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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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11 THERESA BROOKE, a married  
12 woman dealing with her sole  
and separate claim,

13 Plaintiff,

14 v.

15 CAPITOL REGENCY LLC, a  
16 California Limited Liability  
Company dba Hyatt Regency  
17 Sacramento,

18 Defendants.

No. 2:16-cv-02070-JAM-EFB

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

19 This matter involves a self-described "tester" who calls  
20 various hotels to inquire whether they provide ADA compliant pool  
21 access for disabled persons like herself. Capitol Regency LLC  
22 ("Defendant"), operator of one such hotel, moves this Court to  
23 dismiss the action for lack of subject matter jurisdiction.<sup>1</sup> For  
24 the reasons set forth below, the Court grants Defendant's motion,  
25 without prejudice.

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27 <sup>1</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was  
scheduled for May 16, 2017.

1 I. FACTUAL ALLEGATIONS

2 The following facts are taken as true for the purposes of  
3 this motion:

4 Plaintiff Theresa Brooke is a disabled woman confined to a  
5 wheelchair. Compl. at ¶ 4. She resides in Pinal County,  
6 Arizona. Id. at ¶ 1. On some unspecified date, Plaintiff  
7 contacted Defendant's hotel "for purposes of booking a room for  
8 personal and business affairs in Sacramento." Id. at ¶ 24.  
9 Plaintiff asked whether the hotel pool or Jacuzzi had a pool lift  
10 or means of access for disabled persons. Id. Defendant's  
11 representative informed her that the Jacuzzi did not have such  
12 means of access. Id. Plaintiff's agent—again, on some  
13 unspecified date—"independently verified that the Jacuzzi does  
14 not have a lift in position for use or other access, but that a  
15 lift was stored in the corner of the pool area[.]" Id. at ¶ 25.  
16 The agent reported its findings to Plaintiff and provided  
17 Plaintiff with photographs showing "the lack of accessibility."  
18 Id. "But for these barriers, Plaintiff would lodge with  
19 Defendant in the near future." Id. "If and when defendant  
20 removes these barriers, Plaintiff will lodge with Defendant's  
21 hotel since she has several upcoming planned visits to  
22 Sacramento." Id.; see also ¶¶ 29, 30, 34, & 38.

23 Plaintiff filed this action against Defendant for  
24 discrimination under the Americans with Disabilities Act ("ADA")  
25 due to Defendant's alleged failure to remove architectural  
26 barriers to make its lodging services fully accessible to  
27 disabled individuals. Id. at ¶¶ 41-49. Plaintiff seeks  
28 declaratory and injunctive relief on that claim, as well as

1 attorney's fees and costs. Id. at ¶ 49. Plaintiff's second and  
2 third causes of action arise under state law, the California  
3 Unruh Civil Rights Act and the California Disabled Persons Act,  
4 respectively. Id. at ¶¶ 50-61.

## 5 6 II. OPINION

### 7 A. Legal Standard

8 Defendant moves to dismiss the complaint under Federal Rule  
9 of Civil Procedure 12(b)(1) for lack of standing under Article  
10 III. MTD at 4-5; see Maya v. Centex Corp., 658 F.3d 1060, 1067  
11 (9th Cir. 2011) ("[L]ack of Article III standing requires  
12 dismissal for lack of subject matter jurisdiction[.]").

13 A disabled person claiming access discrimination in  
14 violation of the ADA must establish Article III standing in order  
15 to maintain their lawsuit. Chapman v. Pier 1 Imports, Inc., 631  
16 F.3d 939, 946 (9th Cir. 2011). "Because the remedy available to  
17 a private litigant under the ADA is an injunction, Plaintiff has  
18 the burden of proving both an injury in fact and the real threat  
19 of future injury." Johnson v. Overlook at Blue Ravine, LLC, No.  
20 2:10-cv-02387-JAM-DAD, 2012 WL 2993890, at \*2 (E.D. Cal. Jul. 20,  
21 2012) (citing Chapman). An injury in fact must be concrete and  
22 particularized and actual or imminent, not conjectural or  
23 hypothetical. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560  
24 (1992). The injury in fact element is met when a disabled  
25 plaintiff has encountered a barrier violating the ADA. Chapman,  
26 631 F.3d at 947 (citing Doran v. 7-Eleven, Inc., 524 F.3d 1034,  
27 1044 (9th Cir. 2008)). The ADA plaintiff can show a likelihood  
28 of future injury either "when he [or she] intends to return to a

1 noncompliant accommodation and is therefore likely to reencounter  
2 a discriminatory barrier” or “when discriminatory architectural  
3 barriers deter him [or her] from returning to a noncompliant  
4 accommodation.” Chapman, 631 F.3d at 950.

5 B. Analysis

6 Plaintiff argues that her “call and confirm method” of  
7 ascertaining ADA violations provides her with “actual notice” of  
8 the deficiencies, which “triggers the deterrent effect doctrine  
9 and therefore confers standing.” Opp. at 1-2. Plaintiff  
10 contends this question is open in the Ninth Circuit and there is  
11 a split between the districts on the answer. Id. at 2, 5.

12 The Court finds that the weight of authority supports  
13 dismissal of Plaintiff’s ADA claim. Plaintiff must suffer an  
14 injury in fact to invoke Article III standing. However,  
15 Plaintiff does not allege that she visited Defendant’s hotel or  
16 encountered a barrier there. Without such allegations,  
17 “Plaintiff’s injury is not ‘particularized and concrete’ . . .  
18 [or] ‘actual or imminent.’” Brooke v. Peterson, 185 F. Supp. 3d  
19 1203, 1210 (C.D. Cal. 2016) (“Binding precedent supports that  
20 under any theory of standing, including the deterrent effect  
21 doctrine, an ADA plaintiff must have previously visited a  
22 noncompliant place of accommodation to have an injury-in-fact  
23 under Article III.”) . Although some Ninth Circuit dicta seems  
24 to leave the door open for relief, see Peterson, 185 F. Supp. 3d  
25 at 1207-10 (discussing the “deterrent effect” ADA cases in  
26 detail), the Ninth Circuit has not held that plaintiffs have  
27 standing in such circumstances. To the contrary, in each of the  
28 Circuit’s principal “deterrent effect” cases, the “plaintiffs’

1 actual knowledge of at least one of the non-compliant barriers  
2 came through their own percipient, personal encounters with the  
3 barriers and were not simply being reported by an independent  
4 agent." Brooke v. Pacific Gateway Ltd., No. 3:17-cv-0796-CAB-  
5 WVG, slip op. at 2 (S.D. Cal. May 9, 2017); see Pickern v.  
6 Holiday Quality Foods Inc., 293 F.3d 1133 (9th Cir. 2002); Doran,  
7 524 F.3d 1034; Chapman, 631 F.3d 939. The fact that the Ninth  
8 Circuit permits ADA plaintiffs to rely on expert evidence to  
9 challenge barriers the plaintiff did not personally encounter  
10 does not affect the analysis, Doran, 524 F.3d at 1047, as this  
11 allowance only arises where standing is already established.

12 It appears that every district court in California to  
13 address this question has concluded Plaintiff lacks standing.  
14 See Brooke v. Peterson, 185 F. Supp. 3d at 1207-10, 1213  
15 (dismissing four related complaints for failure to allege an  
16 injury in fact); Brooke v. Pacific Gateway Ltd., No. 3:17-cv-  
17 0796-CAB-WVG (S.D. Cal. May 9, 2017) ("In sum, the Court finds  
18 Plaintiff['s] reliance on a telephone call and report of an  
19 independent agent insufficient to confer standing."); Brooke v.  
20 Newport Hotel Holding LLC, No. 8:16-cv-00426-CJC-DFM (C.D. Cal.  
21 Apr. 29, 2016) ("[T]he Court concludes for its purposes that  
22 absent extraordinary circumstances, an ADA plaintiff should have  
23 firsthand knowledge of the presence of at least one barrier in an  
24 establishment before acquiring standing to sue to remove that  
25 barrier or others. This standard is consistent with the Ninth  
26 Circuit's guidance in Pickern and alleviates some of the obvious  
27 problems with ADA plaintiffs suing a multitude of establishments  
28 from afar."); Brooke v. Ayres-Laguna Woods, No. 16-cv-00347-CJC-

1 KES, 2016 WL 1714880 (C.D. Cal. Apr. 12, 2016) (dismissing  
2 complaint for failure to allege injury in fact in analogous  
3 circumstances); Brooke v. Perry Family Trust, No. 2:16-cv-04648-  
4 DMG-AJW (C.D. Cal. Oct. 3, 2016) (same); Brooke v. Everest Hotel,  
5 Inc., No. 5:16-cv-01378-DMG-PJW (C.D. Cal. Oct. 31, 2016) (same);  
6 see also Order to Plaintiff to Show Cause Why the Action Should  
7 Not Be Dismissed for Lack of Standing, Brooke v. H & K P'ship,  
8 No. 1:16-cv-1406-AWI-JLT (E.D. Cal. Oct. 26, 2016) (order issued  
9 for 28 related cases) ("Thus, because Plaintiff did not stay at-  
10 or even visit-the hotels and did not personally encounter the  
11 alleged barriers, it appears Plaintiff lacks standing under  
12 Article III to pursue her claims for violations of the ADA.").  
13 The Court also finds that Judge Curiel's dismissal order in  
14 Brooke v. Kalthia Grp. Hotels supports dismissal. No. 15-cv-  
15 01873-GPC-KSC, 2015 WL 7302736 (S.D. Cal. Nov. 18, 2015).  
16 Contrary to Plaintiff's argument, only dictum from that decision  
17 lends credence to Plaintiff's position. Judge Curiel ultimately  
18 dismissed Plaintiff's complaint for lack of standing and did not,  
19 as Plaintiff contends, Opp. at 5-6, hold that Plaintiff's "call  
20 and confirm method" confers standing. Kalthia Grp. Hotels, 2015  
21 WL 7302736, at \*5 ("A review of cases . . . reveals that an  
22 allegation that Plaintiff's agent verified the violation is not  
23 sufficient to confer standing."). Furthermore, Judge Curiel  
24 distinguished that case from the Arizona cases where Plaintiff  
25 alleged that she "independently verified" the absence of a pool  
26 lift and was thus found to meet the standing requirements. Id.

27 In accordance with the California district courts cited  
28 above, this Court holds that Plaintiff's "call and confirm

1 method," as alleged in the Complaint, does not confer standing.  
2 Plaintiff's ADA claim is thus dismissed, without prejudice.

3 C. Supplemental Jurisdiction

4 The only remaining claims are state law claims. Where a  
5 district court dismisses all federal claims in an action for lack  
6 of subject matter jurisdiction, it cannot exercise supplemental  
7 jurisdiction and must dismiss the state law claims. Herman  
8 Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 806 (9th Cir.  
9 2001). Plaintiff's second and third causes of action are thus  
10 dismissed without prejudice.

11  
12 III. ORDER

13 For the reasons set forth above, the Court GRANTS  
14 Defendant's Motion to Dismiss WITHOUT PREJUDICE. If Plaintiff  
15 elects to file an amended Complaint she should do so within  
16 twenty days of the date of this Order and Defendant should file  
17 its responsive pleading within twenty days thereafter. If  
18 Plaintiff does not file an amended Complaint the clerk will be  
19 directed to close this file.

20 The Court issued its Order re Filing Requirements for Cases  
21 Assigned to Judge Mendez ("Order") on August 30, 2016. ECF No.  
22 3-2. The Order limits memoranda in support of and in opposition  
23 to motions to dismiss to fifteen pages and reply memoranda in  
24 support of motions to dismiss to five pages. The Order also  
25 states that violations of the page limit will result in monetary  
26 sanctions against counsel in the amount of \$50.00 per page and  
27 that the Court will not consider any arguments made past the page  
28 limit. Defendant's Reply Memorandum in support of its Motion to

1 Dismiss is four pages longer than the page limit. As such, the  
2 Court has not considered any arguments made after page five of  
3 the Reply.

4 Counsel for the Defendant is ordered to pay \$200.00 to the  
5 Clerk of the Court within five days of the date of this Order.

6 IT IS SO ORDERED.

7 Dated: May 17, 2017

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9 JOHN A. MENDEZ,  
10 UNITED STATES DISTRICT JUDGE  
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