
16 Safety and Effectiveness” for the ParaGolfer that was submitted to the Food and Drug
17 Administration (“FDA”) on August 7, 2006. RJN Exh. D. Defendant argues that these documents
18 “definitively” settle the question of whether the ParaGolfer device is a wheelchair. *See* RJN at 3.

19 Plaintiffs oppose Defendant’s request for judicial notice on the grounds that the websites
20 cannot be authenticated and all of the documents lack probative value. *See* ECF 19 (“Obj. to
21 RJN”). Plaintiffs have also filed two declarations in support of their objections. *See* ECF 20, 21.

22 Because Exhibit D to Defendant’s RJN is a document available on the FDA’s website, the
23 Court finds that it is a public record that is properly subject to judicial notice. *See Daniels–Hall v.*
24 *Nat’l Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (granting judicial notice of information
25 contained on a government website); *see also Nevarez v. Canyon Lakes Golf Course & Brewery*
26 *LLC*, No. 4:17-CV-03247-KAW, 2017 WL 5479649, at *3 (N.D. Cal. Nov. 15, 2017) (granting
27 judicial notice of the same “510(k) Summary” submitted to the FDA that is at issue in this case).
28 However, Defendant provides no support for the authenticity of the screenshots of websites

1 submitted as Exhibits A through C, and the Court finds that their authenticity is not capable of
2 accurate and ready determination by resort to sources whose accuracy cannot reasonably be
3 questioned. *See* Fed. R. Evid. 201(b).

4 Accordingly, the Court GRANTS Defendant’s request for judicial notice of Exhibit D, and
5 DENIES the request to take judicial notice of Exhibits A, B, and C. With respect to Plaintiffs’
6 supplemental declarations, the Court does not consider them but instead relies on the well-pled
7 allegations in the Complaint.

8 **IV. DISCUSSION**

9 Defendant moves to dismiss the Complaint on several grounds, which the Court addresses
10 in turn. As discussed below, the Court finds that many of Defendant’s arguments go beyond the
11 pleadings in this case and require a factual record in order for the Court to determine whether
12 Defendant’s denial of Plaintiffs’ request for a ParaGolfer constitutes a violation of the ADA or the
13 Unruh Act.

14 First, Defendant argues that it is not required to “alter its inventory” to include accessible
15 or special goods for individuals with disabilities, such as the ParaGolfer. *See* Mot. at 4-5 (quoting
16 28 C.F.R. § 36.307(a)). Plaintiffs respond that a golf cart is not a “good” within the meaning of
17 § 36.307(a), but rather it is part of the “facility.” *See* Opp’n at 5-6, ECF 18. Both parties cite to
18 the Ninth Circuit’s decision in *Karczewski v. DCH Mission Valley LLC*, which held that the
19 plaintiff had stated an ADA claim against a defendant car dealership that failed to provide hand
20 controls for disabled patrons to test drive cars. 862 F.3d 1006, 1011 (9th Cir. 2017). The Ninth
21 Circuit determined that the plaintiff had adequately alleged that temporarily installing hand
22 controls was a reasonable modification necessary to accommodate patrons with disabilities. *Id.*

23 The Ninth Circuit recognized the exception set forth in 28 C.F.R. § 36.307(b) to the
24 general rule of subsection (a), which requires that a “public accommodation shall order accessible
25 or special goods at the request of an individual with disabilities” in some circumstances. *See*
26 *Karczewski*, 862 F.3d at 1014 (citing § 36.307(b)). Such circumstances include when accessible
27 or special goods can be obtained for a supplier with whom the public accommodation customarily
28 does business. § 36.307(b). In *Nevarez v. Canyon Lakes Golf Course & Brewery LLC*, a nearly

1 identical case brought by the same Plaintiffs against a different golf course, the court rejected the
2 defendant’s argument that it was not required to alter its inventory because “[w]hether obtaining
3 such a golf cart is readily achievable...is not properly resolved at the pleadings stage.” No. 4:17-
4 CV-03247-KAW, 2017 WL 5479649, at *3 (N.D. Cal. Nov. 15, 2017). Without a factual record,
5 this Court cannot determine whether the circumstances of § 36.307(b) apply to the facts of this
6 case, or whether the ParaGolfer is a “good” within the meaning of § 36.307(a).

7 Taking the well-pled allegations in the Complaint as true, Plaintiffs have adequately
8 alleged that Defendant violated the ADA by failing to make reasonable modifications in policies,
9 practices, or procedures at Coyote Creek when these modifications were necessary to
10 accommodate persons with disabilities such as Abdul Nevarez. *See* Compl. ¶ 34; *see also*
11 *Karczewski*, 862 F.3d at 1011 (“In sum, taking the allegations in the complaint as true, Plaintiff
12 has stated a claim that Defendant discriminated against him by failing to make a reasonable
13 modification to a policy, practice, or procedure.”) Moreover, it is reasonable to infer from
14 Plaintiffs’ allegations that Defendant’s access to suppliers of regular golf carts meant that
15 Defendant could also obtain adaptive golf carts such as the ParaGolfer. Compl. ¶ 16; *accord*
16 *Canyon Lakes*, No. 4:17-CV-03247-KAW, 2017 WL 5479649, at *3 (N.D. Cal. Nov. 15, 2017).
17 For the foregoing reasons, Defendant’s motion to dismiss the Complaint on the grounds that it is
18 not required to alter its inventory is DENIED.

19 Defendant next points to ADA Regulation § 36.306 which provides that a public
20 accommodation is not required “to provide its customers, clients, or participants with personal
21 devices, such as wheelchairs...” 28 C.F.R. § 36.306. Relying on its request for judicial notice,
22 Defendant argues that the ParaGolfer is a wheelchair. *See* Mot. at 5; *see also* RJN. Plaintiffs
23 oppose this argument by pointing to the Complaint which alleges that the ParaGolfer is an
24 “adaptive golf cart,” and contains no allegation that the ParaGolfer is a wheelchair. *See* Opp’n at
25 7; Compl. ¶ 16. Plaintiffs offer two declarations to counter Defendant’s argument that the
26 ParaGolfer is a wheelchair, which the Court does not consider. *See* ECF 20, 21. The parties’
27 dispute over whether an adaptive golf cart is a “wheelchair” or “personal device” within the
28 meaning of § 36.306 clearly goes beyond the pleadings and is not properly resolved on a motion to

1 dismiss. *Accord Canyon Lakes*, No. 4:17-CV-03247-KAW, 2017 WL 5479649, at *4 (N.D. Cal.
2 Nov. 15, 2017) (“The determination of whether the ParaGolfer is a wheelchair requires evidence
3 far beyond the pleadings, and must be decided on a motion for summary judgment.”)
4 Accordingly, Defendant’s motion to dismiss the Complaint on the grounds that the ParaGolfer is a
5 wheelchair is DENIED.

6 Turning to Plaintiffs’ second cause of action, Defendant argues that in order to establish a
7 violation of the Unruh Act that is “independent of a claim under the ADA,” a plaintiff must plead
8 intentional discrimination. *See* Mot. at 5. In opposition, Plaintiffs make clear that their Unruh Act
9 claim is premised on the alleged ADA violation, which does not require a showing of intentional
10 discrimination. *See* Opp’n at 8; *see also* *Wilson v. Haria & Gogri Corp.*, 479 F. Supp. 2d 1127,
11 1141 (E.D. Cal. 2007) (“In sum, the court concludes that a plaintiff may obtain damages under the
12 Unruh Act for violations of the ADA even without a showing of intentional discrimination.”)
13 Here, Defendant concedes that an ADA violation on its own constitutes a violation of the Unruh
14 Act. *See* Mot. at 6 (citing Cal. Civ. Code 51(f)). Defendant’s arguments regarding Unruh Act
15 claims “independent of” ADA claims are therefore inapplicable. Because the Court finds that
16 Plaintiffs have adequately alleged a violation of the ADA, Defendant’s motion to dismiss the
17 Unruh Act cause of action is DENIED.

18 For the first time in its reply brief, Defendant raises an argument that Plaintiffs lack
19 standing to pursue “speculative” ADA violations, because the pleading conclusively shows that
20 Plaintiffs have not observed or been deterred by any other conditions, nor have they visited or
21 tried to visit Coyote Creek golf course. *See* Reply at 6-8, ECF 22. The Court is not persuaded by
22 Defendant’s standing argument, and indeed, “[t]he district court need not consider
23 arguments raised for the first time in a reply brief.” *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.
24 2007). Moreover, the Court’s review of the Complaint indicates that the only barriers alleged by
25 Plaintiffs are related to Defendant’s failure to (1) maintain a safe, adaptive golf cart in Coyote
26 Creek’s golf cart fleet for use by disabled patrons; and (2) operate accessible tee time booking
27 policies and procedures. *See, e.g.*, Compl. ¶¶ 12, 16, 20, 38, 43, 47. Accordingly, the Court need
28 not determine whether Plaintiffs have standing to pursue claims based on “speculative” ADA

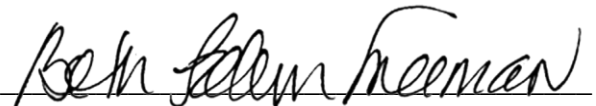
1 violations, because Plaintiffs have only adequately alleged the barriers that they actually observed
2 and encountered.

3 **V. ORDER**

4 For the foregoing reasons, Defendant's motion to dismiss the Complaint is DENIED.
5 Defendant shall file an Answer **on or before March 5, 2018**.

6
7 **IT IS SO ORDERED.**

8
9 Dated: February 12, 2018

10 
11 BETH LABSON FREEMAN
12 United States District Judge