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

10 TWO GUYS, INC., a Washington  
11 Corporation, a.k.a. FRANCHISE  
INFUSION, INC.,

12 Plaintiff,

13 v.

14 NICK-N-WILLY'S FRANCHISE  
15 COMPANY, LLC, a Colorado limited  
liability company; and RICHARD WEIL,  
16 a Colorado resident,

17 Defendants.

CASE NO. C11-5537BHS

ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS

18 This matter comes before the Court on Defendants Nick-N-Willy's Franchise  
19 Company, LLC, and Richard Weil's ("Defendants") motion to dismiss, compel  
20 mediation, or to transfer venue (Dkt. 8). The Court has reviewed the briefs filed in  
21 support of and in opposition to the motion and the remainder of the file and hereby grants  
22 the motion to dismiss for the reasons stated herein.

23 **I. PROCEDURAL HISTORY**

24 On March 25, 2011, Plaintiff Two Guys, Inc., a.k.a. Franchise Infusion, Inc. ("Two  
25 Guys") filed a complaint against Defendants in Clark County Superior Court for the State  
26 of Washington. Dkt. 1, ¶ 1. Two Guys seeks rescission of an Area Developer Marketing  
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1 Agreement (“ADM”), which includes a provision that requires mediation before a legal  
2 action may be filed. Dkt. 9, Declaration of Richard J. Whittemore, Exh. 1, § 19.2.

3 On July 14, 2011, Defendants removed the matter to this Court. Dkt. 1.

4 On July 21, 2011, Defendant filed a motion to dismiss, compel mediation, or to  
5 transfer venue. Dkt. 8. On September 7, 2011, Two Guys responded. Dkt. 11. On  
6 September 9, 2011, Defendants replied. Dkt. 12.

## 7 **II. DISCUSSION**

8 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil  
9 Procedure may be based on either the lack of a cognizable legal theory or the absence of  
10 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901  
11 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the  
12 complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301  
13 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed  
14 factual allegations but must provide the grounds for entitlement to relief and not merely a  
15 “formulaic recitation” of the elements of a cause of action. *Bell Atlantic Corp. v.*  
16 *Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege “enough facts to state a  
17 claim to relief that is plausible on its face.” *Id.* at 1974.

18 In this case, the ADM explicitly requires mediation before any party may file a  
19 legal action under the agreement. Two Guys has failed to allege that they participated in  
20 mediation. Therefore, the complaint lacks a cognizable legal theory for breach of  
21 contract.  
22


23 With regard to Two Guys’ response brief, the request to remand the matter back to  
24 state court is meritless for numerous reasons. The request is also improperly presented in  
25 a responsive brief. Therefore, the Court denies Two Guys’ request to remand.  
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**III. ORDER**

It is hereby **ORDERED** that Defendants' motion to dismiss, compel mediation, or to transfer venue (Dkt. 8) is **GRANTED** and this action is **DISMISSED**. The Clerk is directed to enter judgment for Defendants.

DATED this 3rd day of October, 2011.

  
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BENJAMIN H. SETTLE  
United States District Judge