

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SCOTT G. KELLY and JOHN T.  
DeWALD,

Plaintiffs,

v.

STARR INDEMNITY & LIABILITY  
COMPANY,

Defendant.

CASE NO. 15cv2900 JM(RBB)

ORDER DENYING MOTION TO  
AMEND

Pursuant to Fed.R.Civ.P. 15(a), Plaintiffs Scott G. Kelly and John T. DeWald (collectively “Plaintiffs”) move to amend the complaint to add additional parties and claims. Starr Indemnity & Liability Company (“Starr”) opposes the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court denies the motion to amend.

**BACKGROUND**

On December 23, 2015, Starr removed this diversity action from the Superior Court, County of San Diego. The Complaint alleged two claims against Starr for breach of contract and breach of the duty of good faith and fair dealing. The third cause of action for negligence is asserted only against “DOE AGENTS/BROKERS.”<sup>1</sup>

---

<sup>1</sup> Doe defendants are not considered for federal pleading purposes. See Navarro Sav. & Loan Ass’n v. Lee, 446 U.S. 458, 460-61 (1980).

1 The Proposed First Amended Complaint (“PFAC”) seeks to add Robert Cohen and  
2 Benchmark Commercial Insurance Services (collectively, the “Brokers”) as non-  
3 diverse parties and add causes of action against them for negligence and breach of  
4 fiduciary duty.

5 Plaintiffs are managing members of John DeWald and Associates, LLC (“JDA”),  
6 a real estate development company. (Compl. ¶6). JDA had a business relationship  
7 with Kenneth Brehnan (“Brehnan”). Brehnan invested in various real estate projects  
8 managed by JDA. Prior to May 2011, Brehnan requested that certain “instruments” in  
9 default be paid in full. At that time, however, Brehnan did not request payment for  
10 damages and did not take any legal action against JDA.

11 In November 2011, Plaintiffs allege that Brehnan made a written demand for  
12 payment of past-due promissory notes or credit agreements and provided written notice  
13 of the claim to Starr. (Compl. ¶11). Plaintiffs then tendered the claim to Starr who had  
14 issued a one-year claims-made Directors & Officers liability policy to Plaintiffs for the  
15 period of May 18, 2011 to May 18, 2012. On April 12, 2012, Brehnan forwarded a  
16 draft complaint to Plaintiffs, threatening to file the complaint if the parties were unable  
17 to resolve the dispute.

18 On May 13, 2012, Starr provided written notice to Plaintiffs that Brehnan’s  
19 claims were excluded from the policy. Starr explained that the claim was excluded  
20 because: (1) the claim was made before the inception of coverage; (2) the insureds had  
21 knowledge of the facts giving rise to a potential claim prior to inception of the policy;  
22 and (3) the professional services exclusion applied to bar coverage. (Davisson Decl.,  
23 Exh. B). With respect to the professional services exclusion, Starr explained:

24 The coverage provided by Directors & Officers insuring agreements is  
25 different from that provided by Errors & Omissions policies issued to  
26 defray exposures arising from providing professional services. D&O  
27 coverage does not include malpractice coverage. This point is established  
28 emphatically by the presence of [the professional services exclusion] in  
the . . . Policy.

27 Id. As the claims in the Brehnan complaint allegedly arose from the provision of  
28 management services by JDA, Starr concluded that the nature of Brehnan’s claim

1 triggered the professional services exclusion.

2 On August 9, 2012, Brehnan filed the complaint against JDA. Ultimately,  
3 Plaintiffs and Brehnan settled their dispute.

4 **DISCUSSION**


5 Pursuant to Fed.R.Civ.P. 15(a), Plaintiffs move to amend the complaint to add  
6 new parties (Brokers) and new claims (negligence and breach of fiduciary duty). Rule  
7 15, however, does not afford any relief to Plaintiffs. Plaintiffs seek to add non-diverse  
8 parties and claims allegedly necessary for them to obtain complete relief.

9 In order to join parties, Plaintiffs must satisfy the requirements of Rules 19 or  
10 20. Plaintiffs do not cite applicable rules, set forth no pertinent analysis, and simply  
11 fail to meet their burden to show that joinder is appropriate under the circumstances.  
12 Moreover, the court has not considered the limited analysis set forth by Plaintiffs for  
13 the first time in their reply brief. See Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir.  
14 2007) (affirming district court decision to reject points raised for the first time in reply  
15 brief).

16 The motion to amend is denied.

17 **IT IS SO ORDERED.**

18 DATED: September 1, 2016

19   
20 \_\_\_\_\_  
21 Hon. Jeffrey T. Miller  
22 United States District Judge

21 cc: All parties

22  
23  
24  
25  
26  
27  
28