

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

3                    JOE HAND PROMOTIONS, INC.,  
4

5                                    Plaintiff,

6                                    v.

7                    BILL DAVIS,  
8

9                                    Defendant.

No. C 11-6166 CW

ORDER GRANTING IN  
PART AND DENYING  
IN PART MOTION TO  
DISMISS THIRD-  
PARTY COMPLAINT  
(Docket No. 54)

10                    BILL DAVIS,  
11

12                                    Third-Party Plaintiff,

13                                    v.

14                    DISH NETWORK, LLC,  
15

16                                    Third-Party Defendant.

17                    Third-Party Plaintiff Bill Davis brings this action against  
18 Third-Party Defendant DISH Network LLC for negligent  
19 misrepresentation, breach of contract, negligence, and violations  
20 of California's Unfair Competition Law (UCL). DISH Network moves  
21 to dismiss the third-party complaint for failure to state a claim.  
22 After considering the parties' papers and oral argument, the Court  
23 GRANTS the motion in part and DENIES it in part.

24                                    BACKGROUND

25                    In February 2012, Plaintiff Joe Hand Promotions, Inc. filed a  
26 first amended complaint (FAC) against Davis for violations of 47  
27 U.S.C. §§ 553, 605, and the UCL. Docket No. 8. The FAC alleges  
28 that Davis unlawfully showed a televised fight at the cigar lounge

1 he operates, West Coast Cigars, in violation of Joe Hand's  
2 exclusive rights to promote the fight. Id. ¶¶ 13-41.

3 Davis subsequently filed a third-party complaint against DISH  
4 Network, the satellite television provider for West Coast Cigars.  
5 Docket No. 48, Third-Party Compl. ¶ 8. His complaint asserts that  
6 DISH Network failed to provide his business with lawful television  
7 services. Id. ¶ 10. Specifically, he claims DISH Network  
8 provided West Coast Cigars with a residential service account --  
9 rather than a commercial account -- even though, "when the DISH  
10 Network L.L.C. personnel came to perform the installation it was  
11 obvious that this was a business establishment." Id. ¶ 8. Davis  
12 alleges that, by relying on DISH Network's implicit promise to  
13 provide lawful services, he has "been forced to defend himself and  
14 incur significant damages and liabilities to [Joe Hand]." Id.

15 LEGAL STANDARD

16 A complaint must contain a "short and plain statement of the  
17 claim showing that the pleader is entitled to relief." Fed. R.  
18 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
19 state a claim, dismissal is appropriate only when the complaint  
20 does not give the defendant fair notice of a legally cognizable  
21 claim and the grounds on which it rests. Bell Atl. Corp. v.  
22 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
23 complaint is sufficient to state a claim, the court will take all  
24 material allegations as true and construe them in the light most  
25 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
26 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
27 to legal conclusions; "threadbare recitals of the elements of a  
28 cause of action, supported by mere conclusory statements," are not

1 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
2 (citing Twombly, 550 U.S. at 555).

3 When granting a motion to dismiss, the court is generally  
4 required to grant the plaintiff leave to amend, even if no request  
5 to amend the pleading was made, unless amendment would be futile.  
6 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
7 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
8 amendment would be futile, the court examines whether the  
9 complaint could be amended to cure the defect requiring dismissal  
10 "without contradicting any of the allegations of [the] original  
11 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
12 Cir. 1990).

13 DISCUSSION

14 Davis has alleged that DISH Network provided his commercial  
15 business with a residential service subscription in breach of its  
16 service agreement and its promise to provide lawful commercial  
17 services. Although DISH Network argued at the hearing that Davis  
18 signed an agreement to purchase residential services, it conceded  
19 that it is unable to provide a copy of that agreement.<sup>1</sup>

20 Accordingly, the Court must accept Davis' plausible factual  
21 allegations as true. Those allegations support his claims for  
22 negligent misrepresentation, breach of contract, and negligence.

23 They do not, however, support his claim under the UCL, Cal.  
24 Bus. & Prof. Code §§ 17200 et seq., which must be plead with  
25 particularity under Federal Rule of Civil Procedure 9(b). See

26 \_\_\_\_\_  
27 <sup>1</sup> This failure distinguishes the present case from Joe Hand Promotions,  
28 Inc. v. Campbell, 2011 WL 3439217, \*5-\*7 (E.D. Cal.), where the third-party  
defendant provided a copy of the operative service agreement and the agreement  
"expressly contemplate[d] residential service, not commercial service."

1 Kearns v. Ford Motor Co., 567 F.3d 1120, 1127-28 (9th Cir. 1998).  
2 Thus, Davis' UCL claim is dismissed. He may amend his third-party  
3 complaint within fourteen days of this order if he can truthfully  
4 plead specific details regarding when, how, and by whom DISH  
5 Network's alleged misrepresentations were communicated to him, as  
6 well as the nature of the false representations.

7 CONCLUSION

8 For the reasons set forth above, DISH Network's motion to  
9 dismiss (Docket No. 54) is GRANTED in part and DENIED in part.  
10 Davis' UCL claim is dismissed with leave to amend; his claims for  
11 negligent misrepresentation, breach of contract, and negligence  
12 may proceed.

13 IT IS SO ORDERED.

14  
15 Dated: 4/4/2013

16   
17 CLAUDIA WILKEN  
18 United States District Judge  
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