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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SMOKEY POINT COMMERCIAL,
11 LLC,

Plaintiff,

12 v.

13 DICK'S SPORTING GOODS, INC.,

14 Defendant.

CASE NO. C17-1015JLR

ORDER DENYING MOTION TO
DISMISS

15
16 **I. INTRODUCTION**

17 Before the court is Defendant Dick's Sporting Goods, Inc.'s ("DSG") motion to
18 dismiss Plaintiff Smokey Point Commercial, LLC's ("Smokey Point") amended
19 complaint. (MTD (Dkt. # 15).) The court has considered the parties' submissions in
20 support of and in opposition to the motion to dismiss, the relevant portions of the record,

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1 and the applicable law. Being fully advised,¹ the court DENIES DSG’s motion to
2 dismiss.

3 II. BACKGROUND

4 This case arises from a commercial lease agreement between Smokey Point—the
5 landlord—and DSG—the tenant. (*See generally* FAC (Dkt. # 11).) On December 19,
6 2014, the two entities entered into a lease agreement for retail space in the Smokey Point
7 Market Place (“the Shopping Center”) located in Marysville, Washington. (*Id.* ¶ 6; *see*
8 *also* Compl. (Dkt. # 1-1), Ex. 1 (“Lease”) § 1.1.) The Shopping Center was visually
9 mapped out on a Lease Plan, which was attached to the lease agreement as Exhibit A.
10 (*See* Thoreson Decl. (Dkt. # 21) ¶ 2, Ex. A. (“Lease Plan”); *see also* MTD at Ex. A.)²
11 There are two areas of the Shopping Center, designated Phase I and Phase II, each of
12 which consists of several buildings that would be occupied by various retail tenants. (*See*
13 *id.*)

14 Both parties agree that the lease agreement controls their rights and obligations
15 with regard to DSG’s tenancy, and this case focuses on whether the parties adhered to the
16 terms of this lease agreement in their subsequent conduct. (FAC ¶ 7; *see* MTD at 4.) The

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18 ¹ Smokey Point requests oral argument, but the court finds that oral argument would not
19 be helpful to its disposition of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

20 ² The lease agreement incorporated this Lease Plan and all other exhibits by reference.
21 (Lease § 1.1, 17.24.) However, the Lease Plan was not attached to the complaint. (*See generally*
22 Compl.; FAC.) The court will nevertheless consider the Lease Plan and all other exhibits
because (1) the complaint refers to them; (2) they are central to Smokey Point’s claim; and (3) no
party disputes their authenticity. *See United States v. Corinthian Colls.*, 655 F.3d 984, 999 (9th
Cir. 2011).

1 court first details the relevant provisions of the lease agreement and then summarizes the
2 parties' conduct afterwards.

3 **A. The Lease Agreement**

4 The lease agreement between Smokey Point and DSG indicated that DSG would
5 occupy a space of approximately 45,000 square feet in Building A of Phase I. (*See* Lease
6 § 1.1; Lease Plan.) Party City and Ulta Beauty would occupy Building B adjacent to
7 DSG, with Party City occupying roughly 15,900 square feet and Ulta Beauty occupying
8 roughly 15,000 square feet. (Lease Plan.) Fitness Evolution was designated to open in
9 Building C, next to Building B, or in a building in Phase II of the Shopping Center. (*Id.*;
10 Lease § 1.4(c).)

11 At the time of the lease agreement, the Shopping Center had not yet been
12 constructed. Thus, the lease provided certain provisions concerning the construction
13 process and the future tenants of the Shopping Center. Two of these provisions are
14 pertinent here: (1) section 1.3 preserving Smokey Point's right to modify the
15 configuration and location of buildings within the Shopping Center; and (2) section 1.6
16 guaranteeing that certain co-tenants would be operating at the time DSG opened for
17 business. (*See generally* MTD; Resp. (Dkt. # 20).)

18 1. Section 1.3: Right to Alter Buildings

19 Section 1.3 of the lease provides that Smokey Point has the right to make changes
20 to any of the Shopping Center buildings that are identified on the Lease Plan. (Lease
21 § 1.3.) The provision in full reads:

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1 [Smokey Point] reserves the right to alter the Common Areas³ and to
2 construct any and all improvements including, without limitation, buildings
3 on the Common Areas as it determines and to make changes to any of the
4 Shopping Center Buildings identified on the Lease Plan, including changes
5 in configuration and/or location provided any such changes shall not
6 adversely affect the business operations of [DSG] . . . ; notwithstanding the
7 foregoing, the initial construction of the Shopping Center shall be
8 substantially as shown on the Lease Plan . . . attached hereto as Exhibit A.

9 (*Id.*) Thus, § 1.3 allowed Smokey Point to change the configuration or location of the
10 buildings on the Lease Plan as long as the changes do not adversely affect DSG's
11 business or render the Shopping Center substantially different from how it appears in the
12 attached Lease Plan.

13 2. Section 1.6: Initial Co-Tenancy Requirement

14 The lease also included an Initial Co-Tenancy Requirement, which sought to
15 ensure that the Shopping Center will receive sufficient consumer traffic. (*Id.* § 1.6.)
16 Specifically, § 1.6 sets forth two requirements that must be fulfilled by the time DSG
17 began its tenancy. First, certain identified inducement tenants⁴ must be open and
18 operating in their designated spaces, as shown on the Lease Plan. (*Id.* § 1.6(a).) Second,
19 70% of the remaining leasable area within the Shopping Center must be open and

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23 ³ "Common Areas" are areas designed for the benefit of all tenants and occupants, such
24 as the parking lot, the entrances and exits of the Shopping Center, and sidewalks. (Lease § 1.3.)

25 ⁴ Inducement tenants are other identified retail stores operating in the Shopping Center so
26 that, as a whole, customers will be attracted to the complex. The inclusion of inducement tenants
27 in a lease serves to assuage any fears a tenant may have about the lack of customers or
28 insufficient traffic to the complex in general. (*See Resp.* at 2.)

1 functioning as “Required Tenants,”⁵ as defined by the lease. (*Id.*) In full, the provision
2 provides:

3 [O]n the Rental Commencement Date: (i) Fitness Evolution; (ii) Party City;
4 and (iii) Ulta or an Acceptable Replacement Tenant for Ulta, shall each be
5 open or will simultaneously open with [DSG], fully staffed, stocked and
6 operated as a retail business in substantially all of their respective premises
7 as shown on the Lease Plan . . . [and] at least seventy percent (70%) of the
8 remaining LFA⁶ of Phase 1 of the Shopping Center and any LFA constructed
9 within Phase 2 of the Shopping Center, excluding the LFA of the Demised
10 Premises, the Inducement Tenants, and any out-parcels, shall be open or will
11 simultaneously be open with Tenant, fully staffed stocked and operated by
12 Occupants in substantially all of their premises, for the operation of retail
13 businesses by Required Tenants.

9 (*Id.*) DSG’s motion to dismiss concerns only the first requirement. (*See* MTD at 3, 5
10 n.2.)

11 If either of the two requirements were not met, the lease allows DSG to either
12 delay its opening, or go forward with opening at a “Substitute Rent . . . in lieu of Rent.”
13 (Lease § 1.6(b).) In other words, if the Initial Co-Tenancy Requirement is unfulfilled,
14 then DSG is not obligated to pay full rent to Smokey Point.

15 **B. Conduct After Lease Agreement**

16 At some point after the parties executed lease agreement, Smokey Point
17 reconfigured the Lease Plan—specifically the buildings in Phase I where DSG was to be
18 located. (FAC ¶ 10.) This reconfiguration decreased the overall size of the buildings

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20 ⁵ “Required Tenants” are tenants that meet certain qualifications spelled out by § 1.6 of
21 the lease agreement. (Lease § 1.6(a).) Because DSG’s motion to dismiss does not concern this
22 term (*see* MTD at 3, 5 n.2), the court does not provide the full definition here.

⁶ “LFA” is the leasable floor area, or the area of the Shopping Center that is intended for
exclusive use by a tenant. (*See* Lease § 1.2(d).)

1 containing the three inducement tenants Party City, Ultra, and Fitness Evolution. (*Id.*)
2 Moreover, Smokey Point allowed another tenant, Tuesday Morning, to share a portion of
3 Building C with Fitness Evolution. (*Id.* ¶ 16.) The three inducement tenants opened in
4 all of the allotted space under this reconfigured plan. (*Id.* ¶¶ 13-17.) Because all three
5 inducement tenants were fully staffed, stocked, and operational in substantially all of
6 their respective premises by March 20, 2017, Smokey Point alleges that it met the Initial
7 Co-Tenancy Requirement on March 21, 2017. (*Id.* ¶¶ 12-17.)

8 DSG believes that Smokey Point’s changes to the Lease Plan constituted a failure
9 to fulfill the Initial Co-Tenancy Requirement. (*Id.* ¶ 21.) Accordingly, DSG has
10 exercised its option to pay a lower substitute rent instead of full rent. (*Id.* ¶ 24.)

11 Smokey Point brought suit in Snohomish County Superior Court and alleged two
12 causes of action. (*See id.* ¶¶ 25-35.) First, Smokey Point seeks a declaratory judgment
13 that it has complied with its obligations under the Initial Co-Tenancy Requirement, thus
14 entitling it to full rent from DSG since March 21, 2017. (*Id.* ¶ 29.) Second, Smokey
15 Point alleges that DSG breached the terms of the lease agreement by paying a fraction of
16 the rent owed; to date, Smokey Point alleges that DSG owes approximately \$153,452.00
17 in back rent. (*Id.* ¶ 33.) Smokey Point seeks damages, including the back rent as well as
18 any rent that accrues after the filing of the lawsuit. (*Id.* ¶ 2.)⁷ DSG removed the action to
19 federal court. (Not. of Rem. (Dkt. # 1).)

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22 ⁷ The amended complaint restarts its numbering at the “Relief Requested” section. (*See*
FAC at 6, ¶¶ 1-4.) To be clear, the court cites to ¶ 2 on page 6 of the amended complaint.

III. ANALYSIS

1 DSG moves to dismiss Smokey Point's claims under Federal Rule of Civil
2 Procedure 12(b)(6). (See MTD at 1.) DSG argues that because Smokey Point reduced
3 the size of the inducement tenants' premises, the inducement tenants are not operating in
4 the premises as shown on the Lease Plan attached to the lease. (Id. at 12.) Thus, DSG
5 maintains that Smokey Point has not fulfilled the Initial Co-Tenancy Requirement in
6 § 1.6, which requires the inducement tenants to be operational in the premises "as shown
7 on the Lease Plan." (Id.) DSG maintains that Smokey Point's right to alter the Shopping
8 Center, as guaranteed by § 1.3, has no bearing on the fulfillment of § 1.6. (Id. at 7-10.)
9 Accordingly, DSG claims that it is entitled to pay substitute rent, thus defeating both
10 Smokey Point's declaratory judgment and breach of contract claims. (Id.) The court now
11 addresses DSG's motion.

A. Legal Standard

12 Dismissal for failure to state a claim "is proper if there is a lack of a cognizable
13 legal theory or the absence of sufficient facts alleged under a cognizable legal theory."
14 *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (internal quotation
15 marks omitted). However, "[i]t is well established that questions of fact cannot be
16 resolved or determined on a motion to dismiss for failure to state a claim upon which
17 relief can be granted." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911
18 F.2d 242, 245 (9th Cir. 1990); see also *Ramgen Power Sys. LLC v. Agilis Eng'g Inc.*, No.
19 C12-1762MJP, 2013 WL 12120456, at *2 (W.D. Wash. Apr. 23, 2013) (finding a
20 question of fact to be "an inappropriate subject for a Fed. R. Civ. P. 12(b)(6) dismissal").
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1 “To survive a motion to dismiss, a complaint must contain sufficient factual
2 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*
3 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
4 570 (2007)); see *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A
5 claim has facial plausibility when the plaintiff pleads factual content that allows the court
6 to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
7 *Iqbal*, 556 U.S. at 678. “Mere conclusory statements” or “formulaic recitation[s] of the
8 elements of a cause of action,” however, “are not entitled to the presumption of truth.”
9 *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citing *Twombly*, 550 U.S.
10 at 555).

11 When considering a motion to dismiss under Federal Rule of Civil Procedure
12 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving
13 party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.
14 2005). The court must accept all well-pleaded facts as true and draw all reasonable
15 inferences in favor of the plaintiff. *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*, 135
16 F.3d 658, 661 (9th Cir. 1998). On a motion to dismiss, the court may consider the
17 pleadings, documents attached to the pleadings, documents incorporated by reference in
18 the pleadings, or matters of judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908
19 (9th Cir. 2003) (citing *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th
20 Cir. 2002)).

21 Generally, “a plaintiff’s burden at the pleading stage is relatively light.” *Cascade*
22 *Yarns, Inc. v. Knitting Fever, Inc.*, No. C13-0674RSM, 2013 WL 4721812, at *1 (W.D.

1 Wash. Sept. 3, 2013). “The issue is not whether a plaintiff will ultimately prevail, but
2 whether the claimant is entitled to offer evidence to support the claims. Indeed it may
3 appear on the face of the pleadings that a recovery is very remote and unlikely but that is
4 not the test.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds*
5 *by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

6 **B. DSG’s Motion to Dismiss**

7 This dispute boils down to the interpretation of the phrase “as shown on the Lease
8 Plan” in § 1.6 of the lease agreement. The parties fundamentally disagree over whether
9 this “Lease Plan” refers to the exact version of the Lease Plan that was attached as
10 Exhibit A at the time of signing, or to an iteration of the Lease Plan after Smokey Point
11 exercised its right under § 1.3 to alter the configuration or location of the buildings. (*See*
12 *Lease* § 1.6.) DSG argues that the “Lease Plan” in § 1.6 is wholly separate from any
13 right to alter in § 1.3, and thus the “Lease Plan” refers only to the Exhibit A version.
14 (MTD at 7-9.) In other words, DSG posits that once Smokey Point made changes to the
15 Shopping Center that deviated from what was shown in Exhibit A, Smokey Point failed
16 to meet its initial co-tenancy requirement. (*See id.* at 10-11.) Smokey Point disputes this
17 interpretation of § 1.6, contending that § 1.3 allows Smokey Point to alter the Lease Plan
18 and still comply with the initial co-tenancy requirement. (Resp. at 7-10.) Thus, Smokey
19 Point asserts that it met the initial co-tenancy requirement by having all inducement
20 tenants operating in “substantially all of their respective premises under the Lease Plan
21 reconfigured pursuant to Section 1.3.” (*Id.* at 10.)

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1 Washington law governs the issue of contract interpretation. *See Kent 160 LLC v.*
2 *City of Auburn*, No. C09-1670RSL, 2010 WL 1691870, at *2 (W.D. Wash. Apr. 26,
3 2010). Under Washington law, the goal of contract interpretation is to determine the
4 intent of the parties. *Deep Water Brewing v. Fairway Res. Ltd.*, 215 P.3d 990, 1001
5 (Wash. Ct. App. 2009). To do so, courts follow the “objective manifestation theory of
6 contracts” by determining the intent of the parties from the reasonable meaning of the
7 words of the contract. *GMAC v. Everett Chevrolet, Inc.*, 317 P.3d 1074, 1078 (Wash. Ct.
8 App. 2014); *see also Hearst Commc 'ns Inc. v. Seattle Times Co.*, 115 P.3d 262, 267
9 (Wash. 2005) (directing courts to “impute an intention corresponding to the reasonable
10 meaning of the words used”). However, if two reasonable and fair interpretations of the
11 contract language are possible, the contract is ambiguous. *State Farm Gen. Ins. Co. v.*
12 *Emerson*, 687 P.2d 1139, 1144 (Wash. 1984). Such an ambiguity presents a question of
13 fact that cannot be determined as a legal matter. *See GMAC*, 317 P.3d at 1078; *Tanner*
14 *Elec. Coop. v. Puget Sound Power & Light*, 911 P.2d 1301, 1310 (Wash. 1996). Because
15 questions of fact cannot be resolved at the motion to dismiss stage, a contract that
16 presents an ambiguity cannot be dismissed on a Rule 12(b)(6) motion. *See Cook*, 911
17 P.2d at 245; *Ramgen*, 2013 WL 12120456, at *2. In other words, to prevail, DSG must
18 show that there is only one reasonable interpretation of § 1.6, and that interpretation
19 favors DSG’s position.

20 The court finds that the language in § 1.6, “as shown on the Lease Plan,” is subject
21 to more than one reasonable interpretation. Instead, at this early stage—in which the
22 court cannot consider extrinsic evidence such as the circumstances surrounding the

1 making of a contract, the subsequent conduct of the parties, preliminary negotiations, and
2 the course of dealing between the parties—the court finds that both DSG and Smokey
3 Point’s proposals are reasonable interpretations of the “Lease Plan” referred to in § 1.6.

4 First, nothing in § 1.6 itself suggests one way or the other whether the referenced
5 “Lease Plan” had to be the exact version attached as Exhibit A. In other words, § 1.6’s
6 plain language could be read to support either DSG’s interpretation—that the “Lease
7 Plan” must be the version memorialized as Exhibit A—or Smokey Point’s
8 interpretation—that the “Lease Plan” simply refers to a version of the Lease Plan.
9 Indeed, read in conjunction with § 1.3’s reservation of the right to alter, it is reasonable to
10 believe that parties may have anticipated the Lease Plan changing. And unlike § 1.3,
11 where the language explicitly states that § 1.3 refers to the Lease Plan “attached hereto as
12 Exhibit A” (*see* Lease § 1.3), § 1.6 does not feature any such express tethering (*see id.*
13 § 1.6). This absence of an explicit reference to Exhibit A further amplifies the ambiguity
14 of the “Lease Plan” in § 1.6.

15 Second, read in light of the entire contract, both parties’ interpretations are
16 reasonable at this stage of the proceedings. Because the lease agreement was signed
17 before construction began, the contract in several places contemplated the possibility of
18 change. For instance, exhibit C-1 detailed the finalization process for the construction of
19 DSG’s store and contemplated that the parties would “subsequently agree upon more
20 particularized specifications.” (Thoreson Decl. ¶ 2, Ex. A. at 9.) And indeed, as Smokey
21 Point contends, requiring compliance with a preliminary site plan at such an early stage
22 of construction, before requirements such as permits were secured, may well produce a

1 commercially absurd result. (*See* Resp. at 9-10); *Wash. Pub. Util. Dist. Utils. Sys. v. Pub.*
2 *Util. Dist. No. 1 of Clallam Cty.*, 771 P.2d 701, 707 (Wash. 1989) (discouraging contract
3 interpretations that would lead to an absurd conclusion or render the contract nonsensical
4 or ineffective). Of course, this is not to say that such a result could not have been what
5 the parties intended; it is possible extrinsic evidence may reveal that, as DSG argues, both
6 parties intended for the preliminary Lease Plan attached as Exhibit A to control. (*See*
7 MTD at 12; Reply at 3.) But, the court lacks the necessary information at this stage to
8 make that determination one way or the other. Because the language is susceptible to two
9 reasonable interpretations, creating a question of fact that the court cannot resolve at the
10 motion to dismiss stage, the court denies DSG’s 12(b)(6) motion.

11 DSG raises several arguments against the applicability of § 1.3, none of which are
12 meritorious. First, DSG contends that the right to alter in § 1.3 arises only after the initial
13 construction of the Shopping Center. (MTD at 7.) But this contention mischaracterizes
14 the language of § 1.3. DSG summarily relies on the requirement in § 1.3 that “the initial
15 construction of the Shopping Center shall be substantially as shown on the Lease
16 Plan . . . attached hereto as Exhibit A.” (*Id.* at 8.) But this limitation does not mean that
17 Smokey Point could not make any alterations before the initial construction; instead, the
18 plain language simply requires that any alterations made before the initial construction
19 not be so drastic that the Shopping Center no longer “substantially” adheres to what is
20 shown in the attached Lease Plan. In other words, the language in § 1.3 allows for
21 pre-initial construction changes but merely limits the scope of those changes. Adopting

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1 DSG’s interpretation would read out the word “substantially” from the provision. The
2 court declines to do so. *See Wagner v. Wagner*, 621 P.2d 1279, 1283 (Wash. 1980).

3 DSG next maintains that § 1.3 has no impact on § 1.6, as evidenced by the fact
4 that the sections do not reference each other. (MTD at 8-9.) But the absence of an
5 explicit reference is not dispositive. First, the contract must be construed in its entirety in
6 order to give effect to each clause, and thus, when interpreting § 1.6, the court should
7 take § 1.3 into account. *See Wash. Pub. Util.*, 771 P.2d at 707. Moreover, although the
8 sections do not refer to each other, they both utilize the same terms, such as the “Lease
9 Plan.” *See McLane & McLane v. Prudential Ins. Co. of Am.*, 735 F.2d 1194, 1195-96
10 (9th Cir. 1984) (“We may presume that words have the same meaning through the
11 contract.”); 4 S. Williston, *A Treatise on the Law of Contracts* § 618, at 715-16 (3d ed.
12 1961). Thus, the lack of reference from one section to the other does not conclusively
13 determine that DSG’s reading of § 1.6 is the only reasonable interpretation.

14 Lastly, DSG maintains that interpreting § 1.3 to allow Smokey Point to alter the
15 Lease Plan referenced to in § 1.6 would “render the phrase ‘as shown on the Lease Plan’
16 [in § 1.6] meaningless.” MTD at 10. But even if the “Lease Plan” referenced in § 1.6 is
17 a later iteration of the Lease Plan, the phrase still ensures that upon execution of the plan,
18 the inducement tenants will operate largely as the Lease Plan depicts. In other words, the
19 phrase holds just as much meaning as it would if it referred only to Exhibit A: to provide
20 that the actual construction process adheres to the Lease Plan’s layout, whether that is the

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1 version represented in Exhibit A or some later version reflecting a change Smokey Point
2 made pursuant to § 1.3.⁸

3 Even if the court agrees with DSG’s interpretation and finds that “as shown on the
4 Lease Plan” must be read to refer to the version memorialized as Exhibit A, DSG still
5 could not prevail at this stage because of the ambiguity surrounding the term
6 “substantially.” Section 1.6 requires the inducement tenants to operate in “substantially
7 all of their respective premises as shown on the Lease Plan.” (Lease § 1.6.) Thus, even if
8 the Lease Plan were the one depicted in Exhibit A, Smokey Point could still fulfill its
9 initial tenancy requirement if the changes it made did not “substantially” change the
10 inducement tenants’ premises.⁹ The scope of the change allowed thus depends on how
11 much leeway is contemplated by the term “substantially.”

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14 ⁸ For the first time on reply, DSG points to § 17.19 in the lease agreement and argues that
15 Smokey Point may not amend any part of the contract, including the Lease Plan, without a
16 written agreement between the parties. (Reply (Dkt. # 22) at 5; *see generally* MTD.) The court
17 “need not consider arguments raised for the first time in a reply brief.” *Zamani v. Carnes*, 491
18 F.3d 990, 997 (9th Cir. 2007). Even if the court were to consider this new argument, DSG’s
19 contention is unpersuasive. DSG claims that § 1.3 does not allow Smokey Point to alter the
20 Lease Plan itself but only the buildings identified on the Lease Plan. (Reply at 6.) Thus, DSG
21 maintains that § 1.3 does not authorize Smokey Point to “shrink the spaces occupied by the
22 [i]nducement [t]enants.” (*Id.*) But that distinction is without a difference. If Smokey Point is
authorized by § 1.3 to change the “configuration and/or location” of the buildings (Lease § 1.3),
it certainly has the authority to alter the inducement tenants’ spaces, which are located within the
buildings (*see* Lease Plan).

⁹ Thus, contrary to DSG’s representation, Smokey Point does not “admit[] that it has not
met the Initial Co-Tenancy Requirement” by “acknowledg[ing] that it shrank the spaces
occupied by the [i]nducement [t]enants.” (*See* MTD at 12.) Indeed, Smokey Point could have
reduced the applicable spaces but still fulfilled the Initial Co-Tenancy Requirement if the
reduced spaces remained “substantially” as shown on the Lease Plan. (*See* Lease § 1.6.)

1 DSG and Smokey Point differ in their interpretations of what “substantially”
2 means. DSG contends that the term means “essentially” the same and thus allows for
3 little to no leeway in terms of how much deviation is allowed. (Reply at 7-8.) In
4 contrast, Smokey Point argues for more room to deviate because “substantially” means
5 “largely . . . that which is specified,” or “[f]or the most part.” (Resp. at 8-9.) Because
6 the lease agreement does not define “substantially,” and both definitions are reasonable
7 interpretations, the court concludes that the term is ambiguous. Thus, whether Smokey
8 Point’s reconfiguration of the Lease Plan nonetheless allowed the inducement tenants to
9 occupy “substantially all of their respective premises” is an open question of fact that the
10 court cannot answer at this stage.¹⁰

11 Given the ambiguities surrounding the language “as shown on the Lease Plan” and
12 “substantially,” it is inappropriate on this record for the court to dismiss Smokey Point’s
13 allegations. At this time, the court does not determine—and lacks the information to
14 determine—whether Smokey Point’s reconfiguration of the inducement tenants’ spaces
15 complied with the Initial Co-Tenancy Requirement in § 1.6.

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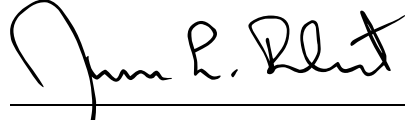
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20 ¹⁰ DSG alleges that Smokey Point makes only a conclusory assertion that it met its initial
21 co-tenancy requirement. (MTD at 11-12.) This assertion is inaccurate. The operative complaint
22 lists when each inducement tenant began operations in its allotted space under the reconfigured
plan (FAC ¶¶ 13-15), describes the opening of an additional tenant in the building with one of
the inducement tenants (*id.* ¶ 16), and spells out the Required Tenants that are purported to
occupy at least 81% of the remaining leasable floor area (*id.* ¶ 18).

1 **IV. CONCLUSION**

2 For the foregoing reasons, the court DENIES DSG's motion to dismiss (Dkt.
3 # 15).

4 Dated this 27th day of October, 2017.

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7 JAMES L. ROBART
United States District Judge

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