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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THERESA BROOKE, A Married Woman
Dealing With Her Sole And Separate
Claim,

Plaintiff,

v.

PACIFIC GATEWAY LTD., LP, a
California limited partnership d/b/a
MARRIOT MARQUIS SAN DIEGO
MARINA,

Defendant.

Case No.: 3:17-CV-0796-CAB-(WVG)

**DISMISSAL FOR LACK OF
SUBJECT MATTER JURISDICTION**

After reviewing the complaint in this matter, the Court was not satisfied that it has subject matter jurisdiction over this dispute. Accordingly, on April 20, 2017, the Court ordered Plaintiff to show cause why this case should not be dismissed for lack of subject matter jurisdiction. [Doc. No. 3.] On April 26, 2017, Plaintiff filed her response to the Order to Show Cause (“OSC”) [Doc. No. 4.] Plaintiff’s response failed to quell the concerns identified in the Court’s OSC.

Plaintiff’s response to the OSC proclaims that Plaintiff is a professional tester hunting for ADA violations. [Doc. No. 4 at 1, 4.] In essence, Plaintiff is contending that as a disabled person, all she needs for standing to sue a hotel for ADA violations is to call

1 the hotel to inquire about ADA accessibility features and have someone else confirm in
2 person that the hotel is not compliant. This Court remains unaware of any binding authority
3 regarding the triggering of the deterrent effect doctrine by the “call and confirm method.”
4 For example in both *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133 (9th Cir. 2002)
5 ¹ and *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034 (9th Cir. 2008)², plaintiffs’ actual knowledge
6 of at least one of the non-complaint barriers came through their own percipient, personal
7 encounters with the barriers and were not simply being reported by an independent agent.
8 Neither of these cases stands for the proposition that an ADA plaintiff has standing if she
9 is deterred from visiting a noncompliant place of public accommodation even if she has
10 never visited that accommodation. *See also Chapman v. Pier 1 Imports (U.S.) Inc.*, 631
11 F.3d 939, 949-950 (9th Cir. 2011)³ (even under the deterrent effect doctrine an ADA
12 plaintiff must have encountered the barriers to have an “injury-in-fact”). Furthermore,
13 Plaintiff’s offer to “drive to San Diego tomorrow (or whenever the Court grants leave to
14 amend), go to Defendant’s Jacuzzi, hop out of her wheelchair, and attempt the impossible
15 of accessing Defendant’s Jacuzzi,” [Doc. No. 4 -1 at 4:22-5:3], so she can personally
16 encounter the barrier appears to this Court to be an attempt to make an end run around this
17 standing requirement.

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19 ¹ In *Pickern*, the plaintiff testified in a deposition that the defendant’s grocery stores were his favorite and
20 his first choice for groceries, and that although the allegedly non-compliant store in question was located
21 70 miles from the plaintiff’s hometown, Plaintiff visited that area almost every week to see his
22 grandmother. *Pickern*, 293 F.3d at 1135

22 ² In *Doran*, although the store in question was 550 miles from the plaintiff’s home, the plaintiff had visited
23 the store on ten to twenty prior occasions and asserted that he planned to visit Anaheim, where the store
24 was located, at least once a year on annual trips to Disneyland.

23 ³ In *Chapman*, the plaintiff sued for barriers he personally encountered during a visit to the accommodation
24 and those that were separately identified by an expert. The Court characterized the deterrent effect
25 doctrine as “an ADA plaintiff can show a likelihood of future injury when he intends to return to a
26 noncompliant accommodation as is therefore likely to reencounter a discriminatory architectural barrier.
27 Alternatively, a plaintiff can demonstrate sufficient injury to pursue injunctive relief when discriminatory
28 architectural barriers deter him from returning to a non-compliant accommodation. . . That is, an ADA
29 plaintiff suffers an injury-in-fact either because discriminatory architectural barriers deter him from
30 returning to a facility or because they “otherwise interfere with his access” to the facility. *Chapman*, 631
31 F.3d at 950.

1 Moreover, Plaintiff’s response does not establish the imminent injury required for
2 standing to seek injunctive relief. The Hotel in question is hundreds of miles from
3 Plaintiff’s residence, and Plaintiff has never patronized the Hotel. Similar ADA cases filed
4 by Plaintiff in this district were also before this Court that were ultimately dismissed. In
5 the orders of dismissal the Court conducted a thorough analysis of the imminent injury
6 issue which are equally applicable here. *See Theresa Brooke v. Gloriett Bay Inn, L.L.C.*,
7 Case No.: 15-CV-2854-CAB-BGS, Doc. No. 8; *Theresa Brooke v. Inn At Sunset Cliffs,*
8 *LLC*, Case No.: 15-CV-2857-CAB-BGS, Doc. No. 9; *Theresa Brooke v. Otoy Hospitality,*
9 *Inc.*, Case No.: 16-CV-309-CAB-KSC, Doc. No 6; *Theresa Brooke v. Excel Hotel Group,*
10 *Inc.*, Case No.: 16-cv-323-CAB-KSA, Doc. No. 6. Here, Plaintiff has failed to provide the
11 Court with specific evidence necessary to establish Plaintiff has suffered an imminent
12 injury. Rather, Plaintiff simply vaguely alleges that she intends to travel to San Diego on
13 business or pleasure sometime in the coming months. [Doc. No. 1 ¶¶ 29, 30]. Moreover,
14 despite the opportunity to demonstrate her travel history to San Diego or at least that she
15 has specific trips planned for the near future, Plaintiff simply states that “as a professional
16 tester . . . I am willing to visit the hotel at issue if the Court grants leave to amend the
17 Complaint and I am willing to book a room for a date six months from now. I often go to
18 Southern California as a tester but have no current set date when I will go. I could go
19 tomorrow or a month from now. I *do* go on a consistent basis though.” [Doc. No. 4-1 ¶12]
20 (emphasis in original). The Court does not interpret these statements as establishing
21 Plaintiff’s intent to visit the Hotel, to the contrary, they establish that when Plaintiff called
22 the Hotel she never intended to visit San Diego or stay at the Hotel and that she does have
23 any concrete plans to visit San Diego in the future.

24 Accordingly, the Court concludes that Plaintiff has failed to provide with specific
25 evidence necessary to establish Plaintiff’s concrete plans to visit San Diego in the future
26 and that she would stay in the Hotel if not for the accessibility issues. Whatever speculative
27 likelihood exists that Plaintiff may some day return to San Diego is insufficient to confer
28 standing upon her to sue the Hotel. *See, e.g., Johnson v. Overlook at Blue Ravine, LLC,*

1 No 2:10-CV-2387 JAM-DAD, 2012 WL 2993890, at *3-4 (E.D. Cal. Jul. 20, 2012)
2 (holding that the plaintiff lacked standing where the apartment complex in question was
3 only fifteen miles from the plaintiff's residence because the plaintiff had no specific plans
4 to return to the complex and presented no evidence of any ties to the complex or the town
5 in which it was located); *Luu v. Ramparts, Inc.*, 926 F.Supp. 2d 1178, 1182-84 (D. Nev.
6 2013) (distinguishing *Pickern* and holding that the plaintiff lacked standing because he
7 failed to present any evidence of a specific intent to return to the Luxor hotel in Las Vegas
8 and did not demonstrate that he prefers the Luxor or that it was the most convenient hotel
9 and casino location for him).

10 In sum, the Court finds Plaintiff reliance on a telephone call and report of an
11 independent agent insufficient to confer standing. Furthermore, despite being given the
12 opportunity by the Court, Plaintiff has not demonstrated any likelihood of returning to San
13 Diego, let alone explained why, if Plaintiff were to return to San Diego, she would choose
14 to stay in this Hotel over all others but for the accessibility issues related to its Jacuzzi. As
15 a result, Plaintiff has not shown a "real and immediate threat of repeated injury in the
16 future" (*Chapman*, 631 F.3d at 946), that would be cured by injunctive relief Plaintiff seeks
17 here. Accordingly, Plaintiff's ADA claim is **DISMISSED WITH PREJUDICE**.

18 Plaintiff's ADA claim was the only claim over which Plaintiff alleged the Court had
19 original subject matter jurisdiction. In light of the dismissal of the ADA claim on
20 jurisdictional grounds, the Court does not have discretion to retain supplemental
21 jurisdiction over Plaintiff's state-law claims and must dismiss them. *Herman Family*
22 *Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001) ("If the district court
23 dismisses all federal claims on the merits, it has discretion under § 1367(c) to adjudicate
24 the remaining claims; if the court dismisses for lack of subject matter jurisdiction, it has no
25 discretion and must dismiss all claims."). Accordingly, Plaintiff's remaining state law

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1 claims are **DISMISSED WITHOUT PREJUDICE** to Plaintiff re-filing such claims in
2 state court. This case is **CLOSED**.

3 It is **SO ORDERED**.

4 Dated: May 9, 2017



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6 Hon. Cathy Ann Bencivengo
7 United States District Judge
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