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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 THEODORE TRAPP, on his own behalf and
11 on behalf of all others similarly situated,

12 Plaintiff,
13 v.

Case No.: 2:09-cv-00995-LDG-PAL

14 BIG POPPA'S, LLC, A Nevada limited
15 liability company d/b/a BADDA BING
16 MEN'S CLUB; SKY TOP VENDING, INC.,
17 a Nevada Corporation d/b/a CAN CAN
18 ROOM; LA FUENTE, INC., a Nevada
19 corporation d/b/a CHEETAH's; C.P.FOOD
20 AND BEVERAGE, INC., a Nevada
21 corporation d/b/a CLUB PARADISE; DÉJÀ
22 VU SHOWGIRLS OF LAS VEGAS, LLC, a
23 Nevada limited liability company d/b/a DÉJÀ
24 VU SHOWGIRLS; PALOMINO CLUB,
25 INC.; SHAC, LLC, a Nevada limited liability
26 company d/b/a SAPPHIRE; K-KEL, INC., a
27 Nevada corporation d/b/a SPEARMINT
28 RHINO; D.2801 WESTWOOD, INC., a
Nevada corporation d/b/a TREASURES;
LITTLE DARLINGS OF LAS VEGAS, LLC,
a Nevada limited liability company d/b/a
LITTLE DARLINGS; O.G. ELIADES, A.D.,
LLC, a Nevada limited liability company d/b/a
OLYMPIC GARDENS; LAS VEGAS
ENTERTAINMENT, LLC, a Nevada limited
liability company d/b/a LARRY FLYNT's
HUSTLER CLUB; MICHAEL A. SALTMAN
d/b/a MINXX; RICK'S LAS VEGAS; FRIAS
MANAGEMENT, LLC, a Nevada limited
liability company d/b/a ACE CAB
COMPANY and A-NORTH LAS VEGAS
CAB; WESTERN CAB COMPANY, a
Nevada corporation d/b/a WESTERN CAB

DEFENDANT D.2801 WESTWOOD, INC.
D/B/A TREASURES' MOTION TO
DISMISS UNDER RULE 12(b)(6) OR FOR
MORE DEFINITE STATEMENT UNER
RULES 12(e)

1 COMPANY and WESTERN LIMOUSINE,
2 NEVADA CHECKER CAB
3 CORPORATION, a Nevada corporation d/b/a
4 CHECKER CAB COMPANY;; NEVADA
5 STAR CABCORPORATION, a Nevada
6 corporation d/b/a STAR CAB COMPANY;
7 NEVADA YELLOW CAB CORPORATION,
8 a Nevada corporation d/b/a YELLOW CAB
9 COMPANY; LUCKY CAB COMPANY OF
10 NEVADA, a Nevada corporation d/b/a
11 LUCKY TRANS; SUN CAB, INC., a Nevada
12 limited liability company d/b/a CLS
13 TRANSPORTATION LAS VEGAS; ON
14 DEMAND SEDAN SERVICES, LLC, a
15 Nevada limited liability company d/b/a ODS
16 LIMOUSINE and ODS CHAUFFEURED
17 TRANSPORTATION; BLS LIMOUSINE
18 SERVICE OF LAS VEGAS, INC., a Nevada
19 corporation d/b/a BLS LIMOUSINE
20 SERVICE OF LAS VEGAS; DESERT CAB,
21 INC., a Nevada corporation d/b/a DESERT
22 CAB COMPANY and ODYSSEY
23 LIMOUSINE; BELL TRANS A NEVADA
24 CORPORATION, a Nevada corporation d/b/a
25 BELL TRANS; TONY CHONG, an
26 individual; and DOE EMPLOYEES 1-1000;

Defendants.

18 Defendant D.2801 Westwood, Inc., d/b/a Treasures (“Treasures”), moves the Court to
19 dismiss the Complaint with prejudice pursuant to Fed. R. Civ. P. 8 and 12(b)(6) on the grounds
20 that it fails to state a claim against Treasures upon which relief can be granted, or, in the
21 alternative, for a more definite statement pursuant to Fed. R. Civ. P. 12(e).

22 Dated this 10th August, 2009.

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23
24 By: /s/ Ross C. Goodman
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27 *Attorneys for Defendant*
28 *D.2801 Westwood, Inc. d/b/a Treasures*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 Plaintiff has not provided a single allegation of any wrongful conduct against Treasures
4 but wants to proceed with protracted and expensive discovery to see what may turn up. This is
5 precisely what the Supreme Court has forbidden in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

6 Plaintiff fails to plead any factual content - as required under *Iqbal* - that allows this
7 Court to draw a reasonable inference that Treasures is liable for the misconduct alleged. Instead,
8 Plaintiff's naked assertions of an alleged scheme involving kickbacks are devoid of any facts
9 specifying wrongful conduct involving Treasures requiring dismissal under Rules 8 and 12(b)(6)
10 of the Federal Rules of Civil Procedure. In the alternative, Plaintiff should be required to amend
11 his Complaint to allege a more definite statement under Rule 12(e) especially given Rule 9(b)'s
12 heightened pleading requirements. Fed. R. Civ. P. 9(b).

13 FACTUAL BACKGROUND

14 Plaintiff alleges that he was diverted from being delivered to the club of his first choice to
15 a different club after being deceived by an unidentified taxicab driver that the second place of
16 business was a "better" club. See Compl. at ¶¶63-63. Plaintiff asserts that this diversion is
17 common practice which is motivated by payments from different clubs for the delivery of such
18 customers. See Compl. at ¶¶2 and 70-71. From this single incident, Plaintiff speculates without
19 any specificity that Treasures and other defendants are somehow embroiled in a vast conspiracy
20 to deceive and divert customers from their intended choice of business. See Compl. at ¶¶63-71.

21 However, these non-specific allegations, which amount to nothing more than legal
22 conclusions masquerading as facts, are insufficient as a matter of law to state a claim.

23 Accordingly, the Complaint should be dismissed.

24 ARGUMENT

25 The allegations fall far short of the requirements of Fed R. Civ. P. 8 as described by the
26 Supreme Court recently in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The Court explained that,
27 although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,'
28 [] it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at

1 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint will not
2 “suffice if it tenders ‘naked assertion[s]’ devoid of further factual enhancement.” *Id.*

3 Accordingly, “[t]o survive a motion to dismiss, a complaint must contain sufficient
4 factual matter, accepted as true, to “state a claim that is plausible on its face.” *Id.* “A claim has
5 facial plausibility when the plaintiff pleads *factual content* that allows the court to draw the
6 *reasonable inference* that the defendant is liable for the misconduct alleged.” *Id.* (emphasis
7 added). Thus, while “Rule 8 marks a notable and generous departure from the hyper-technical,
8 code-pleading regime of a prior era, [] it does not unlock the doors of discovery for a plaintiff
9 armed with nothing more than conclusions.” *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S.
10 at 556)

11 **I. The Allegations are Insufficient to State a Claim Under Rule 8 and *Iqbal*.**

12 Under *Iqbal*, Plaintiff must allege facts sufficient to support an inference that Treasures
13 engaged in misconduct in violation of the Nevada’s R.I.C.O. statute and Deceptive Trade
14 Practices Act. The Complaint does not allege any facts, let alone sufficient facts, to support any
15 such inference. Specifically, Plaintiff fails to allege a single drop off, payment, or even a
16 description of any diversion to constitute a claim for relief against Treasures. To the contrary,
17 the Complaint supports the *opposite* inference, *i.e.*, that Treasures did not engage in any
18 wrongful conduct. At most, the Complaint alleges that Treasures engaged in some unspecified
19 conduct at unspecified time that was fraudulent. But, it is well-established that the court need
20 not “necessarily assume the truth of legal conclusions merely because they are cast in the form of
21 factual allegations,” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)
22 (internal quotations omitted). There is not a single allegation in the Complaint that supports the
23 inference that Treasures did anything in violation of the Nevada’s R.I.C.O. Statute and Deceptive
24 Trade Practices Act. The Supreme Court has made clear that such non-specific allegations,
25 which amount to nothing more than legal conclusions masquerading as facts, are insufficient as a
26 matter of law to state a claim. Accordingly, the Complaint should be dismissed.

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1 **II. Alternatively Plaintiff Should be Required to Amend its Complaint to Provide a**
2 **More Definite Statement.**

3 If the Court permits Plaintiff to proceed on his allegations, Plaintiff should provide a
4 more definite statement pursuant to Fed. R. Civ. P. 12(e) and given the Fed. R. Civ. P. 9(b)
5 heightened pleading requirements.

6 A party may move for a more definite statement where a pleading is “so vague or
7 ambiguous that the party cannot reasonably prepare a response.” Fed, R. Civ. P. 12(e). The
8 current form of Plaintiff’s complaint is devoid of any allegations that Treasures cannot
9 meaningfully respond. As discussed above, it is not clear from the Complaint as written which
10 allegations (if any) related to conduct attributed to Treasures. There are no allegations of
11 specific wrongful conduct.

12 Moreover, the alleged statements purportedly made by an unidentified taxicab driver may
13 be his opinion or viewpoint protected by the First Amendment. *Dodds v. American*
14 *Broadcasting Co.*, 145 F.3d 1053, 1065 (9th Cir. 1998) (a statement is not actionable if it cannot
15 reasonably be interpreted as stating actual facts that are provably false). For instance, each
16 alleged statement is not objectively verifiable: (1) “There are better clubs than Play it Again
17 Sam”; (2) “There are better clubs”; (2) “The girls are better at other clubs”; (4) “Play it Again
18 Sam is kinda sketchy; and (5) “I’ll take you to a better club.” *See* Compl. at ¶66.

19 In its present form, the Complaint lacks sufficient factual matter to draw even a
20 reasonable inference of misconduct especially since the driver is unknown and such analysis
21 turns on the extent and use of these figurative or hyperbolic statements. *Knievel v. ESPN*, 393
22 F.3d 1068, 1075 (9th Cir. 2005) (any statement can be parsed or set forth in a limited context that
23 could be interpreted incorrectly).

24 In addition, as detailed above, Plaintiff fails to state with particularity, as required under
25 Fed. R. Civ. P. 9(b) involving allegations of civil R.I.C.O. and deceptive trade practices claims,
26 “the time, place, and specific content of the false representations as well as the identities of the
27 parties to the misrepresentation.” *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th
28 Cir. 1989). Moreover, Plaintiff fails to allege a second consecutive criminal act to even trigger a

1 claim under Nevada’s civil R.I.C.O. statute. *Siragusa v. Brown*, 971 P.2d 801, 810 (Nev. 1998).
2 Specifically, Plaintiff must allege at least two “not isolated” incidents relating to racketeering
3 that have the same or similar: (1) pattern; (2) intent; (3) results; (4) accomplices; (5) victims; or
4 (6) methods of commission, or are otherwise interrelated by distinguishing characteristics and
5 are not isolated incidents. *Hale v. Burkhardt*, 104 Nev. 632, 637, 764 P.2d 866, 869 (1998).

6 Here, Plaintiff simply alleges a single cab ride with an unidentified driver rather than two
7 predicate acts required to state a claim for relief under Nevada’s Civil R.I.C.O. statutes.

8 **III. Plaintiff Lacks Standing to Sue Treasures for Any Violation of Civil R.I.C.O and**
9 **Deceptive Trade Practices Because Plaintiff failed to Plead an Injury And Fails**
10 **to Allege An Amount in Controversy That Exceeds \$5,000,000.00.**

11 Plaintiff lacks standing to bring its claim against Treasures because Plaintiff failed to
12 plead a violation of civil R.I.C.O or deceptive trade practices, and therefore, has not established
13 any breach or injury. “Article III standing is a controlling element in the definition of a case or
14 controversy.” *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 849m 848 (9th
15 Cir. 2007) (alteration and internal quotation marks omitted). “[T]o satisfy Article III’s standing
16 requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and
17 particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly
18 traceable to the challenged action for the defendants; and (3) it is likely, as opposed to merely
19 speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc.*
20 *v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000) (quoting *Lujan v. Defenders*
21 *of Wildlife*, 504 U.S. 555, 560-561.).

22 Specifically, Plaintiff claims that Treasures engaged in a conspiracy to divert customers.
23 *See* Compl. at ¶¶63-71. The generalized allegation that Plaintiff was diverted to a “better” club
24 from the club of his first choice because of statements made by an unidentified driver fails to
25 allege how he was injured. *Allum v. Valley Bank of Nevada*, 109 Nev. 280, 282, 849 P.2d 297
26 (1993). Instead, Plaintiff fails to even allege whether the second club was in fact “better” than
27 the first club and whether the driver’s statements caused Plaintiff to spend more money on the
28

1 taxi fare or club cover charge. Therefore, Plaintiff has pled only a “conjectural” or
2 “hypothetical” violation of the Nevada’s R.I.C.O. statute and Deceptive Trade Practices Act and
3 has failed to demonstrate any “actual” or “particularized” harm. *See Laidlaw*, 528 U.S. at 180-
4 181. The Complaint is devoid of *factual content* that allows the court to draw the *reasonable*
5 *inference* that Treasures is liable for diverting customers and that the Plaintiff was in fact
6 harmed.

7 In light of Plaintiff’s failure to allege even a second predicate act, much less, the amount
8 of damages the Plaintiff was somehow injured by the diversion *i.e.*, inflated admission fee,
9 increased cab fare or gratuity, the Complaint lacks any facts necessary beyond speculation that
10 the amount in controversy exceeds \$5,000,000.00. *See*, Class Action Fairness Act, 28 U.S.C.
11 §1332(b). Accordingly, absent such showing as required by the Class Action Fairness Act,
12 Plaintiff fails to allege how this Court has original jurisdiction over this matter

13 **CONCLUSION**

14 Plaintiff fails to plead any factual content - as required under *Iqbal* - that allows this
15 Court to draw a reasonable inference that Treasures is liable for the misconduct alleged. Instead,
16 Plaintiff’s naked assertions of an alleged scheme involving kickbacks are devoid of any facts
17 specifying wrongful conduct involving Treasures requiring dismissal under Rules 8 and 12(b)(6)
18 of the Federal Rules of Civil Procedure.

19 Contrary to Rule 9(b)’s heightened pleading requirements, Plaintiff only alleges one
20 generalized allegation involving an unidentified taxicab driver, which statements may be
21 protected under the First Amendment and not objectively verifiable, rather than two predicate
22 acts as required to state a claim for relief under Nevada’s civil R.I.C.O. statutes. Moreover, this
23 Court lacks original jurisdiction over this matter given Plaintiff’s failure to allege any
24 preliminary facts, beyond speculation, that the amount in controversy exceeds \$5,000,000.00.

25 For these reasons, the Court should grant Treasures’ motion to dismiss the complaint
26 pursuant to Rules 8 and 12(b)(6) of the Federal Rules of Civil Procedure. In the alternative, the
27 Court should require Plaintiff to provide a more definite statement under Rules 9(b) and 12(e) of
28 the Federal Rules of Civil Procedure. As such, Treasures requests that the Court schedule oral

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argument at its earliest convenience.

Respectfully submitted this 10th day of August, 2009.

GOODMAN LAW GROUP

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CERTIFICATE OF MAILING

I hereby certify that on the 10th day of August, 2009 the foregoing **DEFENDANT**
D.2801 WESTWOOD, INC. D/B/A TREASURES' MOTION TO DISMISS UNDER RULE
12(b)(6) OR FOR MORE DEFINITE STATEMENT UNER RULES 12(e) was electronically
served upon all attorneys of record in this matter.

/s/

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