SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
GREGORY F. HURLEY, Cal. Bar No. 126791
ghurley@sheppardmullin.com
MICHAEL J. CHILLEEN, Cal. Bar No. 210704
mchilleen@sheppardmullin.com
BRADLEY J. LEIMKUHLER, Cal. Bar No. 261024
bleimkuhler@sheppardmullin.com
650 Town Center Drive, 4th Floor
Costa Mesa, California 92626-1993
Telephone: 714.513.5100
Facsimile: 714.513.5130

Attorneys for Defendants,
INSOMNIAC HOLDINGS, LLC and
SPEEDWAY MOTORSPORTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

Jonathan Corbett,

Plaintiff,

v.

Insomniac Holdings, LLC, Speedway Motorsports, Inc.,

Defendants.

Case No. 2:16-cv-03604-PSG-JEM

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Judge: Hon. Philip S. Gutierrez
Hearing Date: January 23, 2017
Hearing Time: 1:30 p.m.
Courtroom: 880

Trial Date: July 18, 2017
Action Filed: May 24. 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases — Page(s)

Statutes

Other Authorities

Defendants Insomniac Holdings, LLC ("Insomniac") and Speedway Motorsports, Inc. ("SMI") (collectively "Defendants") hereby submit their memorandum of points and authorities in support of their Motion for Summary Judgment or, in the Alternative, Summary Adjudication ("Motion"). Defendants also move the Court to dismiss, pursuant to Fed. R. Civ. P. 12(i), SMI for lack of personal jurisdiction.

I. INTRODUCTION

Plaintiff Jonathan Corbett ("Plaintiff") has brought this lawsuit alleging that Defendants violated the Americans with Disabilities Act ("ADA"), the California Unruh Act ("Unruh Act"), and Nevada's nondiscrimination law due to certain alleged policies concerning prescription and over-the-counter medication that were allegedly in effect at the 2016 Electric Daisy Carnival ("EDC") at the Las Vegas Motor Speedway ("LVMS") in Las Vegas, Nevada.

Plaintiff's claims fail for several, independent reasons. First, SMI is not a proper defendant in this action as the Court lacks personal jurisdiction over it. Second, Plaintiff lacks standing to bring this action because he did not suffer any injury-in-fact as required to satisfy Article III. Third, Plaintiff's claims are moot because the 2016 EDC has already occurred. Fourth, Plaintiff failed to request a reasonable modification of Defendants' alleged policies. Fifth, in the alternative, Plaintiff's claims are not yet ripe because no relevant policies have yet been developed for future EDC festivals. Sixth, Plaintiff's claims under the Unruh Act fail as a matter of law because the Unruh Act does not apply to this action. Finally, to the extent the Court does not dismiss all of Plaintiff's claims with prejudice, then the Court should decline supplemental jurisdiction over Plaintiff's state-law claims.

II. FACTUAL BACKGROUND

A. Plaintiff's Allegations.

Plaintiff alleges that certain policies pertaining the use of medication at the June 2016 EDC in Las Vegas, NV violate the ADA, the Unruh Act, and Nevada's

nondiscrimination law. The EDC was a music and nightlife festival that took place over 3 days in June 2016. (Complaint ¶ 16). The EDC occurred at the LVMS. (*Id*.).

Plaintiff alleges that Insomniac, the company that produced the EDC, published a policy on its website that maintained a list of acceptable and prohibited items. (*Id*. at ¶¶ 19-20). Specifically, this policy prohibited patrons from bringing in to the venue "over-the-counter medication." (*Id*.). The policy allowed patrons to bring prescription drugs into the event, but required patrons to declare the medication upon entry. (*Id*.).

Plaintiff alleges that he is has "legitimate medical conditions" that require him to carry both prescription and over-the-counter medication with him when he leaves his home. (*Id*. at ¶¶ 21-22). Further, Plaintiff states he does not want to have to disclose his "medication" to event personnel when he arrives. (*Id*. at ¶ 23). As a result, Plaintiff claims that these policies violate the ADA.

B. Policies At 2016 EDC.

Unfortunately, illegal drugs, such as MDMA (ecstasy) and LSD (acid) that are sometimes brought to EDC by concert goers can easily be hidden in over-the-counter and/or prescription medications. Tiny amounts of these drugs can be extremely dangerous. Fatalities have occurred at the EDC as a result of these drugs. As a result, EDC developed certain policies to combat this problem. The 2016 EDC drugs policies are described below.

Prescription Medications:

The EDC policy in 2016 expressly allowed prescription medications and their use as directed. EDC's medication policy is reviewed before and after each event and is subject to change from festival to festival. As stated in the attached declaration of Maren Steiner, who was the Director of Health and Safety for the 2016 EDC, the policy and practice at the EDC in 2016 was as follows. Each gate area was staffed by trained medical personnel. When a guest wanted to bring in

prescription medicine, the medical personnel interacted with that guest. They compared the prescription with a picture identification, and ascertained if what was in the prescription container matches the shape, size, color, etc. for that medication. If the medication matched the prescription, then the guests were permitted to bring the medication into the EDC. Guests were permitted to maintain possession of prescription medications, such as inhalers, EpiPens, diabetic medications, birth control, and antibiotics, on their persons. (Steiner Decl. ¶ 5).

There was an exception for prescription medications that are considered "controlled substances," such as narcotic pain medication and anxiety medication. Guests were permitted to maintain possession of such controlled prescription medication up to ten (10) pills or less per bottle. If the medication in question was a controlled substance and the guest had greater than ten (10) pills in quantity, that medication was checked into the main medical tent. (Steiner Decl. ¶ 6).

The medical tents were staffed by medical professionals such as doctors, nurses, and paramedics experienced in emergency situations. Most of these professionals had worked many of these festivals around the US and the world. At the main medical tent, the guest's medication was scanned and labeled with a bar code. The guest was then issued a wrist band with a bar code on it that matched the medication. The medication was held in the main medical tent and the guest returned to the tent to use the medicine as directed in the prescription. If something happened to the guest away from the tent, staff was trained to check for the medical wrist band, a call would then made and if the medication was needed it could be rushed to the scene and administered, or the guest could be taken by emergency vehicle to the main medical tent. When the guest left the festival, the guest picked up the remainder of their prescription medication. (Steiner Decl. ¶ 7).

Over-the-Counter Medications:

The 2016 festival did not allow guests to bring in over the counter medications (OTCs). For guests who wanted OTCs, they were available for free

upon request at the main medical tent, as well as at any of the other several medical tents on-site where a nurse was present. In addition, OTCs were available for purchase at the several general stores. The medical tents and general stores had numerous types of OTC medication. Insomniac does not believe there were any categories of OTC medication that were not available in the medical tents and/or the general stores. (Steiner Decl. ¶ 8).

At no point in 2016 did the policy ever allow for a guest to be queried about what their disability was, or why they might need a certain prescription. Insomniac made no judgment on a guest's need for any type of medication. (Steiner Decl. ¶ 9).

In responses to Defendants' discovery, Plaintiff has refused to disclose a medical condition impacted by these 2016 policies. Moreover, as Plaintiff has refused to disclose whether or not Plaintiff uses, or intends to use, illegal drugs, it is reasonable to assume that this is merely an attempt to have a federal court strike a reasonable safety policy designed to protect against deaths from illegal drugs. (Exhibit A at Response to RFA No. 9). It is hard to envision a clearer abuse of the ADA statute and the jurisdiction of this Court.

C. Undisputed Material Facts.

The following undisputed facts are relevant to this Motion.

1) SMI is incorporated in Delaware, its principal place of business is in North Carolina, does not maintain any offices in California, is not (and has never been) a resident of California, and is not required to maintain and does not maintain registered agents for service in California.

2) SMI (1) does not regularly conduct business in California; (2) does not maintain a place of business in California, (3) has no employees, servants, or agents based within California; (4) does not maintain and has never maintained continuous and systematic contact with California, (5) does not sell any products in California, and (6) did not purposely conduct or engage in any activities which give rise to Plaintiff's lawsuit.

3) The EDC took place in Las Vegas, Nevada at the LVMS.

4) The EDC took place in June 2016.

5) Plaintiff did not attend the June 2016 EDC.

6) Plaintiff alleges that policies in effect for the June 2016 violated the ADA, the Unruh Act, and the Nevada nondiscrimination law.

7) Any relevant policies concerning over-the-counter and/or prescription medication for a potential 2017 EDC in Nevada have yet to be developed.

8) Plaintiff did not request Insomniac to modify its alleged policy concerning over-the-counter or prescription medication before bringing this lawsuit.

III. ARGUMENT

A. The Court Lacks Personal Jurisdiction Over SMI

As an initial matter, the Court lacks personal jurisdiction over SMI and, therefore, SMI is not a proper defendant in this case. Plaintiff's conclusory allegations imputing liability to SMI fail to establish a *prima facie* case of personal jurisdiction over SMI. The power of a federal court to exercise personal jurisdiction depends on: (i) whether an applicable state statute confers personal jurisdiction; and (ii) whether assertion of such jurisdiction comports with federal constitutional principles of due process. *Haisten v. Grass Valley Medical Reimbursement*, 784 F.2d 1392, 1396 (9th Cir. 1986). A *prima facie* showing of jurisdiction requires Plaintiff to produce admissible evidence that, if believed, would be sufficient to establish the existence of personal jurisdiction. *Data Disc., Inc. v. Sys. Tech. Assoc.*, 557 F.2d 1280, 1285 (9th Cir. 1995). Mere allegations of sufficient contacts are not enough. *Id*.

Because SMI does not engage in any of the conduct necessary to establish jurisdiction under California's long-arm statute, it is not subject to personal jurisdiction in this state.

1. SMI Lacks Sufficient Contact With California To Subject It To Personal Jurisdiction In This State.

California's long-arm statute allows personal jurisdiction to the extent permitted by the Due Process Clause of the Constitution. Cal. Code Civ. Proc. § 410.10. The Due Process Clause requires that a non-resident defendant have "minimum contacts" with the forum such that exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[1]

The minimum contacts standard can be satisfied in one of two ways. Plaintiff must show that the defendant is subject either to (i) general personal jurisdiction; or (ii) specific personal jurisdiction. *Roth v. Garcia Marque*, 942 F.2d 617, 620 (9th Cir. 1991). Neither exists here.

a. SMI Is Not Subject To General Personal Jurisdiction.

A defendant may be held subject to general personal jurisdiction where its forum-related activities are substantial, continuous, and systematic. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004).

SMI does not have substantial, continuous, and systematic contacts with California. Rather, SMI is incorporated in Delaware, its principal place of business is in North Carolina, does not maintain any offices in California, is not (and has never been) a resident of California, and is not required to maintain and does not maintain registered agents for service in California. (UMF No. 1). SMI (1) does not regularly conduct business in California; (2) does not maintain a place of business in California, (3) has no employees, servants, or agents based within California; (4) does not maintain and has never maintained continuous and systematic contact with California, (5) does not sell any products in California, and (6) did not purposely

[1] As § 410.10 is coextensive with federal due process requirements, the jurisdictional inquiries under state law and federal due process "merge into one analysis." *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991).

conduct or engage in any activities which give rise to Plaintiff's lawsuit. (UMF No. 2).

For lack of qualifying contacts, SMI cannot be held subject to general personal jurisdiction in California. *See, e.g., Von Grabe v. Sprint*, 312 F. Supp. 2d 1285, 1295 (S.D. Cal. 2003) ("Such lack of contacts generally are held sufficient to successfully challenge the exercise of general jurisdiction.").

b. SMI IS Not Subject To Specific Personal Jurisdiction.

A defendant may be held subject to specific jurisdiction where: (i) it has done some act to purposely avail itself of the privilege of conducting activities in the forum; (ii) the complaint arises out of the defendant's forum-related activities; and (iii) the exercise of jurisdiction is reasonable. *Schwarzenegger*, 374 F.3d at 802. If the plaintiff fails to satisfy either of the first two prongs, an inquiry into reasonableness is not necessary as personal jurisdiction cannot be established. *Id*. Plaintiff cannot establish either of the first two prongs as to SMI.

First, SMI does not purposely avail itself of California's resources. It does not conduct any business in California, and it does not otherwise have any qualifying contracts with California employees. (*See* Section III(A)(1)(a), *supra*). Even if Plaintiff could prove contacts through a subsidiary, the mere choice to conduct business in California through a subsidiary does not constitute purposeful availment sufficient to satisfy the first prong of this test. *Sonora Diamond Corp. v. Sup. Ct.*, 83 Cal. App. 4th 523, 553 (2000) ("Despite the parent's obvious volitional choice to enter the California market through a subsidiary, the Supreme Court made it clear that this alone was not enough.").

Second, the Complaint does not arise out of SMI's forum-related activities because SMI did not participate in the actions giving rise to this litigation. All of Plaintiff's causes of action center around an event that took place in Nevada – not California. (UMF No. 3). In fact, Plaintiff's entire theory of liability for SMI is based on the concept that it is liable as the owner of the LVMS and allegedly

allowing Insomniac to operate the EDC pursuant to Insomniac's policies. (Complaint ¶¶ 34-35). These statements, even if true, only would subject SMI to jurisdiction in Nevada – as the state where the event took place – and not California.

Plaintiff has failed to establish any facts that would subject SMI to personal jurisdiction in California. Therefore, his Complaint against SMI must be dismissed.

B. Plaintiff Lacks Standing To Sue.

Plaintiff has failed to establish he has standing under Article III of the United States Constitution. To show standing, "a plaintiff has the burden of proving: (1) that he or she suffered an 'injury in fact,' (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Standing is a jurisdictional limitation; it is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Organization for the Advancement of Minorities with Disabilities v. The Brick Oven Restaurant*, 406 F. Supp. 2d 1120, 1125 (S.D. Cal. 2005), quoting *Lujan*, 504 U.S. at 560. Because Plaintiff lacks standing, "the court lacks jurisdiction over the civil action." *OAMD*, 406 F. Supp. 2d at 1125.

To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548; *Lujan*, 504 U.S. at 560. For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548. A "concrete" injury must be "de facto"; that is, it must actually exist. *Id*. An ADA plaintiff "can establish standing to sue for injunctive relief either by demonstrating deterrence, or by demonstrating injury-in-fact coupled with an intent to return to a

noncompliant facility." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F. 3d 939, 944 (9th Cir. 2011). Plaintiff cannot show either.

Courts have interpreted this condition to require that an ADA plaintiff actually have encountered an alleged barrier to have standing to sue. *E.g. Pickern v. Holiday Foods*, 293 F.3d 1133, 1138 (9th Cir. 2002) (plaintiff had personally visited defendant's store and therefore personally observed and encountered the barriers at the store); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1038 (9th Cir. 2008) (finding that a plaintiff who had visited a 7-Eleven store "on several occasions" had standing to challenge other violations in the store); *Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000); *Resnick v. Magical Cruise Co., Ltd.*, 148 F. Supp. 2d 1298, 1301-02 (M.D. Fla. 2001) (plaintiff's review of website was insufficient to confer standing and finding that belief plaintiff would encounter discrimination at some unspecified time the future did not constitute a concrete and particularized injury).

In this case, Plaintiff cannot establish he ever personally suffered injury because EDC already took place and he concededly did not attend. (UMF Nos. 4-5). Therefore, Plaintiff never personally experienced the injury he claims to have alleged.

The following case is illustrative: In *Brooke v. Peterson*, 2016 WL 2851440 (C.D. Cal. May 13, 2016), an ADA plaintiff alleged that a pool at defendant's hotel lacked a pool lift. However, the plaintiff conceded that she had not actually visited or lodged at defendant's hotel before bringing suite. Instead, the plaintiff attempted to premise her standing on the grounds that she would call the defendant hotel, inquire whether their pool or Jacuzzi tub had a pool lift. If the hotel responded in the negative, then her agent would then visit the hotels and "verify" the lack of a pool lift. The Court rejected plaintiff's arguments that this was sufficient to establish standing. The Court noted that the case law in the Ninth Circuit has conferred standing on plaintiffs "only after visiting the place of public

accommodation and encountering at least one barrier there." *Id*. at *7. The Court explained:

> Binding precedent supports that under any theory of standing, including the deterrent effect doctrine, an ADA plaintiff must have previously visited a noncompliant place of public accommodation to have an injury-in-fact under Article III. *Chapman*, 631 F.3d at 949, 950; *Doran*, 524 F.3d at 1040, 1041, 1047. Without ever visiting the hotels and encountering the barriers, Plaintiff's injury is not 'particularized and concrete.' *See Doran*, 524 F.3d at 1040; *Pickern*, 293 F.3d at 1138. And without ever visiting the hotels and encountering the barriers, Plaintiff's injury is not 'actual or imminent.' *See Doran*, 524 F.3d at 1040; *Pickern*, 293 F.3d at 1138. Whether the case law requires Plaintiff to *encounter* the barriers or if it is enough that Plaintiff have *personal, percipient knowledge* of the barriers doesn't matter here, as Plaintiff has never even visited the hotels."

Id. at 2015 WL 2851440, *6; *see also Brooke v. Newport Hotel Holding LLC*, Case No. 16-00426-CJC (Order dated April 29, 2016), at *6-8 ("It is not too much to ask of ADA plaintiffs that they personally witness or encounter at least one ADA violation at a public accommodation before suing to remedy that violation or others."); *Brooke v. The Irvine Company LLC*, Case No. 16-00438-DOC (Order dated October 7, 2016) (same), *Advocates for Individuals with Disabilities LLC v. WSA Properties LLC*, Case No. 16-02375-PHX (Order dated October 3, 2016) (same).

The Supreme Court's recent decision in *Spokeo* reaffirms this reasoning by emphasizing that a plaintiff *must* have suffered an injury in fact to have standing. 136 S. Ct. at 1547-48.

Here, Plaintiff appears to premise his entire theory of standing on the grounds that he reviewed the website for the event and claims he was deterred from attending

the 2016 EDC because of these policies. (Complaint ¶¶ 22-24, UMF No. 5). The facts and circumstances around this lawsuit demonstrate why this is not sufficient. As Plaintiff did not attend the event, Plaintiff is forced to engage in rank speculation concerning what the policies actually were, what the procedures what have looked like in practice, and whether Defendants would have accommodated any reasonable requests to modify its policy for him on account of his alleged disability. Therefore, it is entirely unknown whether Plaintiff would have ever been specifically and adversely impacted by the challenged policies.

Further, the standing analysis requires that an ADA plaintiff demonstrate a real an immediate harm of future injunctive relief. In *Midgett v. Tri-County Met. Transp. Dist. of Oregon*, 254 F.3d 846 (9th Cir. 2001), the Ninth Circuit held that in order to be entitled to injunctive relief, an ADA plaintiff must prove that he faces a threat of real and immediate irreparable harm. *See Id*. at 850; *see also Luu v. Ramparts, Inc.*, 926 F. Supp. 2d 1178, 1182 (D. Nev. 2013) ("[I]solated, past incidents of ADA violations do not support an inference that a plaintiff faces a real and immediate threat of continued, future violations of the ADA in the absence of injunctive relief."); *Stan v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 119 (N.D.N.Y. 2000); *Dorsett v. Southeastern Pennsylvania Transp. Authority*, 2005 WL 2077252 (E.D. Penn. Aug. 28, 2005).

Plaintiff cannot show that he faces a real and immediate threat of future harm because any relevant policies concerning over-the-counter and/or prescription medication for any future EDC festivals in Nevada have yet to be developed. (UMF No. 7). Therefore, Plaintiff has no standing to obtain injunctive relief.

In sum, Plaintiff lacks standing to bring his claims and his case should be dismissed.

C. Plaintiff's Claims For Injunctive Relief Are Moot.

Relatedly, Plaintiff's claims are also moot. Plaintiff's claims are limited to the allegations in his Complaint. In *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903

(9th Cir. 2011), the Ninth Circuit confirmed that a plaintiff must identify all alleged access barriers in his complaint in order to give the defendant fair notice under Fed. R. Civ. Proc. 8. The only alleged barrier at issue in this case are Defendants' alleged policies for the June 2016 EDC. (UMF No. 6).

"Mootness is a jurisdictional defect that can be raised at any time by the parties or the court *sua sponte*." *Parr v. L&L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1087 (D. Haw. 2000). A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001). "The question is whether there can be any effective relief." *West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000). "Past exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." *Renne v. Geary*, 501 U.S. 312, 320-21 (1991). "This requisite ensures that the courts are able to grant effective relief, rather than rendering advisory opinions." *Medical Society of New Jersey v. Herr*, 191 F. Supp. 2d 574, 581 (D.N.J. 2002).

"The only remedy available for a violation of the Americans with Disabilities Act under a private right of action is injunctive relief. Accordingly, if no ADA violations exist at the time the court is asked to provide injunctive relief, the ADA claim is moot because there is no basis for relief and there is nothing for the court to order the facility to change." *Gasper v. Marie Callender Pie Shops*, 2006 U.S. Dist. LEXIS 96929, *4 (C.D. Cal. 2006).

In this case, Plaintiff's claim is indisputably moot because the EDC took place in June 2016. As a result, the Court cannot order the injunctive relief sought by Plaintiff in his Complaint. Therefore, Plaintiff's claim is moot.

D. <u>In the Alternative, Plaintiff's Claims Are Not Yet Ripe.</u>

In the alternative, even if the Court were to find that Plaintiff's claims were not "moot," then the Court should determine that Plaintiff's claims are not yet ripe for this Court's adjudication. Any relevant policies concerning over-the-counter

and/or prescription medication for the 2017 EDC have yet to be developed. (UMF No. 7). Therefore, Plaintiff's claims are not yet ripe for review.

The following cases are illustrative: In *Calloway v. Thomas*, 2009 WL 1925225 (D. Or. 2009), a district court held that an inmate's claim that the defendant agency would not consider early placement at a residential reentry center pursuant to recently adopted changes to the placement review process was not ripe for review. The court reasoned that the claims were unripe because they had not yet been applied to petitioner (and may never be):

> "With respect to petitioner's claims that the BOC refuses to consider inmates for twelve months RRC time, I conclude they are not ripe. Petitioner appears to concede that he has not received pre-release RRC placement review under the October 2008 regulations, the April 14 Memorandum, or Programs Statement 7310.04, implementing § 3624(c), because two years remain before his projected release date. *A review of the record demonstrates that these rules have not been applied to petitioner in a concrete and particularized way.* Because petitioner is not presently entitled to a RRC assessment under § 3624(c), he has not demonstrated a specific present objective harm or a specific future harm. Indeed, his projected release date is tentative as some intervening event may impact when he receives that review." *Id.* at *4 (emphasis added).

See also Thompson v. Smith, 2008 WL 1734495, *4 (E.D. Cal. 2008), *adopted in full*, 2008 WL 1970318 (E.D. Cal. 2008); *Aguilar v. Woodring*, 2008 WL 4375757, *3-4 (C.D. Cal. 2008) (same).

Similarly, in *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1246-52 (3d Cir. 1996), the Third Circuit found that a sex offender who had been released from prison did not have a ripe claim to challenge a statute that would require notification to private citizens *if* the local prosecutor should determine that he

presented a moderate or high risk of offending again. The court found that it was a matter of speculation whether a moderate or high risk determination would ever be made. Moreover, there were no facts to illuminate the operation or possible effects of the notification provisions. *Id*. at 1246-52.

Here, Plaintiff's claims are not yet ripe for review as no policies or procedures concerning drugs and/or medications at future EDCs have been developed or finalized. (UMF No. 7). In addition, it is entirely speculative whether Plaintiff will attend a future EDC. It is further speculative whether Plaintiff will ever be subject to these policies. Therefore, there is simply no record for the Court to evaluate whether these assumed policies have specifically harmed Plaintiff. It is further entirely possible that Plaintiff will ever attend an EDC in the future. It is also possible that Plaintiff's need for medication will change and/or Defendants will accommodate a request from Plaintiff to modify its policy. Therefore, even if the Court determines that Plaintiff's claims are not moot, they are not yet ripe for adjudication.

E. Plaintiff's Claims Fail Because He Failed To Request A Reasonable Modification to Insomniac's Policy Before Bringing Suit.

Plaintiff's claims fail for the additional reason that he failed to request a reasonable modification to Defendants' alleged policy. In order to obtain injunctive relief under the ADA, a plaintiff bears the burden of proving that he made a requested modification to the defendants' policy, that the request was reasonable, and that the defendants refused that request. *See Mannick v. Kaiser Foundation Health Plan*, 2006 WL 2168877, at *12 (N.D. Cal. 2006) ("*Johnson* held that the plaintiff bears the burden of proving that a modification was requested and that the requested modification was reasonable. . . Plaintiff did not meet his burden because he did not show that he requested a transfer as a reasonable modification, and also because he did not provide evidence showing that a transfer was a reasonable modification."); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F. 3d 1052 (5th

Cir. 1997); *see also Alumni Cruises, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290, 1305 (S.D. Fla. 2013) ("The plaintiff bears the burden of proving that [he] requested a modification and that the modification sought is reasonable.").

Here, Plaintiff failed to request that Defendant modify its policy in advance of bringing this lawsuit. (UMF No. 8). Therefore, Plaintiff cannot meet his burden to show that he requested Defendants make a modification to their policy.

F. The Unruh Act Does Not Apply To This Action.

Plaintiff's claims under the Unruh Act should be dismissed in their entirety because it does not apply to this action. The Unruh Act protects "all persons within the jurisdiction of this state" against discrimination by business establishments. Cal. Civil Code § 51. The jurisdiction of the Unruh Act is expressly limited to violations taking place in California. *See Archibald v. Cinerama Hawaii Hotels, Inc.*, 73 Cal. App. 3d 152, 159 (1977) (holding that "section 51 by its express language applies only within California); *see also Keum v. Virgin America, Inc.*, 781 F. Supp. 2d 944, 955 (2011) (granting defendant's motion for judgment on the pleadings because the alleged violation of the Act did not occur in California, even though the final destination of the flight was California); *Warner v. Tinder, Inc.*, 105 F. Supp. 3d 1083, 1109 (C.D. Cal. 2015) (Unruh act does not have extraterritorial reach).

Here, the alleged discrimination, if it had occurred, would have taken place at a music festival in Las Vegas, Nevada. (UMF Nos. 3-4, 6). Plaintiff alleges he is a resident of Miami, Florida. (Complaint ¶ 5). Therefore, no discrimination took place in California. As a result, the Unruh Act does not apply to Plaintiff's claims.

IV. TO THE EXTENT THE COURT DOES NOT DISMISS ALL OF PLAINTIFF'S CLAIMS, IT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION.

To the extent the Court does not dismiss Plaintiff's state-law claims with prejudice, the Court should decline supplementary jurisdiction over them.

Under 28 U.S.C. § 1367(c), courts may properly exercise their discretion to decline supplemental jurisdiction if *any* of the four statutory grounds exist:

> "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

28 U.S.C. § 1367(c).

As explained below, in this case, three of the four statutory grounds exist for declining supplemental jurisdiction.

A. Dismissal Of Plaintiff's Federal Claims Warrants Dismissal Of Her State-Law Claims.

As the Supreme Court has instructed, once the federal claims are dismissed courts should decline supplemental jurisdiction over related state-law claims:

> "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine judicial economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state-law claims."

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, fn. 7 (1988); *Wentzka v. Gellman*, 991 F.2d 423, 425 (7th Cir. 1993) ("[W]e said quite clearly that, where a federal claim drops out before trial a district court should not retain the state law claims absent extraordinary circumstances"); *Acri v. Varian Assoc's, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1996) ("The Supreme Court has stated, and we have 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'").

In ADA barrier cases, courts properly and routinely decline supplemental jurisdiction over related state-law access claims once the ADA cause of action has been dismissed. *See, e.g., Wilson v. Costco Wholesale Corporation,* 426 F.Supp.2d 1115, 1124 (S.D. Cal. 2006) ("Because the Court has dismissed all claims over which it has original jurisdiction in this matter, the Court will decline to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims"); *Harris v. Stonecrest Care Auto Ctr., LLC,* 472 F. Supp. 2d 1208, 1220 (S.D. Cal. 2007) (same).

For example, in *Rodriguez v. Ralphs Grocery Company,* 2009 WL 1101550 (9th Cir. 2009), the Ninth Circuit stated that "if the federal claim is dismissed for lack of subject matter jurisdiction, a district court has no discretion to retain the supplemental claims for adjudication, and must dismiss the state law claims without prejudice." *Id.* at 2.

Likewise, in *Oliver v. Ralphs Grocery Company*, 654 F.3d 903 (9th Cir. 2011), the Ninth Circuit upheld the district court decision to decline supplemental jurisdiction over the plaintiff's state-law access claims once his ADA claim had been dismissed:

> "We finally turn to [Plaintiff's] argument that the district court erred in declining to exercise supplemental jurisdiction over his state law claims. By granting summary judgment to Ralphs and Cypress Creek on [Plaintiff']'s ADA claim, the district court, properly disposed of all claims over which it had original jurisdiction. Because the balance of the factors of judicial economy, convenience, fairness, and comity did not tip in favor of retaining the state law claims after the dismissal of the ADA claim, *San-ford v. MemberWorks, Inc.,* 625 F.3d 550, 561 (9th Cir. 2010) ...the district court did not abuse its discretion in dismissing [Plaintiff]'s state law claims without prejudice."

Id. at 911.

The reasoning behind these cases is that dismissing the state-law claims promotes the values of comity and fairness. *See, e.g., Kemper v. Sacramento Radiology Medical Group,* 2007 WL 2481938, *6 (E.D. Cal. 2007) ("The *Gibbs* values of comity and fairness do not weigh in favor of the federal court deciding Plaintiffs' state disability and damage claims. Accordingly, the court declines to continue exercising supplemental jurisdiction over Plaintiffs' remaining state law claims and therefore these are dismissed under 28 U.S.C. §1367(c)(3)"); *Oliver v. Ralphs Grocery Company,* 654 F.3d 903, 911 (9th Cir. 2011) (same).

A. Plaintiff's Unruh Act Claim Raises Novel And Complex Issues Of State Law.

Courts have recognized that claims under the Unruh Act raise novel and complex issues of state law, providing another basis to decline supplemental jurisdiction. For example, in *Grutman v. The Regents of the University of California,* 807 F.Supp.2d 861 (N.D. Cal. 2011), the court explained that the way in which damages are calculated presents novel and complex issues of state law:

> "Here, the Court declines to exercise supplemental jurisdiction because Plaintiffs claim raises novel and difficult questions of state law, the resolution of which will have signification implications for enforcement of the [California Unruh Civil Rights Act]. In particular, the results of this and similar litigation will be dramatically different depending on whose interpretation of Section 52(a) the Court adopts...neither the case law nor the legislative history offered by Defendant as to the 2008 amendment require that the Court find that a plaintiff who encounters architectural barriers on a daily basis in her residence should be treated differently from plaintiffs who encounter architectural barriers, over a series of visits, to other types of business establishments. The court notes also that the tension between *Doran* and *Botosan* as to whether daily damages are available under Section

> 52 is salient in this case ... under these circumstances, the Court concludes that this is a matter of state law that is better left to the California courts to decide."

Id. at 870.

Likewise, the recently-enacted SB 1186 amendments to Plaintiff's state-law claims also present novel and complex issues regarding how damages are calculated. These amendments were adopted to "address the misuse of Sections 52 and 54.3 of the Civil Code by a small minority of disability rights lawyers and plaintiffs…[who] stack[ ] multiple claims for the same construction-related accessibility violation on different occasions…to substantially increase the purported statutory liability of a defendant in order to intimidate and pressure the defendant into making a quick monetary settlement." Civil Code § 55.56, 2012 Note. Under these amendments, "a plaintiff's conduct must have a reasonable explanation for the asserted need for multiple visits to a site where known barrier violations would deny full and equal access, in light of the obligation to mitigate damages." (*Id.*).

Numerous district courts have recognized that such unresolved state-law issues are a proper basis to decline to exercise supplemental jurisdiction. *See, e.g.*, *Molski v. EOS Estate Winery*, 2005 WL 3952249 (C.D. Cal. 2005); *Jankey v. Beach Hut*, 2005 WL 5517235 (C.D. Cal. 2005); *Molski v. Hitching Post I Rest., Inc.*, 2005 WL 3952248 (C.D. Cal. 2005); *Molski v. Mandarin Touch Restaurants*, 359 F. Supp. 2d 924 (C.D. Cal. 2005); *Molski v. Kahn Winery*, 381 F. Supp. 2d 1209 (C.D. Cal. 2005); *Sanford v. Del Taco*, 2006 WL 1310318 (E. D. Cal. 2006).

B. Plaintiff's State-Law Claims Substantially Predominate Over His Federal Claims.

Likewise, courts have recognized that a plaintiff's state-law claims for monetary damages substantially predominate over his or her claim for injunctive relief under the ADA, providing yet another ground for declining supplemental jurisdiction. "State law claims have become the tails that wag the dog of federal

ADA litigation." *Gunther v. Lin,* 144 Cal.App.4th 223, 256 (2006). "[E]nterprising plaintiffs (and their attorneys) have found a way to circumvent the will of Congress by seeking money damages while retaining federal jurisdiction." *Molski v. Mandarin Touch Rest.,* 347 F.Supp.2d 860, 862-63 (C.D. Cal. 2004). As explained by one district court:

> "While Plaintiff has pleaded a federal claim as a jurisdictional hook to maintain the action in federal court, the case centers on Plaintiff's claim for damages which are recoverable only under the state law claims…Even though Plaintiffs have submitted a notice of voluntary limitation of damages, seeking only an award of $4,000 to Molski and $1,000 to [co-plaintiff that is an association], it is still clear that the claim for damages is the predominant focus of this lawsuit. Further, since the state law claims provide for injunctive relief, the federal claim adds nothing to the lawsuit that could not be obtained in Superior Court. Accordingly, Plaintiffs' state law claims substantially predominate over the federal ADA claim.

Molski v. EOS Estate Winery, 2005 WL 3952249, *4 (C.D. Cal. 2005).

For these reasons, courts routinely decline to exercise supplemental jurisdiction. *See, e.g., Pinnock v. Safino Designs, Inc.,* 2007 WL 2462107, *4 (S.D. Cal. 2007) ("Given the disparity in terms of comprehensiveness of the remedy sought, state law claims substantially predominate over the ADA for purposes of 28 U.S.C. § 1367(c)(2)"); *Molski v. EOS Estate Winery,* 2005 WL 3952249, *4 (C.D. Cal. 2005); *Molski v. Hitching Post I Rest., Inc.*, 2005 WL 3952248, *4 (C.D. Cal. 2005); *Singletary v. The Brick Oven Rest.*, 406 F.Supp.2d 1120, 1130-31 (S.D. Cal. 2005).

In sum, to the extent the Court does not dismiss Plaintiff's state-law claims with prejudice, then the Court should decline supplemental jurisdiction over them.

V. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's claims and enter judgment against Plaintiff.

Dated: November 14. 2016

SHEPPARD. MULLIN. RICHTER & HAMPTON llp

By /s/ *Gregory F. Hurley*
GREGORY F. HURLEY

Attorneys for Defendants,
INSOMNIAC HOLDINGS, LLC and
SPEEDWAY MOTORSPORTS. INC.