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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDUARDO GUILARTE,

Plaintiff,

v.

ANDREA MONTI, et al.,

Defendants.

Case No. [16-cv-01726-MMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO AMEND**

Re: Dkt. No. 41

Before the Court is plaintiff Eduardo Guilarte's ("Guilarte") "Motion . . . for Leave to File a Third Amended Complaint," filed December 19, 2016. Defendant Andrea Monti ("Monti") has filed opposition; Guilarte has not filed a reply. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for decision on the parties' respective written submissions, VACATES the hearing scheduled for January 20, 2017, and rules as follows.

Guilarte requests leave to file a proposed Third Amended Complaint ("Proposed TAC")¹ for the purpose of adding two new claims, specifically, a claim titled "Breach of Contract" and a claim titled "Violation of Cal. Civ. Code § 52.1 (the 'Bane Act')" (see Proposed TAC at 16:12, 17:18), to which he seeks to name as defendants Monti, Marriott International, Inc. ("Marriott") and the City of Buenos Aires ("Buenos Aires").²

¹The Proposed TAC is attached as Exhibit 1 to the Declaration of Amy Sommer Anderson.

²Neither Marriott nor Buenos Aires has filed a response to the instant motion. By order filed November 15, 2016, the Court dismissed all claims alleged against Marriott in the Second Amended Complaint, and Guilarte has not filed proof of service of the summons and complaint upon Buenos Aires, which defendant, to date, has not appeared.

1 A court "should freely give leave [to amend] when justice so requires." See Fed.
2 R. Civ. P. 15(a)(2). "[F]our factors are commonly used" in determining whether leave to
3 amend is appropriate, specifically, "bad faith, undue delay, prejudice to the opposing
4 party, and futility of amendment." See DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
5 186 (9th Cir. 1987).

6 Here, Monti does not argue that Guilarte is acting in bad faith, nor does she
7 contend granting leave to amend would cause undue delay or point to any prejudice she
8 would suffer thereby. Monti does argue, however, that the proposed new claims are
9 futile.

10 The Court considers each such claim, in turn.

11 **A. Proposed Breach of Contract Claim**

12 The proposed claim for breach of contract is based on allegations that Guilarte
13 purchased for \$35 a ticket to the "Argentine Tango USA Festival and USA
14 Championship" ("the Event"), that he "conduct[ed] himself in a respectful and respectable
15 manner" while attending the Event, and that "defendants breached the contract" by not
16 allowing him to "fully attend[] the Event," in that they required him to leave the premises.
17 (See Proposed TAC ¶¶ 25, 66, 69-73.)

18 Monti first argues the proposed breach of contract claim is futile for the reason
19 that, she contends, no breach of contract occurs when a person who "host[s] a private
20 event" requires an attendee to leave, as the host has the "exclusive right to determine
21 who should be permitted to attend." (See Def.'s Opp. at 4:17-19.) The sole authority
22 Monti cites in support of such proposition, MacLeod v. Fox West Coast Theatres Corp.,
23 10 Cal. 2d 383 (1937), however, is distinguishable, as it concerned the right of a host to
24 remove a person from an event to which attendance has been limited. See id. at 384-85,
25 387-88 (holding event sponsor entitled to remove plaintiff, who entered movie theater to
26 attend advance showing "limited to representatives of the press, and one hundred
27 employees of [the co-sponsor]," where plaintiff was not "within either of the classes of
28 persons which theretofore had been designated as proposed invitees"). Here, by

1 contrast, Guilarte alleges he purchased a ticket to an event advertised as open to the
2 public (see Proposed TAC ¶ 69, Ex. D), not the type of event at issue in MacLeod.
3 Moreover, even in those jurisdictions where a ticket to a public event has been deemed
4 "a mere license revocable at the will of the proprietor," see Greenberg v. Western Turf
5 Ass'n, 140 Cal. 357, 360 (1903) (collecting cases), such proprietor, in exercising said
6 right, "becomes responsible in damages" for "the price of the purchased ticket," as well
7 as for "necessary expenses as may have been incurred by its purchaser in attending or in
8 seeking to attend the entertainment," see id. at 360-61.

9 Monti next relies on a state court pleading requirement that a party alleging a
10 breach of a written contract must either quote the terms of the contract "verbatim" in the
11 complaint or "attach[]" the "instrument" thereto. See Otworth v. Southern Pacific
12 Transportation Co., 166 Cal. App. 3d 452, 459 (1985). Assuming the same or a similar
13 requirement is applicable in federal court, the instrument on which Guilarte relies, the
14 ticket to the Event, has been attached as an exhibit to the Proposed TAC. (See
15 Proposed TAC Ex. F.)

16 Consequently, as to the breach of contract claim, Monti has not shown the
17 proposed amendment would be futile.³

18 Accordingly, the Court will afford Guilarte leave to amend to allege the proposed
19 breach of contract claim.

20 **B. Proposed Bane Act Claim**

21 The Bane Act prohibits a person from "interfer[ing] by threats, intimidation, or
22 coercion, or attempt[ing] to interfere by threats, intimidation, or coercion, with the exercise
23

24 ³To the extent the proposed breach of contract claim is alleged against Marriott
25 and Buenos Aries, the proposed claim would appear to be futile, as the Proposed TAC
26 includes no allegation, let alone facts to support a finding, that either of those entities was
27 a party to the contract formed by Guilarte's purchase of the ticket. See Tri-Continental
28 Int'l Corp. v. Paris Savings & Loan Ass'n, 12 Cal. App. 4th 1354, 1359 (1993) (holding a
plaintiff "cannot assert a claim for breach of contract against one who is not a party to the
contract"). Nonetheless, as those parties have not filed opposition to the instant motion,
the Court does not further address herein the sufficiency of the claim as alleged against
them.

1 by any individual or individuals of rights secured by the Constitution or laws of the United
2 States, or of the rights secured by the Constitution or laws of [California]." See Cal. Civ.
3 Code § 52.1(a). As interpreted by the California Supreme Court, the provisions of the
4 Bane Act do not apply to "ordinary tort actions," but, rather, are "limited to threats,
5 intimidation, or coercion that interfere with a constitutional or statutory right." See
6 Venegas v. County of Los Angeles, 32 Cal. 4th 820, 843 (2004).

7 Guilarte bases his proposed Bane Act claim on an allegation that defendants, by
8 "prohibit[ing] [him] from attending and taking part in [the Event]," deprived him of his "right
9 to full and equal accommodation and service in all business establishments within the
10 state." (See Proposed TAC ¶¶ 75-76.) The viability of the claim, as pleaded, is thus
11 dependent on a threshold showing that Guilarte had a right, secured by either a
12 constitutional provision or a statute, see Venegas, 32 Cal. 4th at 843, to "full and equal
13 accommodation and service" with respect to the Event (see Proposed TAC ¶ 76). Monti
14 argues the proposed Bane Act claim is futile for the reason that Guilarte cannot establish
15 any such right. As discussed below, the Court agrees.

16 Guilarte fails to identify, either in his Proposed TAC or in his motion, a
17 constitutional provision or statute that creates a right of which he allegedly was deprived
18 when defendants required him to leave the Event. In his motion, Guilarte cites to Bender
19 v. County of Los Angeles, 217 Cal. App. 4th 968, 978 (2013) and Shoyoye v. County of
20 Los Angeles, 203 Cal. App. 4th 947, 957-62 (2012), which cases, he asserts, hold a
21 claim under the Bane Act can be based on facts that would support a tort claim for false
22 imprisonment. The Court is not persuaded. As noted, the Bane Act does not apply to
23 "ordinary tort actions." See Venegas, 32 Cal. 4th at 843. Indeed, the plaintiffs in Bender
24 and Shoyoye based their respective Bane Act claims on alleged violations of the Fourth
25 Amendment, not on a tort claim of false imprisonment. See Bender, 217 Cal. App. 4th at
26 978 (holding, "[h]ere, the Bane Act applies because there was a Fourth Amendment
27 violation . . . accompanied by . . . coercion"); Shoyoye, 203 Cal. App. 4th at 955 (noting
28 plaintiff's Bane Act claim was predicated on alleged violation of "either the Fourth

1 Amendment to the United States Constitution or article I, section of the California
2 Constitution, which both pertain to the right of the people to be secure against
3 unreasonable searches and seizures"); see also id. at 959 (holding Bane Act "was
4 intended to address only egregious interferences with constitutional rights, not just any
5 tort").

6 Lastly, even assuming a Bane Act claim could be based on a tort claim for false
7 imprisonment, that cause of action, as alleged by Guilarte in his prior pleadings, was
8 dismissed for failure to state a claim (see Order, filed January 3, 2017, at 2:10-16; Order,
9 filed August 2, 2016, at 8:23 - 9:11), and Guilarte, in the Proposed TAC, has not
10 endeavored to cure the deficiencies previously identified by the Court.

11 Consequently, as to the Bane Act claim, the proposed amendment would be futile,
12 and, accordingly, the Court will not afford Guilarte leave to amend to allege said claim.

13 **CONCLUSION**

14 For the reasons stated above, Guilarte's motion for leave to amend is hereby
15 GRANTED in part and DENIED in part, as follows:

16 1. To the extent Guilarte seeks leave to amend for the purpose of alleging his
17 proposed breach of contract claim, the motion is GRANTED;

18 2. In all other respects, the motion is DENIED.

19 3. Guilarte shall file any Third Amended Complaint no later than February 3, 2017.

20 In said pleading, Guilarte may not include any claim set forth in the Second Amended
21 Complaint that was dismissed in the Court's orders dated January 3, 2017, and
22 November 15, 2016, and may not include any new claim other than the proposed breach
23 of contract claim.

24 **IT IS SO ORDERED.**

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26 Dated: January 17, 2017

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MAXINE M. CHESNEY
United States District Judge