JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: EDCV 14-01478 SJO (KKx) **DATE:** July 7, 2015

TITLE: Chris Langer v. American Wholesale Furniture I, Inc. et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFF:	**COUNSEL PRESENT FOR DEFENDANT:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [Docket No. 13]; **DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT** [Docket No. 16]

These matters are before the Court on Defendant American Wholesale Furniture I, Inc.'s ("Defendant") Motion for Summary Judgment ("Defendant's Motion"), filed May 5, 2015,[1] and Plaintiff Chris Langer's ("Plaintiff") Motion for Leave to File a First Amended Complaint ("Plaintiff's Motion"), filed May 8, 2015. Plaintiff filed an opposition to Defendant's Motion ("Plaintiff's Opposition") on June 8, 2015, to which Defendant filed a reply ("Defendant's Reply") on June 15, 2015. Defendant filed an opposition to Plaintiff's Motion on May 22, 2015 ("Defendant's Opposition"), to which Plaintiff filed a reply ("Plaintiff's Reply") on May 25, 2015. The Court found these matters suitable for disposition without oral argument and vacated the hearings set for June 8, 2015, and June 29, 2015. *See* Fed. R. Civ. P. 78(b). For the reasons stated below, the Court **GRANTS** Defendant's Motion and **DENIES** Plaintiff's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts are undisputed. Plaintiff is a paraplegic and uses a wheelchair for mobility. (Compl. ¶ 1, ECF No. 1; [Def.'s] Statement of Uncontroverted Facts and Conclusions of Law ("Def.'s Facts") ¶ 2, ECF No. 13-4.)[2] Additionally, Plaintiff drives a specially equipped van that has

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[1] Defendant's Motion was noticed for hearing on June 29, 2015 (*see* Mem. of P. & A. in Supp. of [Def.'s Mot.] ("Def.'s Mot.") 1, ECF No. 13-1), while Plaintiff's Motion was noticed for hearing on June 8, 2015. (*See generally* Pl.'s Mem. of P. & A. in Supp. of [Pl.'s Mot.] ("Pl.'s Mot."), ECF No. 16-1.)

[2] Plaintiff does not dispute any of the facts stated in Defendant's Facts. (*See generally* Pl.'s Resp. to [Def.'s Facts], ECF No. 25-1.)

a ramp that deploys from the passenger side and has been issued a Disabled Person parking placard by the state of California. (Compl. ¶ 1; *see also* Def.'s Facts ¶ 2.) Defendant is, or was at the time of the incidents alleged, the real property owner, business operator, lessor, or lessee for American Wholesale Furniture, a furniture store located in Temecula, California (the "Furniture Store" or "Store"). (Compl. ¶ 2; Def.'s Facts ¶ 1.)

On April 6, 2014, Plaintiff visited the Furniture Store, which is a place of public accommodation, to shop. (Compl. ¶¶ 7-8; Def.'s Facts ¶ 3.) Parking spaces are one of the facilities, privileges, or advantages offered by Defendant to customers at its Store. (Compl. ¶ 9.) However, according to Plaintiff's Complaint, "there [was] not a single handicap-accessible parking space available for disabled persons" at Defendant's Store when he visited in April 2014. (Compl. ¶ 10.) Further, although a disabled-accessible parking space once existed in Defendant's parking lot, at the time Plaintiff visited the Furniture Store, this space had "faded beyond recognition." (Compl. ¶ 11; Def.'s Facts ¶ 5.) Plaintiff maintains that Defendant has no policy or procedure in place to ensure that an accessible parking space remains visible in its parking lot and that its handicap parking space is "no longer suitable for disabled customers." (Compl. ¶ 12.)

Plaintiff filed the instant lawsuit on July 18, 2014. (*See generally* Compl.; Def.'s Facts ¶ 4.) In the Complaint, Plaintiff brings four causes of action for: (1) violation of the Americans with Disabilities Act of 1990 ("ADA") 42 U.S.C. §§ 12101, *et seq.* (Compl. ¶¶ 17-23); (2) violation of California's Unruh Civil Rights Act ("Unruh Act" or "Act"), Cal. Civ. Code §§ 51, *et seq.* (Compl. ¶¶ 24-26); (3) violation of California's Disabled Persons Act ("DPA"), Cal. Civ. Code § 54, *et seq.* (Compl. ¶¶ 27-29); and (4) negligence. (Compl. ¶¶ 30-31; *see also* Def.'s Facts ¶ 6.)

In written discovery propounded October 3, 2014, Defendant asked Plaintiff to identify each "architectural barrier" that existed at the Furniture Store at the time of Plaintiff's visit. (Def.'s Facts ¶ 8; Decl. of David P. Hall in Supp. of [Def.'s Mot.] ("Hall Decl.") ¶ 2, Ex. A ("Interrogatories") ¶¶ 5-6, ECF No. 13-2.) Plaintiff objected to this interrogatory on the grounds that it called for a legal conclusion, then responded as follows:

> Notwithstanding the objection and subject to it, Plaintiff visited American Wholesale Furniture on or about April 6, 2014, and discovered that . . . [t]here was not a single accessible parking space available for use by persons with disabilities. Further, there were several blue lines in the parking lot that indicated that a handicap-accessible parking space used to exist at [Defendant's Store]. However, the handicap-accessible parking space was faded beyond recognition on the date of Plaintiff's visit to the [Store].

(Interrogatories ¶¶ 5-6.) Plaintiff did not identify any other alleged architectural barriers affecting Defendant's Furniture Store in his response to the Interrogatories. (*See generally* Interrogatories.)

Defendant's Interrogatories also asked Plaintiff to identify each ADA violation that existed at Defendant's Furniture Store at the time of his visit. (Interrogatories ¶ 7.) Plaintiff's response to the interrogatory again only identified the lack of an accessible parking space. (Interrogatories ¶ 7.) On November 10, 2014, Plaintiff served a supplemental response to Defendant's Interrogatory No. 1, but did not otherwise supplement his responses to the Interrogatories. (Hall Decl. ¶ 3.)

In its Motion, filed May 5, 2015, Defendant requests that the Court: (1) grant summary judgment as to Plaintiff's ADA claim; and (2) dismiss Plaintiff's remaining claims for lack of subject matter jurisdiction. (*See generally* Def.'s Mot.) In his Motion for Leave to Amend, filed May 8, 2015, Plaintiff moves for leave to file a First Amended Complaint alleging additional ADA violations. (*See generally* Pl.'s Mot.)

II. DISCUSSION

A. Legal Standards Underlying Defendant's Motion[3]

Federal Rule of Civil Procedure 56(a) mandates that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the nonmoving party bears the burden of proving the claim or defense, the moving party does not need to produce any evidence or prove the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Instead, the moving party's initial burden "may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* "The mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be insufficient [to preclude summary judgment]; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts."). At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See Anderson*, 477

[3] Defendant maintains that "[t]he dismissal of ADA claims under similar situations" may be obtained through either "motions to dismiss for [lack of] subject matter jurisdiction [or] as motions for summary judgment." (Def.'s Mot. 3 n.1.) Here, "[i]n light of [Defendant's] use of extrinsic evidence and discovery responses," Defendant concluded that "a motion for summary judgment appeared to be the more prudent motion." (Def.'s Mot. 3 n.1.)

U.S. at 249. A court is required to draw all inferences in a light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

B. ADA Claim

The ADA prohibits discrimination based on disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a). Accordingly, a person violates the ADA when he or she fails to remove architectural barriers that deny persons with disabilities access where the barrier's removal is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term "public accommodation" encompasses "shopping center[s] or other sales or rental establishment[s]." 42 U.S.C. § 12181(7)(E).

In order to prevail on his ADA claim, Plaintiff "must show that (1) [he] is disabled within the meaning of the ADA; (2) [D]efendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) [P]laintiff was denied public accommodations by [D]efendant because of [his] disability." *See Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007) (citing 42 U.S.C. §§ 12182(a)-(b)). Additionally, in order to demonstrate "discrimination on account of one's disability due to an architectural barrier, [P]laintiff must also prove that: (1) the existing facility at [D]efendant's place of business presents an architectural barrier prohibited under the ADA, and (2) the removal of the barrier is readily achievable." *See Parr v. L & L Drive-Inn Restaurant*, 96 F. Supp. 2d 1065, 1085 (D. Haw. 2000) (citations and original emphasis omitted). The term "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9).

Under the ADA Accessibility Guidelines ("ADAAG"),[4] any business that provides parking spaces must provide parking spaces accessible to persons with disabilities. *See* 1991 Standards § 4.1.2(5); 2010 Standards § 208.1. One in every six disabled-accessible parking spaces must be van accessible and a parking lot with between 26 spaces and 50 spaces must have two disabled-accessible spaces. 2010 Standards §§ 208.2, 208.2.4.

[4] "In general, a facility is 'readily accessible to and usable by individuals with disabilities' if it meets the requirements promulgated by the Attorney General in the 'ADA Accessibility Guidelines' or the 'ADAAG,' which is essentially an encyclopedia of design standards." *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir. 2011) (citations omitted). The ADAAG were originally established in 1991 ("1991 Standards"), and updated in 2010 ("2010 Standards"). *See* 28 C.F.R. § 36, App. A, Subpart A.

1. ADA Analysis

Here, the following facts are undisputed. Plaintiff is disabled within the meaning of the ADA and Defendant's Furniture Store is a place of public accommodation. (Compl. ¶¶ 1-2; Def.'s Facts ¶¶ 1-2.) The sole ADA violation identified in Plaintiff's Complaint, filed July 18, 2014, is Defendant's failure to provide a visible, ADA-compliant parking space for use by individuals with disabilities. (Def.'s Facts ¶¶ 4-6*; see generally* Compl.)

On August 18, 2014, Defendant hired Jason James ("James"), a Certified Access Specialist, to inspect its parking lot for compliance with the ADA and its corresponding regulations. (Def.'s Facts ¶ 11; Decl. of Jason James in Supp. of [Def.'s Mot.] ("James Decl.") ¶¶ 2-4, ECF No. 13-3.) On August 22, 2014, James returned to Defendant's Store to perform a follow-up inspection of the parking lot ("Follow-up Inspection"). (Def.'s Facts ¶ 12; James Decl. ¶ 5.) At the Follow-Up Inspection, James observed that Defendant's parking lot contained thirteen parking spaces and one marked, disabled-accessible space. (Def.'s Facts ¶ 13; James Decl. ¶ 6.) Additionally, James took photographs of Defendant's disabled-accessible parking space and prepared a report outlining his inspection. (James Decl. ¶¶ 5-6, Ex. B.) Ultimately, James: (1) noted that the disabled-accessible parking space on Defendant's property complied with the ADA's dimensional, signage, and other requirements; (2) issued Defendant a Disability Access Inspection Certificate; and (3) entered into an agreement with Defendant to conduct annual inspections of Defendant's parking lot to assure continued ADA compliance. (*See* Def.'s Facts ¶¶ 13-23; James Decl. ¶¶ 7-11, Exs. B-C.) Finally, on April 30, 2015, James returned to Defendant's property "to check the status of the handicap stall" and observed that the space was "still marked and in the same condition as it was in at the time of [his Follow-Up Inspection on] August 22, 2014." (James Decl. ¶ 12, Ex. D.)

Defendant argues that because James inspected its parking lot and determined that its disabled-accessible parking space complies with the ADA, Plaintiff's ADA claim is moot.[5] (*See* Def.'s Mot. 4-6.) The Court agrees.

The Ninth Circuit has held that "[b]ecause a[n ADA] plaintiff can sue only for injunctive relief . . . a defendant's voluntary removal of alleged barriers prior to trial can have the effect of mooting a plaintiff's ADA claim." *Oliver*, 654 F.3d at 905 (citations omitted). Thus, courts routinely grant

[5] Plaintiff essentially concedes this point in his Opposition, stating that he "does not dispute that the parking has been fixed." (Pl.'s Opp'n 1, ECF No. 25.) Nonetheless, Plaintiff argues that the Court should exercise supplemental jurisdiction over Plaintiff's three remaining state law claims. (Pl.'s Opp'n 1-5.)

motions to dismiss or motions for summary judgment where the plaintiff's ADA claims have been mooted by the defendant's efforts to remedy the alleged architectural barrier. *See, e.g., Kohler v. In-N-Out Burgers*, No. CV 12-05054 GHK, 2013 WL 5315443, at *7-8 (C.D. Cal. Sept. 12, 2013) (motion for summary judgment); *Kohler v. Bed Bath & Beyond of Cal., LLC*, No. EDCV 11-01246 VAP, 2012 WL 2449928, at *12-13 (C.D. Cal. June 27, 2012) (motion for summary judgment); *Langer v. Roclar Co.*, No. CV 14-01623 ODW, 2014 U.S. Dist. LEXIS 66488, at *4-5 (C.D. Cal. May 14, 2014) (motion to dismiss). Here, it is undisputed that Defendant remedied the alleged ADA violation affecting its Store's parking lot: the lack of a visible, disabled-accessible parking space. Because this "alleged barrier[] no longer exist[s], Plaintiff cannot obtain relief from this Court under the ADA." *See In-N-Out Burgers*, 2013 WL 5315443, at *7.

Accordingly, the Court finds that Defendant's successful remedial measures have rendered Plaintiff's ADA claim moot, and **GRANTS** Defendant's Motion for Summary Judgment as to this claim. Because Plaintiff's ADA claim no long presents an actual case or controversy, Plaintiff's first cause of action for violation of the ADA is **HEREBY DISMISSED as moot**.

2. Supplemental Jurisdiction

In his Opposition, Plaintiff argues that the Court should exercise supplemental jurisdiction over his three remaining claims, which are based exclusively on state law. (*See generally* Pl.'s Opp'n.) However, 28 U.S.C. § 1367 provides that "[a] district court may decline to exercise supplemental jurisdiction over a state claim if 'the district court has dismissed all claims over which it has original jurisdiction.'" *Bed Bath & Beyond*, 2012 WL 2449928, at *13 (quoting 28 U.S.C. § 1367(c)(3)). Further, "[t]he Supreme Court has stated, and [the Ninth Circuit] ha[s] often repeated, that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.'" *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). Thus, "[w]here a district court dismisses a federal claim, leaving only state claims for resolution, it should decline jurisdiction over the state claims and dismiss them without prejudice." *Wade v. Reg'l Credit Ass'n*, 87 F.3d 1098, 1101 (9th Cir. 1996) (citing *Les Shockley Racing v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 509 (9th Cir. 1989)).

Here, Plaintiff's three remaining Unruh Act, DPA, and negligence claims are based on California statutes and common law, and "[t]he primary responsibility for developing and applying state law belongs to the state courts." *In-N-Out Burgers*, 2013 WL 5315443, at *8. Further, adjudicating these claims, "would actively frustrate the ADA's goals of providing quick relief for individuals currently facing structural barriers in places of public accommodation[because] it would take away federal resources that could otherwise be devoted to handling ADA claims." *Id.*

Accordingly, in the interests of comity, fairness, and conservation of judicial resources, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims. Plaintiff's second, third, and fourth causes of action are **HEREBY DISMISSED without prejudice.**

C. Legal Standard: Motion for Leave to Amend

In his Motion, filed three days after Defendant's Motion for Summary Judgment, Plaintiff requests leave to amend his Complaint to include additional ADA violations apart from those related to Defendant's parking lot, including alleged travel barriers within Defendant's Store. (*See* Pl.'s Mot. 1; *see also* Decl. of Mark Potter in Supp. of [Pl.'s Mot.] ("Potter Decl.") ¶ 3, ECF No. 16-2, Ex. 2 ("Proposed FAC"), ECF No. 16-3.) Plaintiff makes this request pursuant to Rule 15 of the Federal Rules of Civil Procedure ("Rule 15"). (*See generally* Pl.'s Mot.) Defendant argues that Plaintiff's Motion is "too little, too late" because: (1) it was filed ten months after Plaintiff initiated this lawsuit; (2) provides no explanation for Plaintiff's delay in seeking leave to amend; and (3) is "presumably [intended] to keep the case in federal court." (*See* Def.'s Opp'n 1, 4-8, ECF No. 23.)

Rule 15 provides that where a party is not amending his or her complaint as a matter of course, "[the] party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(1)-(2). The rule also states that "the court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "Although Federal Rule of Civil Procedure 15(a) provides that leave to amend 'shall be freely given when justice so requires,' it 'is not to be granted automatically.'" *In re W. States Wholesale Natural Gas Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (quoting *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990)). Thus, courts in the Ninth Circuit "consider[] the following five factors to assess whether to grant leave to amend: '(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment[,] and (5) whether plaintiff has previously amended his complaint.'" *Natural Gas Litig.*, 715 F.3d at 738 (quoting *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990)). The Court considers each of these factors in turn.

1. Prejudice

The "crucial factor" in determining whether to grant leave to amend under Rule 15 "is the resulting prejudice to the opposing party." *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973); *see also Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003) ("[T]he consideration of prejudice to the opposing party . . . carries the greatest weight.") (citation omitted); *Jackson,* 902 F.2d at 1387 (stating that "[p]rejudice to the opposing party is the most important factor" for courts to consider in adjudicating a motion for leave to amend) (citations omitted). Where "additional claims advance different legal theories and require proof of different facts," courts have found prejudice to the non-moving party. *See Jackson,* 902 F.2d at 1387

(citations omitted). Further, "[a] need to reopen discovery and therefore delay the proceedings [also] supports a district court's finding of prejudice from a delayed motion to amend the complaint." *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (citation omitted); *see also W. Shoshone Nat'l Council v. Molini,* 951 F.2d 200, 204 (9th Cir. 1991) (finding prejudice where "the introduction of a major new evidentiary issue at such a late stage in the litigation w[ould] require extensive additional discovery"). "The party opposing amendment bears the burden of showing prejudice." *DCD Programs Ltd. v. Leighton,* 833 F.2d 183, 187 (9th Cir. 1987) (citation omitted).

Here, Defendant argues it will be prejudiced if Plaintiff is given leave to amend for the following reasons. First, in his proposed amended complaint, Plaintiff seeks to: (1) add a new party to the lawsuit, Charles LLC; and (2) add violations for path of travel barriers that were allegedly discovered in April 2015, one year after Plaintiff's only visit to Defendant's Store alleged in the Complaint. (*See* Def.'s Opp'n 4-5.) Second, Defendant contends that it "relied on the allegations of the [C]omplaint to file [its] motion for summary judgment." (Def.'s Opp'n 5.) For the following reasons, the Court agrees that Defendant will be prejudiced if Plaintiff is granted leave to amend his Complaint.

This matter was pending for almost ten months when Plaintiff filed his Motion on May 8, 2015. (*See generally* Pl.'s Mot.) Additionally, at the Scheduling Conference held May 18, 2015, the Court set a: (1) July 6, 2015 Discovery Cutoff date; (2) August 10, 2015 Pretrial Conference; and (3) August 18, 2015 Trial. (Minutes of Scheduling Conference ("Scheduling Order") 1, ECF No. 20; *see also* ECF No. 21 (correcting the date for the Pretrial Conference).) Although these dates were set after Plaintiff filed his Motion, permitting Plaintiff to add a new defendant to this case at this stage in the litigation would be highly prejudicial to both Defendant and Charles, LLC. *See, e.g., Perez-Falcon v. Synagro W. LLC*, No. CV 11-01645 AWI, 2013 U.S. Dist. LEXIS 44227, at *18-19 (finding that allowing the plaintiff to add a new party "18 months after initiation of the lawsuit and 6 months prior to trial would be highly prejudicial to [the defendant]."). Further, it is likely that discovery would have to be reopened after the July 6, 2015 cutoff date in order for the parties to support their respective claims and defenses, causing further delay. *See Lockheed Martin*, 194 F.3d at 986. Finally, even if Plaintiff were not requesting to add a new defendant to this litigation, his claims arising from architectural barriers not previously mentioned in the Complaint, including the alleged "travel barriers within the [S]tore," (Pl.'s Reply 2, ECF No. 24; *see also* Proposed FAC ¶¶ 12-14), "require proof of different facts." *See Jackson,* 902 F.2d at 1387.

Given the aforementioned prejudice to Defendant, this factor weighs against granting leave to amend.

2. Undue Delay

"Delay alone does not provide sufficient grounds for denying leave to amend." *Hurn v. Ret. Fund Trust of Plumbing, Heating & Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981). However, "[a]lthough delay is not a dispositive factor in the amendment analysis, it is relevant." *Lockheed Martin,* 194 F.3d at 986 (citation omitted). "[I]n evaluating undue delay, [courts] inquire whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) (citations and internal quotation marks omitted). As a general matter, courts also disapprove of lengthy delays between the time the moving party obtained a relevant fact and the time that party sought leave to amend. *See, e.g., Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798-99 (9th Cir. 1991) (eight months); *JJCO, Inc. v. Isuzu Motors Am., Inc.,* No. CV 08-00419 SOM, 2009 WL 3818247, at *5 (D. Haw. 2009) (five months).

Here, Plaintiff filed his Complaint on July 18, 2014, and based his ADA and other claims on an architectural barrier allegedly affecting Defendant's parking lot at the time Plaintiff visited the Furniture Store on April 6, 2014. (Def.'s Facts ¶¶ 3-6; *see generally* Compl.) However, according to the declaration filed with Plaintiff's Motion, Plaintiff or his counsel[6] discovered that paths of travel within and outside of Defendant's Store were blocked with "merchandise and other objects" so that "no wheelchair user could gain entrance or enjoy the facilities" a little more than a year later on April 23, 2015. (*See* Potter Decl. ¶¶ 2-3.) Plaintiff now seeks leave to include these alleged travel barriers in an amended complaint. (*See generally* Pl.'s Mot.; Proposed FAC.) However, as indicated above, in his response to Defendant's Interrogatories, served November 5, 2014, Plaintiff failed to identify any (1) architectural barriers or (2) ADA violations affecting Defendant's Store apart from the alleged lack of a disabled-accessible parking space. (Hall Decl. ¶ 2; Interrogatories ¶¶ 5-7.) Further, Plaintiff provides no explanation regarding what caused his delay in discovering these alleged travel barriers or why he failed to seek leave to amend the Complaint until after Defendant filed its Motion for Summary Judgment.[7] (*See generally* Pl.'s Mot.; Pl.'s Reply.) Based on the foregoing, the Court finds that Plaintiff should have known of or investigated any further architectural barriers at Defendant's Store well before Defendant filed its Motion for Summary Judgment. *See AmerisourceBergen*, 465 F.3d at 953.

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[6] Defendant's Opposition suggests that Plaintiff's counsel, not Plaintiff, encountered the alleged travel barriers inside Defendant's Furniture Store. (*See* Opp'n 9-10.)

[7] This is especially problematic in light of Defendant's representation that its counsel informed Plaintiff that Defendant intended to file a motion for summary judgment based on the mootness of Plaintiff's ADA claim at a meeting between the parties' attorneys on December 30, 2014. (*See* Decl. of David P. Hall in Supp. of [Def.'s Opp'n] ¶ 6, ECF No. 23-1; Opp'n 7.)

The Court finds that there was undue delay in terms of the filing of Plaintiff's Motion. Accordingly, this factor weighs against granting Plaintiff leave to amend. *See, e.g., Nationwide Agribusiness Ins. Co. v. Garay*, No. CV 14-00138 AWI, 2015 WL 756617, at *4-5 (E.D. Cal. Feb. 23, 2015).

3. Bad Faith

In general, absent "evidence in the record which would indicate a wrongful motive," the courts will not deny leave to amend on the basis of bad faith. *See DCD Programs,* 833 F.2d at 187. However, courts have found bad faith where a plaintiff's request for leave to amend constituted "an obvious attempt to stave off summary judgment." *Simmons, III v. Cnty. of L.A.*, No. CV 04-09731 SVW, 2010 WL 3294230, at *1 (C.D. Cal. Aug. 18, 2010) (citing *Schlacter-Jones v. Gen. Tel. of Cal.*, 936 F.2d 435, 443 (9th Cir. 1991); *Parish v. Frazier*, 195 F.3d 761, 764 (5th Cir. 1999)); *see also Trans Video Elecs., Ltd. v. Sony Elecs., Inc.*, 278 F.R.D. 505, 510 (N.D. Cal. 2011) (denying the plaintiff's motion for leave to amend where the motion was made "in bad faith . . . [and] as a last-ditch attempt to avoid the case being dismissed in its entirety" via a motion for summary judgment).

As indicated above, the time at which Plaintiff elected to file his Motion–three days after Defendant filed its Motion for Summary Judgment–is highly suspect. Further, Plaintiff has failed to provide any explanation for this delay. (*See generally* Pl.'s Mot.; Pl.'s Reply.) Accordingly, because Plaintiff's Motion appears to have been filed in bad faith, this factor weighs against amendment. *See Simmons*, 2010 WL 3294230, at *1.

4. Futility

"[F]utile amendments should not be permitted," *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau,* 701 F.2d 1276, 1293 (9th Cir. 1983) (citations omitted), and "[f]utility 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). However, "[plaintiffs] should be granted leave to amend unless it appears beyond doubt that [their amended complaint] would also be dismissed for failure to state a claim [because the plaintiffs] could prove no set of facts in support of their claims which would entitle them to relief." *DCD Programs,* 833 F.2d at 188 (citations, internal quotation marks, and formatting omitted); *see also Miller v. Rykoff-Sexton, Inc.,* 845 F.2d 209, 214 (9th Cir. 1988) ("[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.") (citations omitted).

Here, it does not appear that amendment would be futile because: (1) Plaintiff produced photographic evidence of the alleged travel barriers affecting Defendant's Store (Potter Decl. ¶¶ 2-3, Exs. A-F); and (2) the guidelines in the ADAAG require that a covered site have "[a]t least

one accessible route" with a width of 36 inches "connect[ing] accessible buildings, facilities, elements, and spaces."[8] 1991 Standards § 4.3.2-4.3.3. Because the "Court cannot conclude Plaintiff's proposed amendment is futile . . . this factor does not weigh against amendment." *See Perez-Falcon*, 2013 U.S. Dist. LEXIS 44227, at *17.

5. Previous Amendments

Finally, as stated above, the Court considers "whether [P]laintiff has previously amended [his] complaint," in determining whether to grant leave to amend. *See DCD Programs*, 833 F.2d at 186 n.3. Here, as indicated in his Motion, Plaintiff has not previously sought leave to amend the Complaint. (*See* Pl.'s Mot. 5-6.) Thus, this factor is neutral. *See Perez-Falcon*, 2013 U.S. Dist. LEXIS 44227, at *14-15.

6. Conclusion

On balance, the Court finds that the factors of undue delay, bad faith, and prejudice weigh strongly against granting Plaintiff's Motion for Leave to File a First Amended Complaint. Notably, Plaintiff has provided no explanation for his failure to request leave to amend until ten months after filing suit. Further, his decision to file such a motion three days after Defendant filed its Motion for Summary Judgment appears to have been made in bad faith. Finally, Defendant has been prejudiced by this delay because it relied on Plaintiff's representations regarding his ADA claims in marshaling its evidence and moving for summary judgment.[9] Accordingly, the Court **DENIES** Plaintiff's Motion.

III. RULING

[8] For the most part, Defendant's arguments regarding futility, speak less to whether Plaintiff could prove a "set of facts . . . that would constitute a valid and sufficient claim or defense," *see Miller,* 845 F.2d at 214, and more to whether Plaintiff's failure to supplement his responses to the Interrogatories would bar him from supplying certain evidence in support of a motion or at trial under Federal Rule of Civil Procedure 37. (*See* Def.'s Opp'n 9-10.)

[9] Additionally, Defendant will likely suffer further prejudice, along with Charles, LLC, unless the Court re-opens discovery regarding Plaintiff's alleged travel barrier claims.

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For the foregoing reasons, the Court **GRANTS** Defendant's Motion and **DENIES** Plaintiff's Motion. Plaintiff's state law-based claims under the Unruh Act and DPA, as well as his negligence claim, are **HEREBY DISMISSED without prejudice** for lack of subject matter jurisdiction.

This matter shall close.

IT IS SO ORDERED.