

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 4 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

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

Plaintiff-Appellant,

v.

THE IRVINE COMPANY, a Delaware  
Limited Liability Company doing business  
as The Resort at Pelican Hill,

Defendant-Appellee.

No. 16-56489

D.C. No. 8:16-cv-00438-DOC-  
DFM

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
David O. Carter, District Judge, Presiding

Submitted September 26, 2017\*\*

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

Theresa Brooke appeals from the district court's judgment dismissing for lack of standing her action alleging violations of the Americans with Disabilities Act ("ADA"). We have jurisdiction under 28 U.S.C. § 1291. We affirm in part,

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

vacate in part, and remand.

In her opening brief, Brooke does not challenge the district court's dismissal of her ADA claim for lack of standing or declination of supplemental jurisdiction over her state law claims, and therefore Brooke waived any such challenge. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[A]rguments not raised by a party in its opening brief are deemed waived.”). However, Brooke's claims should have been dismissed without prejudice. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017). (dismissal for lack of subject matter jurisdiction should be without prejudice); *Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1046 (9th Cir. 1994) (dismissal based on declining supplemental jurisdiction over state law claims should be without prejudice). We vacate the judgment to the extent it dismisses Brooke's complaint with prejudice and remand for the sole purpose of entering judgment without prejudice.

The parties shall bear their own costs on appeal.

**AFFIRMED in part, VACATED in part, and REMANDED.**