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**United States District Court
Central District of California**

BROKEN DRUM BAR, INC. et al.,
Plaintiff,
v.
SITE CENTERS CORP. et al.,
Defendants.

Case No. 2:19-cv-01445-ODW (SKx)

**ORDER GRANTING, IN PART,
DENYING IN PART, DEFENDANTS’
MOTION TO DISMISS [21]**

I. INTRODUCTION

Plaintiffs Broken Drum Bar, Inc. (“Broken Drum Bar”); Stefan Guillen; and Brian Maginnis bring various claims against Defendants Site Centers Corp. Inc.; DDR Urban, Inc.; DDR Urban LP (“DDR”); Patrick Brady; and Morgan Erickson relating to a lease dispute. Defendant DDR¹ owns and operates a shopping center in Long Beach, California. (First Am. Compl. (“FAC”) ¶¶ 11, 18, ECF No. 12.)

Defendants move to dismiss on the following grounds: (1) Plaintiffs Guillen and Maginnis lack standing; (2) Defendants Site Centers Corp. Inc., DDR Urban, Inc., Brady, and Erickson are improper defendants; and (3) Plaintiffs failed to sufficiently

¹ The other two entities are allegedly affiliates of DDR Urban LP. (See FAC ¶¶ 9–15.)

1 allege each cause of action. (*See generally* Mot. to Dismiss FAC (“Mot.”), ECF No.
2 21.)

3 Having reviewed the papers and the oral argument of counsel, and for the
4 reasons that follow, the Court **GRANTS, IN PART, DENIES IN PART**, Defendants’
5 Motion to Dismiss.

6 II. FACTUAL BACKGROUND

7 Plaintiff Stefan Guillen is the President of Broken Drum Bar, Inc. (Mot. 3.)
8 Plaintiff Brian Maginnis is an investor of Broken Drum Bar, Inc. (Id.)

9 Defendant DDR owns and operates the Pike Outlets in Long Beach, California.
10 (Mot. 3.) Defendant Patrick Brady is the Vice President of Leasing for Defendant Site
11 Centers Corp., Inc. (FAC ¶ 12.) Defendant Morgan Erickson is the Regional General
12 Manager for Defendant Site Centers Corp., Inc. (FAC ¶ 13.)

13 In 2017, Mr. Guillen, on behalf of Broken Drum Bar, Inc., commenced the
14 process of obtaining a lease for unit number 550 (previously occupied by Sgt.
15 Pepper’s Dueling Pianos). (*See* FAC ¶¶ 18, 27.) As part of the process, Plaintiff
16 Guillen submitted a detailed outline of his business plan to Defendant Brady, which
17 informed Defendant Brady that he intended to use the space as a live music and
18 entertainment venue. (FAC ¶ 19.) Defendant Brady responded that Plaintiff Guillen’s
19 proposal had been recommended for approval and that “final approval and consent
20 [for] use as a live music and bar . . . would take a few more weeks.” (FAC ¶ 20.)

21 On March 1, 2018, Plaintiffs took over the lease of unit number 550 from Sgt.
22 Pepper’s Dueling Pianos. (FAC ¶ 22.) On March 17, 2018, Plaintiffs held a soft
23 opening for the business. (FAC ¶ 23.) During the soft opening, security guards were
24 sent to Plaintiffs’ business due to noise complaints from the nearby movie theatre,
25 Cinemark Movie Theatres (“Cinemark”). (FAC ¶ 24.) Due to the noise, during
26 Plaintiffs’ operation of the business, Defendants would place security personnel at the
27 entrance of Plaintiffs’ business, and the security personnel were instructed to take
28 notes of employee names and patrons entering the business. (FAC ¶ 29.)

1 Prior to entering into the lease, Plaintiffs allege that Defendants informed them
2 that there had been no prior noise complaints related to unit number 550. (FAC ¶ 30.)
3 However, Plaintiffs allege that they were informed by numerous tenants at the
4 shopping center that noise complaints from unit number 550 were nothing new and
5 had been ongoing for several years. (FAC ¶¶ 27–28.) Defendants demanded that
6 Plaintiffs remedy the noise issue or change the nature of their business. (FAC ¶ 31.)
7 In response, Plaintiffs informed Defendants that they would withhold rent until
8 Defendants fixed the property. (FAC ¶ 32.) However, shortly thereafter, Plaintiffs
9 ceased operation of the Broken Drum Bar. (FAC ¶ 33.)

10 III. PROCEDURAL HISTORY

11 On January 7, 2019, Plaintiffs filed this lawsuit in Los Angeles County Superior
12 Court. (Notice of Removal, ECF No. 1.) Plaintiffs brought seven claims for relief:
13 (1) negligence; (2) breach of implied covenant of good faith and fair dealing; (3)
14 intentional misrepresentation; (4) negligent misrepresentation; (5) negligent
15 interference with prospective economic relations; (6) intentional interference with
16 prospective economic relations; and (7) breach of quiet enjoyment. (*See generally*
17 FAC.)

18 On February 27, 2019, Defendants removed this case on the basis of diversity
19 jurisdiction. (*Id.*) On March 11, 2019, Defendants filed a motion to dismiss. (ECF
20 No. 9.) On March 27, 2019, Plaintiffs filed a First Amended Complaint adding two
21 additional parties, Patrick Brady and Morgan Erickson, purportedly to destroy
22 diversity. (ECF No. 12.) On the same day, Plaintiffs attempted to file a motion for
23 remand, which the Court struck because it was improperly filed. (*See* ECF No. 19.)
24 Plaintiffs have not attempted to refile their motion for remand. On April 10, 2019,
25 Defendants again moved to dismiss the case. (Mot.)

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1 **IV. LEGAL STANDARD**

2 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
3 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
4 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). To
5 survive a dismissal motion, a complaint need only satisfy the minimal notice pleading
6 requirements of Rule 8(a)(2)—a short and plain statement of the claim. *Porter v.*
7 *Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations must be enough to
8 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550
9 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient factual matter,
10 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
11 *Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

12 The determination of whether a complaint satisfies the plausibility standard is a
13 “context-specific task that requires the reviewing court to draw on its judicial
14 experience and common sense.” *Id.* at 679. A court is generally limited to the
15 pleadings and must construe all “factual allegations set forth in the complaint . . . as
16 true and . . . in the light most favorable” to the plaintiff. *Lee v. City of Los Angeles*,
17 250 F.3d 668, 679 (9th Cir. 2001). But a court need not blindly accept conclusory
18 allegations, unwarranted deductions of fact, and unreasonable inferences. *Sprewell v.*
19 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

20 Where a district court grants a motion to dismiss, it should generally provide
21 leave to amend unless it is clear the complaint could not be saved by any amendment.
22 *See Fed. R. Civ. P. 15(a); Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d
23 1025, 1031 (9th Cir. 2008).

24 **V. DISCUSSION**

25 **A. Standing**

26 Based on the allegations in the First Amended Complaint, Plaintiffs Guillen and
27 Maginnis do not have standing to bring a claim related to the lease dispute. The First
28 Amended Complaint generally alleges that Plaintiff Guillen, acting on behalf of

1 Broken Drum Bar, Inc., negotiated and entered into the lease with Defendant DDR.
2 (See FAC ¶ 42.) Plaintiff Maginnis was an investor in Broken Drum Bar. (FAC ¶ 69.)
3 Plaintiffs offer no response to this issue.

4 “The normal rule is that a corporation is run by its management, and the
5 corporation itself has the right to make claims.” *Quinn v. Anvil Corp.*, 620 F.3d 1005,
6 1012 (9th Cir. 2010). For individual shareholders of a corporation to bring a suit on
7 behalf of the corporation, the shareholders must bring a shareholder derivative suit
8 and comply with Federal Rule of Civil Procedure 23.1. *Id.* Among other
9 requirements, Rule 23.1 requires that the plaintiff “allege with particularity the efforts,
10 if any, made by the plaintiff to obtain the action the plaintiff desires from the
11 directors.” *Potter v. Hughes*, 546 F.3d 1051, 1056 (9th Cir. 2008) (internal quotation
12 marks omitted).

13 Here, Plaintiffs Guillen and Maginnis do not come close to alleging facts
14 sufficient to support a derivative lawsuit. With Broken Drum Bar, Inc. as a party to
15 this lawsuit, Plaintiffs’ ability to maintain a derivative suit is improbable; Broken
16 Drum Bar, Inc. is already acting in the interest of its shareholders. *See Paulson, Inc. v.*
17 *Bromar, Inc.*, 775 F. Supp. 1329, 1339 (D. Haw. 1991) (finding that derivative actions
18 are only permitted when “a corporation has failed to enforce a right which may be
19 properly assigned to it”) (internal quotation marks omitted).

20 Accordingly, the Court grants Defendants’ Motion and dismisses Plaintiffs
21 Guillen and Maginnis with leave to amend. Plaintiffs Guillen and Maginnis are given
22 leave to amend to allege non-derivative claims.

23 **B. Defendants Site Centers Corp. Inc. and DDR Urban, Inc.**

24 Defendants argue that Site Centers Corp. Inc. and DDR Urban, Inc. are not
25 proper parties to the lawsuit and should be dismissed. Plaintiffs offer no opposition to
26 this issue.

27 Plaintiffs allege that Site Centers Corp., Inc. and DDR Urban, Inc. were the
28 property development and management companies. (FAC ¶¶ 9, 10.) Plaintiffs further

1 allege that Site Centers Corp., Inc. is the successor company to DDR Corp., Inc.
2 (FAC ¶ 9.) Plaintiffs also allege that each of the Defendants were the agents and
3 employees of every other Defendant and were acting within the scope and course of
4 such agency and employment. (FAC ¶ 16.) Moreover, Plaintiffs allege that
5 Defendants were acting for the benefit of each co-Defendant. (FAC ¶ 17.)

6 These boilerplate, conclusory allegations are insufficient to survive a motion to
7 dismiss. *See Fajardo v. Ross*, No. 1:12-cv-00217 AWI DLB, 2012 WL 2921179, at
8 *1 (E.D. Cal. July 17, 2012). Plaintiffs fail to explain how Site Centers Corp. Inc. and
9 DDR Urban, Inc. are related to the other defendants or their potential liability to any
10 causes of action. Neither of these Defendants are signatories to the lease agreement
11 between Broken Drum Bar, Inc. and DDR Urban LP.

12 Accordingly, the Court grants Defendants' Motion, however, Plaintiffs are
13 given leave to amend its complaint to allege more specific facts against Site Centers
14 Corp. Inc. and DDR Urban, Inc.

15 **C. Defendants Brady and Erickson**

16 Defendants also move to dismiss Defendants Brady and Erickson on the
17 basis that they are sham defendants.

18 “An exception to the requirement of complete diversity exists where it
19 appears that a plaintiff has fraudulently joined a ‘sham’ non-diverse defendant.”
20 *Sanchez v. Lane Bryant, Inc.*, 123 F. Supp. 3d 1238, 1241 (C.D. Cal. 2015). “If the
21 plaintiff fails to state a cause of action against a resident defendant, and the failure
22 is obvious according to the settled rules of the state, the joinder of the resident
23 defendant is fraudulent.” *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d
24 1203, 1206 (9th Cir. 2007) (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336,
25 1339 (9th Cir. 1987)); *see also Padilla v. AT&T Corp.*, 697 F. Supp. 2d 1156, 1158
26 (C.D. Cal. 2009) (“[A] non-diverse defendant is deemed a sham defendant if . . .
27 the plaintiff could not possibly recover against the party whose joinder is
28 questioned.”).

1 Plaintiffs offer no opposition or reason why these Defendants could be held
2 individually liable as Plaintiffs have alleged that Defendants Brady and Erickson
3 were acting within the scope of their employment. (See FAC ¶ 16.) Further, these
4 Defendants were added only after the case was removed. Plaintiffs previously
5 identified Defendants Brady and Erickson in their Complaint, and simply changed
6 them to Defendants in their First Amended Complaint, likely in an attempt to
7 destroy diversity. Plaintiffs did not make any new allegations against them. Nor
8 do the allegations raise a sufficient claim against Defendants Brady and Erickson.
9 Further, Plaintiffs were provided an opportunity at the hearing to address why the
10 Court should not consider Defendants Brady and Erickson sham defendants, and
11 Plaintiffs failed to provide any substantive response.

12 Accordingly, the Court grants the Motion and dismisses Defendants Brady and
13 Erickson without leave to amend.

14 **D. Specific Claims**

15 **1. Negligence**

16 Defendants move to dismiss Plaintiffs' claim for negligence on the basis that
17 Defendants owed no duty to Plaintiffs. Specifically, Defendants argue that the lease
18 agreement "disclaims any such duty" because the lease agreement contemplated
19 Plaintiff taking the property on an "as-is" basis. (Mot. 13.)

20 To maintain a claim for negligence, Plaintiffs must allege "(1) duty; (2) breach;
21 (3) causation; and (4) damages." *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1203 (9th Cir.
22 2003). In California, "the general rule is that all persons have a duty to use ordinary
23 care to prevent others from being injured as the result of their conduct." *Rowland v.*
24 *Christian*, 69 Cal. 2d 108, 112 (1968), superseded by statute of other grounds as stated
25 in *Perez v. S. Pac. Transp. Co.*, 218 Cal. App. 3d 462, 467 (1990)); *see also* Cal. Civ.
26 Code § 1714. California further recognizes a duty of care to communicate accurate
27 information (1) "where providing false information poses a risk of and results in
28 physical harm to person or property;" or (2) "where information is conveyed in a

1 commercial setting for a business purpose.” *Friedman v. Merck & Co.*, 107 Cal. App.
2 4th 454, 477 (2003).

3 Here, as pled, Plaintiffs have stated a sufficient claim for negligence. Plaintiffs
4 allege that Defendants fell below the requisite standard of care by failing to disclose
5 “prior and ongoing noise bleeds and property defect” resulting in harm to Plaintiffs.
6 (*See* FAC ¶ 40.) Plaintiffs further allege that the failure to disclose information
7 resulted in Plaintiffs being unable to book entertainment acts, eventually resulting in
8 Plaintiffs shutting down the business. (FAC ¶¶ 39–40.) Defendants’ argument that
9 Plaintiffs took the property on an “as-is” basis is misplaced. Simply because Plaintiffs
10 took the property on an “as-is” basis does not relieve Defendants of their duty to
11 convey accurate information to Plaintiffs. Nor does the provision allow Defendants to
12 make misrepresentations to Plaintiffs to induce Plaintiffs into signing a lease.

13 The Court denies Defendants’ Motion on the negligence claim.

14 **2. Breach of Covenant of Good Faith and Fair Dealing**

15 Defendants move to dismiss Plaintiffs’ breach of covenant of good faith and
16 fair dealing on the basis that “allegations *prior* to the existence of a contract cannot
17 form the basis for a claim for breach of the covenant of good faith and fair dealing.”
18 (Mot. 14 (emphasis in original) (citing *McClain v. Octagon Plaza, LLC*, 159 Cal. App.
19 4th 784, 799 (2008).) Plaintiffs do not oppose, instead, they seek leave to amend.
20 Based on the facts and circumstances of this case, the Court finds that this claim could
21 be saved by an amendment.

22 Accordingly, the Court grants the Motion as to this claim with leave to amend.

23 **3. Intentional and Negligent Misrepresentation**

24 Defendants move to dismiss Plaintiffs’ claims for intentional and negligent
25 misrepresentation because Plaintiffs do not specifically identify which Defendant
26 made a misrepresentation. Defendants also argue that because Plaintiffs took the
27 property on an “as-is” basis, Plaintiffs could not have justifiably relied on Defendants’
28 statements.

1 Plaintiffs agree that their claim for intentional misrepresentation lacks sufficient
2 detail and request leave to amend to include such detail.

3 However, Plaintiffs have made a sufficient claim for negligent
4 misrepresentation. Defendants' argument that Plaintiffs could not have justifiably
5 relied on Defendants' statements is more suitable for summary judgment than a
6 motion to dismiss. At this stage, Plaintiffs have sufficiently alleged that Defendants
7 knowingly/negligently failed to provide Plaintiffs with material information and that
8 Plaintiffs' reliance on Defendants' misrepresentations is the cause of Plaintiffs' harm.
9 (FAC ¶¶ 57, 61, 63, 67–70.)

10 Accordingly, the Court grants Defendants' Motion to Dismiss as to the claim
11 for intentional misrepresentation with leave to amend and denies the Motion as to the
12 claim for negligent misrepresentation.

13 **4. Negligent Interference with Prospective Relations and**
14 **Intentional Inference with Prospective Economic Relations**

15 Defendants move to dismiss Plaintiffs' claims for negligent and intentional
16 interference with prospective economic relations on the basis that Plaintiffs did not
17 allege a wrongful act. (Mot. 17–18.) Defendants argue that Plaintiffs' sole basis for
18 these claims is that Defendants refused fix the property defect, which is not wrongful
19 conduct because the lease agreement assigned repairs of property defects to Plaintiffs,
20 not Defendants. This is wrong. Plaintiffs allege that Defendants' wrongful conduct
21 was Defendants' representations that "there was no noise complaint from neighboring
22 tenants prior to [Plaintiffs] signing the lease" and that even after the lease was signed,
23 Defendants reassured Plaintiffs that there had been no prior noise complaints.
24 (FAC ¶¶ 82, 83.) As a result of Defendants' alleged wrongful conduct, Plaintiffs
25 claim that the relationship between Plaintiff Guillen and Plaintiff Maginnis was
26 interfered with. (FAC ¶¶ 74, 84.)

1 However, Plaintiffs did not address these claims in their Opposition. Further,
2 although not addressed in the Motion, these claims are tenuous as Plaintiffs failed to
3 allege sufficient facts to support a claim.

4 To state a claim for negligent interference with prospective economic relations,
5 a plaintiff must allege:

6 (1) an economic relationship existed between the plaintiff and a third
7 party which contained a reasonably probable future economic benefit
8 or advantage to plaintiff; (2) the defendant knew of the existence of
9 the relationship and was aware or should have been aware that if it did
10 not act with due care its actions would interfere with this relationship
11 and cause plaintiff to lose in whole or in part the probable future
12 economic benefit or advantage of the relationship; (3) the defendant
13 was negligent; and (4) such negligence caused damage to plaintiff in
that the relationship was actually interfered with or disrupted and
plaintiff lost in whole or in part.

14 *Venhaus v. Shultz*, 155 Cal. App. 4th 1072, 1077–78 (2007). Here, Plaintiffs failed to
15 allege that the relationship between Plaintiff Guillen and Plaintiff Maginnis contained
16 a reasonably probable future economic benefit, that Defendants’ failure to act with
17 due care would interfere with this relationship; and how the relationship was actually
18 interfered with or disrupted.

19 To state a claim for intentional interference with prospective economic
20 advantage, a plaintiff must allege: “(1) the existence, between the plaintiff and some
21 third party, of an economic relationship that contains the probability of future
22 economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3)
23 intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption
24 of the relationship; and (5) economic harm proximately caused by the defendant’s
25 action.” *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, 2 Cal. 5th 505,
26 512 (2017).

27 Here, Plaintiffs failed to allege facts that Defendants’ wrongful acts were
28 designed to disrupt the relationship between Plaintiff Guillen and Plaintiff Maginnis,

1 actual disruption of the relationship, and economic harm proximately caused by
2 Defendants' action.

3 Accordingly, the Court grants Defendants' Motion as to these claims with leave
4 to amend.

5 **5. Breach of Quiet Enjoyment**

6 Defendants move to dismiss Plaintiffs' claim for breach of quiet enjoyment on
7 the basis that Defendants had no obligation to repair the premises under the lease.
8 Again, this argument is misplaced. Plaintiffs allege that Defendants breached the
9 covenant of quiet enjoyment because Defendants placed their security guards on
10 Plaintiffs' premises "to interfere, harass and intimidate Plaintiff's Broken Drum Bar's
11 occupation of [u]nit [number] 550." (FAC ¶ 91.) This is sufficient to state a claim.
12 *See Nativi v. Deutsche Bank National Trust Co.*, 223 Cal. App. 4th 261, 292 (2014)
13 (finding the covenant of quiet enjoyment "insulates the tenant against any act or
14 omission on the part of the landlord . . . which interferes with a tenant's right to use
15 and enjoy the premises for the purposes contemplated by the tenancy").

16 Accordingly, the Motion is denied as to this claim.

17 **6. Damages**

18 Defendants also move to dismiss this case as Plaintiffs have no recoverable
19 damages because the lease agreement limits Plaintiffs' ability to recover damages.
20 Defendants do not argue that the damages that Plaintiffs seek are unavailable by law,
21 but rather, the lease agreement alters what Plaintiffs may recover.

22 As an initial matter, a demand for an improper remedy is not a proper basis for
23 a 12(b)(6) motion. *Cent. Sierra Envtl. Res. Ctr. v. Stanislaus Nat'l Forest*, 304 F.
24 Supp. 3d 916, 955 n.28 (E.D. Cal. 2018) (quoting *Massey v. Banning Unified Sch.*
25 *Dist.*, 256 F. Supp. 2d 1090, 1092 (C.D. Cal. 2003)) ("Courts do not grant motions
26 under Rule 12(b)(6) 'merely because a plaintiff requests a remedy to which he or she
27 is not entitled.'").

1 Further, at this stage, it is improper to dismiss a claim on the basis that the lease
2 agreement prohibits certain damages. *See Whittlestone, Inc. v. Hand-Craft Co.*, 618
3 F.3d 970, 975 n.2 (9th Cir. 2010) (reviewing the entire contract and finding that it
4 would be inappropriate to dismiss claims based on the language of a contract
5 prohibiting consequential damages).

6 Accordingly, the Court denies the Motion based on the limitation of damages
7 provision of the lease agreement.

8 IV. CONCLUSION

9 For the foregoing reasons, the Court **GRANTS IN PART, DENIES IN PART,**
10 Defendants' Motion. Plaintiffs may amend their complaint to address the deficiencies
11 as identified above within **fourteen (14) days** from the date of this Order.

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13 **IT IS SO ORDERED.**

14
15 May 22, 2019

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18 **OTIS D. WRIGHT, II**
19 **UNITED STATES DISTRICT JUDGE**