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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MILILANI GROUP, INC., No. 2:12-cv-00891 JAM-CKD  
Plaintiff,  
v.  
O'REILLY AUTOMOTIVE, INC.,  
and CSK AUTO, INC.  
Defendants.

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

This matter is before the Court on Defendants O'Reilly Automotive, Inc. ("O'Reilly"), and CSK Auto, Inc.'s ("CSK") (collectively "Defendants") Motion to Dismiss Plaintiff's Second Amended Complaint ("SAC") (Doc. #20). Plaintiff Mililani Group, Inc. ("Plaintiff") opposes the motion (Doc. #26) and Defendants replied (Doc. #28).<sup>1</sup> For the following reasons, Defendants' motion is GRANTED.

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for March 6, 2012.

## I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 Defendants previously moved to dismiss all claims against  
3 O'Reilly and the waste claim; that motion was granted with leave  
4 to amend (Doc. #16). On December 18, 2012, Plaintiff filed its  
5 SAC (Doc. #17). In the SAC, Plaintiff alleges two causes of  
6 action against Defendants, the first for breach of contract and  
7 the second for waste. SAC ¶¶ 12-27. Defendants once more moved  
8 to dismiss all claims against O'Reilly and the waste claim (Doc.  
9 #20).<sup>2</sup> Good cause having been shown, the Court granted Plaintiff  
10 leave to file a late opposition and gave Defendants a week to  
11 reply (Doc. #27).

12 On or about August 29, 1988, CSK entered into a written  
13 lease agreement for warehouse and office space in Dixon,  
14 California (the "Property"). SAC ¶ 13. CSK vacated the Property  
15 on April 30, 2011. Id. ¶ 16. Plaintiff alleges that CSK  
16 breached the lease by failing to maintain insurance, maintain the  
17 Property, and return the Property to the condition required by  
18 the lease and its failure resulted in permanent diminution in  
19 value of the Property. Id. ¶ 25.

20 In addition, Plaintiff alleges that CSK merged with O'Reilly  
21 on July 11, 2008, and that since the merger, the day-to-day  
22 decisions regarding the Property were made by O'Reilly.  
23 Plaintiff further alleges that O'Reilly imposed unrealistic  
24 budgeting and financial goals on CSK that prevented CSK from  
25 carrying out the terms of the contracts to which it was

26       <sup>2</sup> Defendants also request judicial notice of several documents.  
27 Doc. #20. However, the Court finds these documents unnecessary  
28 for the determination of this motion and therefore, Defendants'  
request for judicial notice is denied.

1 obligated. Id. ¶¶ 6-8. Moreover, Plaintiff's management was  
2 allegedly informed that CSK managers had no control over spending  
3 decisions and budgets and that such decisions must be made by  
4 O'Reilly. Id.

5

6 II. OPINION

7 A. Legal Standard

8 A party may move to dismiss an action for failure to state  
9 a claim upon which relief can be granted pursuant to Federal  
10 Rule of Civil Procedure 12(b) (6). In considering a motion to  
11 dismiss, the court must accept the allegations in the complaint  
12 as true and draw all reasonable inferences in favor of the  
13 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),  
14 overruled on other grounds by Davis v. Scherer, 468 U.S. 183  
15 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that  
16 are mere "legal conclusions," however, are not entitled to the  
17 assumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678  
18 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555  
19 (2007)). To survive a motion to dismiss, a plaintiff needs to  
20 plead "enough facts to state a claim to relief that is plausible  
21 on its face." Twombly, 550 U.S. at 570. Dismissal is  
22 appropriate where the plaintiff fails to state a claim  
23 supportable by a cognizable legal theory. Balistreri v.  
24 Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

25 Upon granting a motion to dismiss for failure to state a  
26 claim, the court has discretion to allow leave to amend the  
27 complaint pursuant to Federal Rule of Civil Procedure 15(a).  
28 "Dismissal with prejudice and without leave to amend is not

1 appropriate unless it is clear . . . that the complaint could  
2 not be saved by amendment." Eminence Capital, L.L.C. v. Aspeon,  
3 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

4       B. Discussion

5           1. Alter Ego Liability

6       Defendants move to dismiss all claims against O'Reilly,  
7 contending that Plaintiff has failed to allege sufficient facts  
8 to establish alter ego liability. Plaintiff once again argues  
9 that it is not required to allege its claims in detail under the  
10 Federal Rules of Civil Procedure. Opp. at 2.

11       Federal courts apply the law of the forum state in  
12 determining whether to pierce the corporate veil. SEC v. Hickey,  
13 322 F.3d 1123, 1128 (9th Cir. 2003) (citations omitted). Under  
14 California law, the corporate veil may be pierced when the  
15 corporation is the alter ego of a controlling shareholder.  
16 Sonora Diamond Corp. v. Superior Court, 83 Cal.App.4th 523, 537-  
17 38 (2000). Alter ego liability requires (1) "a unity of interest  
18 and ownership between the corporation and its equitable owner  
19 that the separate personalities of the corporation and the  
20 shareholder do not in reality exist" and (2) "an inequitable  
21 result if the acts in question are treated as those of the  
22 corporation alone." Id. at 538.

23       As discussed in the Court's previous Order, to pursue this  
24 theory of liability, a plaintiff must allege the elements of the  
25 doctrine and conclusory allegations are insufficient. Hokama v.  
26 E.F. Hutton & Co., Inc., 566 F. Supp. 636, 647 (C.D. Cal. 1983).  
27 As to the first prong, Plaintiff provides general allegations  
28 that O'Reilly makes decisions for CSK through budgeting and

1 management. However, these allegations are still too vague and  
2 do not include facts to show a unity of interest and ownership.  
3 See Wehlage v. EmpRes Healthcare, Inc., 791 F. Supp. 2d 774, 782-  
4 83 (N.D. Cal. 2011) (holding that broad allegations are not  
5 sufficient to show a unity of interest and ownership). As to the  
6 second prong, Plaintiff alleges, "Defendant O'Reilly acted in bad  
7 faith in that its refusal to permit CSK to perform the lease  
8 obligations constituted bad faith." SAC ¶ 9. This allegation is  
9 not only conclusory because Plaintiff provides no facts to show  
10 conduct amounting to bad faith, but also circular in logic  
11 because it assumes what Plaintiff is trying to prove. Therefore,  
12 Plaintiff has not satisfied the second prong.

13 Accordingly, the Court finds that Plaintiff has not alleged  
14 either element of alter ego liability and therefore, all claims  
15 against O'Reilly must be dismissed. Because Plaintiff has twice  
16 failed to state alter ego liability against O'Reilly, the Court  
17 does not grant leave to amend.

18 2. Waste Claim

19 Defendants also contend that the waste claim should be  
20 dismissed because Plaintiff has failed to plead facts to show a  
21 permanent depreciation in the Property's market value.  
22 Plaintiff rejoins that deliberately allowing the landscaping to  
23 die and the support columns to deteriorate is permanent damage  
24 to the building. Opp. at 3.

25 Waste is defined as an unlawful act or omission of duty on  
26 the part of a tenant, resulting in permanent injury to the  
27 property. Old Republic Ins. Co. v. Superior Court, 66  
28 Cal.App.4th 128, 149 (1998) disapproved on other grounds by

1        Vandenberg v. Superior Court, 21 Cal.4th 815, 982 P.2d 229 (1999)  
2        (citation omitted). To constitute waste, the market value of  
3        real property has to be permanently diminished. Smith v. Cap  
4        Concrete, Inc., 133 Cal.App.3d 769, 775 (1982). Proof of  
5        "conduct which has resulted in substantial depreciation of the  
6        market value of the land" establishes waste. Id.; see also  
7        Avalon Pac.-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC,  
8        192 Cal.App.4th 1183, 1215 (2011) (holding that "waste occurs when  
9        damage is sufficiently substantial and permanent to cause an  
10      injury to the reversion interest").

11        The Court previously held that Plaintiff could maintain this  
12      cause of action only if Plaintiff properly alleged permanent  
13      damage. Order at 7. Plaintiff argues that Defendants allowed  
14      the landscaping to die and the support columns to deteriorate  
15      placing the building in danger of falling, but those allegations  
16      are not found in the SAC and Plaintiff provides no facts that  
17      would allow Defendants or the Court to determine whether the  
18      Property's diminution in market value was permanent. Plaintiff  
19      only alleges that Defendants failure to maintain or repair the  
20      Property "resulted in the permanent diminution in value of the  
21      Premises beyond ordinary wear and tear." SAC ¶ 25. However,  
22      this bare assertion of a legal conclusion is insufficient to  
23      establish that the Property value was permanently diminished.  
24      Moreover, Plaintiff fails to allege that Defendants' conduct  
25      resulted in substantial damage. See Avalon Pac.-Santa Ana, L.P.,  
26      192 Cal.App.4th at 1215 (requiring permanent and substantial  
27      damage for a waste claim).

28        Accordingly, because Plaintiff has failed to allege

1 sufficient facts for a waste claim, the Court dismisses  
2 Plaintiff's second cause of action. Plaintiff gives no  
3 indication of what more it could plead to state a claim,  
4 signaling that indeed there are no additional facts Plaintiff  
5 could include in the complaint were it granted leave to amend.  
6 Therefore, the Court dismisses this claim without leave to  
7 amend.

9

### III. ORDER

10 For the reasons set forth above, Defendants' Motion to  
11 Dismiss is GRANTED WITH PREJUDICE. The case will proceed on the  
12 Second Amended Complaint on only the breach of contract claim  
13 against CSK. Further, Defendants' Motion to Strike Plaintiff's  
14 Second Amended Complaint (Doc. #18) is denied as moot.

15 IT IS SO ORDERED.

16 || Dated: April 3, 2013

John A. Mendez  
JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE