

**Newage Garden Grove, LLC v Wells Fargo Bank, N.A.**

2023 NY Slip Op 32447(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 653775/2022

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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NEWAGE GARDEN GROVE, LLC,

Plaintiff,

- v -

WELLS FARGO BANK, N.A., AS TRUSTEE, ON BEHALF  
OF THE REGISTERED HOLDERS OF THE CSAIL 2017-  
CX9 COMMERCIAL MORTGAGE TRUST, COMMERCIAL  
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES  
2017-CX9, and RIALTO CAPITAL ADVISORS, LLC

Defendants.

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INDEX NO. 653775/2022

MOTION DATE 12/12/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISMISS

Plaintiff Newage Garden Grove, LLC (Newage) brings this action against Defendants Wells Fargo Bank, N.A., as Trustee, on behalf of the registered Holders of the CSAIL 2017-CX9 Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2017-CX9 (Lender) and Rialto Capital Advisors, LLC (Rialto, and together with Lender, Defendants), asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory judgment, fraud, violations of the California Unfair Competition Law, Cal. Bus. & Prof. Code. §§ 1720 *et seq.*, economic duress, and fraudulent inducement (NYSCEF # 1 – the Complaint or Compl.). Presently before the court is Defendants’ partial motion to dismiss the Complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) (NYSCEF # 9). Newage opposes the motion. For the following reasons, Defendants’ motion is granted in part and denied in part.

**BACKGROUND<sup>1</sup>**

This action arises from a disputed payment by Newage of approximately \$6.1 million in default interest and fees in connection with its payoff and refinancing of an approximately \$20.5 million loan (Compl. ¶¶ 1, 53, 56). Newage is a limited liability company formed in or around 2006 for purposes of developing and operating a Sheraton-branded hotel in Garden Grove, California (the Property)

<sup>1</sup> The following facts are derived from the allegations in the Complaint. They are accepted as true solely for purposes of this motion.

(*id.* ¶¶ 2, 11, 15). The Property is closely situated to Disneyland and generates substantial revenue from lodging Disneyland guests (*id.* ¶ 15)

### *The Loan Agreement*

On May 31, 2017, Newage, as borrower, and Column Financial, Inc., as original lender, executed a series of documents, including a loan agreement, dated as of May 31, 2017 (the Loan Agreement), in connection with a \$20,500,000.00 loan to Newage secured by the Property (the Loan) (Compl. ¶¶ 2, 16; NYSCEF # 11 – Agreement). Pursuant to the Loan Agreement, Newage would make monthly payments of \$122,314.59 (the Monthly Payment), with interest on the Loan accruing at a rate of 5.18% per annum (the Interest Rate) (Compl. ¶ 18). Each Monthly Payment first applied to any accrued interest and the balance went towards the Loan’s principal (Agreement § 2.3.1). The Loan Agreement also provided for certain Events of Default under Section 8.1. If an Event of Default occurred or was continuing, the interest on the Loan began accruing at a rate of 5% per annum on top of the Interest Rate, calculated from the date such payment was due” (the Default Rate) (Compl. ¶ 19; Agreement § 2.2.4). The maturity date on the Loan was June 6, 2022 (the Maturity Date), at which time Newage was to pay the full outstanding principal balance on the Loan, as well as any accrued and unpaid interest (Compl. ¶ 18; Agreement § 2.3.3).

There were several enumerated occurrences that would constitute an Event of Default, including, as is relevant here, Newage’s failure to pay “any portion of the [Loan] when due” or breach “any covenant contained in Section 4.1.30” of the Loan Agreement, i.e., the Special Purpose Entity (SPE) Covenant (Agreement § 8.1[a][i], [x]). Pursuant to the SPE Covenant, Newage represented and warranted that it “is, has at all times since its formation been and shall continue to be” an SPE (Agreement § 4.1.30(a)). The Loan Agreement, in turn, defined an SPE as a limited liability company that has complied with a list of 44 different requirements (Compl. ¶ 24). Chief among them is a requirement that Newage would have “no Indebtedness other than (i) the Loan, (ii) liabilities incurred in the ordinary course of business relating to the ownership and operation of the Property and the routine administration of [Newage] . . . and (iii) such other liabilities permitted pursuant to” the Loan Agreement (Agreement at pp. 27-28).

As an SPE under the Loan Agreement, Newage further represented that

other than capital contributions and distributions permitted under the terms of its organizational documents, [it] has not entered into or been a party to, and shall not enter into or be a party to, any transaction with any of its partners, members, shareholders or Affiliates except in the ordinary course of its business and on terms which are commercially reasonable terms comparable to those of an arm’s-length transaction with an unrelated third party[.]

(Agreement at 28). Newage alleges that this provision expressly permitted capital contributions by, and distributions to, Newage's members (Compl. ¶ 26).

Beyond the Default Rate, the Loan Agreement also contemplated certain late payment charges and Lender reimbursement rights in connection with an Event of Default, in addition to other rights and remedies (Compl. ¶¶ 20-23). For instance, Section 2.3.4 provided for a late fee charge to "defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate for the loss of the use of such delinquent payment" (the Late Fee) (Agreement § 2.3.4). And Sections 9.6 and 10.13(a) contemplated that Newage would "promptly reimburse Lender on demand" for certain fees and expenses stemming from special servicing of the Loan after an event of default (the Special Servicing Fees) (*id.* §§ 9.6, 10.13[a]).

Meanwhile, the Loan Agreement also addressed performance of the parties' obligations and any modifications to its contractual provisions. Specifically, under the Loan Agreement's plain terms, "[n]o modification, amendment, extension, discharge, termination or waiver of any provision of th[e] Agreement . . . shall in any event be effective unless the same shall be in a writing signed by the party against whom enforcement is sought" (Agreement § 10.4). The Loan Agreement further provided that "[n]either any failure nor any delay on the part of Lender in insisting upon strict performance of any term, condition, covenant or agreement, or exercising any right, power, remedy or privilege hereunder . . . shall operate as or constitute a waiver thereof[.]" (*id.* § 10.5).

Finally, in addressing governing law, the Section 10.3 of the Loan Agreement provided that

in all respects, including . . . matters of construction, validity and performance, this agreement, the note and the other loan documents and the obligations arising hereunder and thereunder shall be governed by, and construed in accordance with, the laws of the State of New York applicable to contracts made and performed in such state (without regard to principles of conflicts of laws) and any applicable law of the United States of America

(*id.* § 10.3(a)).

### ***Rialto's Assertion of Nonmonetary Defaults under the Loan Agreement***

Upon the Loan's origination, Column assigned its rights to Lender, and the Loan was concurrently securitized and pooled into a commercial mortgage-backed security pass-through trust (the Trust), with Lender serving as Trustee (Compl. ¶¶ 2, 17). In or around May 2020, the Loan was then transferred to Rialto as Special Servicer (*id.* ¶ 17).

By March 2020, Newage faced financial hardships entering the third year of its five-year Loan term because of the COVID-19 pandemic and the resulting closure of Disneyland (Compl. ¶ 32). As a result, Newage failed to timely make its Monthly Payment under the Loan Agreement beginning around June 2020 (*id.* ¶ 33). Given its financial issues, Newage entered modification and forbearance discussions with Rialto. (*id.* ¶ 32). Newage alleges that, in May 2020 and December 2020, respectively, Rialto provided Newage with two separate pre-negotiation letters to govern modification and forbearance discussions (*id.* ¶ 33).

Newage avers that it believed the parties were engaging in “good faith forbearance and modification negotiations with Rialto” (Compl. ¶ 34). But then, around October 5, 2021, Rialto declared an Event of Default under Section 8.1(a)(x) of the Loan Agreement through a notice of default (*id.* ¶ 36; NYSCEF # 12 – Default Notice). The Default Notice, which was sent on behalf of Lender, stated that Newage had breached Section 4.1.30 of the Loan Agreement by taking on “non-permitted debt,” specifically pointing to Newage’s August 31, 2021, balance sheet listing “Loan-PHE” as a liability in the amount of \$2,085,000.00 (Default Notice at 1; Compl. ¶¶ 28-29, 36). The Default Notice further identified various other “partner loans” received by Newage between 2017-2020 (Default Notice at 1-2; Compl. ¶¶ 28, 36). For its part, Newage contends that these purported non-permitted debts were, in fact, capital contributions from its members that were expressly permitted by the Loan Agreement and about which Lender and Rialto were previously aware (Compl. ¶¶ 27, 31, 37).<sup>2</sup> It further alleges that Rialto invoked these nonmonetary defaults to threaten Newage’s principals with personal liability under Section 9.4(c)(II)(G) of the Loan Agreement (*id.* ¶ 38).

Three days later, on October 8, 2021, Rialto emailed a payoff demand statement to Newage (Compl. ¶ 39).<sup>3</sup> As part of the payoff demand, Rialto sought retroactive default interest covering the life of the Loan, which amounted to more than \$5 million (*id.*). Then, on October 11, 2021, Rialto sent an acceleration notice declaring the Loan immediately due and payable and noting that interest would continue to accrue at the Default Rate (*id.* ¶ 40). In response, the parties held a call on October 15, 2021, during which Newage offered to pay all amounts owed except for the default interest claimed by Rialto (Compl. ¶¶ 41, 55).<sup>4</sup> Rialto declined to accept this offer (*id.* ¶ 41). Accordingly, on October 18, 2021, Newage wrote to Rialto to explain that no nonmonetary default had occurred because the alleged “loans” were capital contributions (*id.* ¶¶ 41-42). Newage then followed up on October 27, 2021, with a letter from a certified public accountant explaining the same thing,

<sup>2</sup> Newage claims these capital contributions were recorded as loans as placeholders for deferred member contributions in accordance with standard accounting and tax principles (Compl. ¶¶ 28-31).

<sup>3</sup> Rialto then sent a revised statement the next day (Compl. ¶ 39).

<sup>4</sup> New alleges that, “[o]n multiple occasions before, on, and after October 15, 2021,” it purportedly offered to pay all amounts owed to reinstate the Loan and/or repay the Loan in full if Rialto withdrew its demand for default interest. (Compl. ¶ 55). Rialto purportedly refused Newage’s offer each time (*id.*)

prompting Rialto to engage an independent professional to evaluate Newage's claims (*id.* ¶¶ 42-43).

Following its investigation, Rialto asserted via email that, in violation of the Loan Agreement, Newage improperly transferred funds between itself and related companies between June 2017 and June 2020 (Compl. ¶ 46). Rialto's email made no reference to its previous nonmonetary default theory (*id.*). In response, Newage provided a letter and accompanying report from a forensic accountant indicating that these alleged transfers had occurred in the ordinary course of business (*id.* ¶ 47). Rialto responded on January 28, 2022, by rejecting Newage's position that it had received permitted contributions and transfers (*id.* ¶ 48).

Newage alleges, on information and belief, that Rialto sought default interest from Newage because it could retain those amounts, in whole or in part, in its individual capacity (Compl. ¶ 55). Newage further contends, again on information and belief and without any other supporting details, that Rialto has engaged in similar conduct—with similar motivations—when interacting with other unspecified borrowers (*id.*).

### ***Newage's Disputed Payoff Upon Refinancing***

As forbearance discussions continued, Newage eventually obtained a refinancing opportunity, with a closing expected on or before April 1, 2022 (Compl. ¶ 49). Consequently, on January 7, 2022, and again on January 26, 2022, Newage requested a payoff statement from Rialto (*id.* ¶ 49). In doing so, it reiterated its willingness to pay amounts owed to reinstate the Loan if Rialto withdrew its position on default interest (*id.*) Newage also noted that Rialto's claimed defaults were a significant impediment to its refinancing efforts (*id.*).

Rialto eventually provided a payoff statement on March 21, 2022 (Compl. ¶ 50). In this payoff statement, Rialto requested a total payoff amount of \$27,053,208.12 (*id.* ¶ 51). Rialto then circulated a revised statement shortly after that updated the payoff amount due to \$24,769,672.19 (*id.* ¶ 52). To reach this revised amount, Rialto credited Newage with \$2.3 million that had been erroneously included in the original payoff quote, but increased the amount of default interest, special servicing fees, and liquidation fees due by \$39,182.57 (*id.*).

On March 29, 2022, Newage paid the \$24,769,672.19 requested by Rialto (the Payoff Amount), but it did so expressly under prior written protest (Compl. ¶ 53). Newage specifically took issue with Rialto's charge of \$6,181,598.88, which comprised of \$5,619,195.77 in accrued default interest, a \$222,923.68 in Late Fee, a \$114,198.93 in Special Servicing Fee, and a \$225,280.75 Liquidation Fee (*id.* ¶¶ 52, 56). In making this payment, Newage also explained that its payment was involuntary because Lender and Rialto conditioned the release of lien of the Deed of

Trust on the Property on full payment and, without the lien released, it could not refinance the Loan with a new lender (*id.* ¶ 54).

### LEGAL STANDARDS

CPLR 3211(a) provides for various grounds under which a party may move for judgment dismissing one or more causes of action, including when a pleading “fails to state a cause of action” (CPLR 3211 [a] [7]) or “a defense is founded upon documentary evidence” (CPLR 3211 [a] [1]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the non-movant] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Whitebox Concentrated Convertible Arb. Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation omitted]; accord *Pavich v Pavich*, 189 AD3d 548, 549 [1st Dept 2020]).

“[W]hether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss” (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). Nevertheless, dismissal based on documentary evidence under 3211(a)(1) is warranted “only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it” (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

### DISCUSSION

In its Complaint, Newage advances seven causes of action: (1) a claim for breach of contract; (2) a claim for breach of the implied covenant of good faith and fair dealing; (3) a claim for declaratory judgment that the Default Rate, the Late Fee, and the Special Servicing Fees are unenforceable penalties; (4) claims of fraud and fraudulent inducements; (5) a claim under the California Unfair Competition Law, Cal. Bus. & Prof. Code. §§ 1720 *et seq.* (the UCL); and (6) a claim for economic duress (Compl. ¶¶ 57-91). For most of Newage’s causes of action (except its claims for declaratory judgment and fraudulent inducement), Newage seeks judgment in the amount of no less than \$6,181,598.88, i.e. the amount of default interest it claims was erroneously included in the Payoff Amount (*id.* ¶¶ 52, 56, 61, 70, 80, 83, 87). Defendants now move to dismiss all claims except for breach of contract (NYSCEF # 12).

## I. Newage's UCL Claim (Count V)

Defendants move to dismiss Newage's UCL claim on two bases. First, Defendants argue that the Loan Agreement's choice-of-law provision, which provides that New York law would govern "matters of construction, validity and performance" of the Loan Agreement, precludes Newage from bringing a claim under a California statute (NYSCEF # 13 – MOL at 16-17). Second, Defendants contend that Newage's UCL claim fails to allege any harm to the public in general and is, in fact, premised on nothing more than the parties' private contractual dispute (*id.* at 17-18; NYSCEF # 15 – Reply at 6-7).

In opposition, Newage retorts that Defendants advance an overly broad interpretation of the Loan Agreement's choice-of-law provision, and that this provision should only be read to apply to contractual claims (NYSCEF # 14 – Opp. at 11-12). With respect to the merits of its UCL claim, Newage argues that Defendants have disregarded the allegations of the Complaint, which alleges that Rialto has engaged in the same conduct with other borrowers (*id.* at 7-9).

As explained below, the court concludes that, although the Loan Agreement's choice-of-law provision does not preclude Newage's UCL claim, Newage has nevertheless failed to state a claim for relief under that statute.

### A. Impact of the Loan Agreement's Choice-of-Law Provision

It is the "well-settled 'policy of the courts of [New York] to enforce contractual provisions for choice of law and selection of a forum for litigation" (*Boss v Am. Exp. Fin. Advisors, Inc.*, 15 AD3d 306, 307 [1st Dept 2005], quoting *Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 [1st Dept 1995]). Tort claims, however, are typically outside the scope of these contractual choice-of-law provisions (*see Audax Credit Opportunities Offshore Ltd. v TMK Hawk Parent Corp.*, 72 Misc 3d 1218[A], at \*16 [Sup Ct, NY County, Aug. 16, 2021], citing *Fin. One Pub. Co. Ltd. v Lehman Bros. Special Fin. Inc.*, 414 F3d 325, 335 [2d Cir 2005]; *see also Knieriemen v Bache Halsey Stuart Shields Inc.*, 74 AD2d 290, 293 [1st Dept 1980] ["that their contract should be governed by an expressed procedure does not bind them as to causes of action sounding in tort"]). For a choice-of-law provision to extend to extra-contractual tort and statutory claims, "the express language of the provision must be sufficiently broad as to encompass the entire relationship between the contracting parties" (*McBeth v Porges*, 171 F Supp 3d 216, 224 [SD NY 2016]; *see also Avnet, Inc. v Deloitte Consulting LLP*, 187 AD3d 430 [1st Dept 2020]; *Cap. Z Fin. Servs. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100, 109 [1st Dept 2007]). Such circumstances are "rare" (*see Cadigan v Liberty Helicopters, Inc.*, 2023 NY Slip Op 30619[U], at \*2 [Sup Ct, NY County, Mar. 2, 2023] [collecting cases]).

Here, Defendants argue that the parties agreed that New York law would apply to all matters pertaining to the Loan Agreement and its performance,

including tort and statutory claims (MOL at 9, 17). But Defendants' position is premised on an overly broad reading of the Loan Agreement. As neither party disputes, Section 10.3 of the Loan Agreement states that "the agreement, the note and other loan documents and the obligations hereunder and thereunder" are to be governed by New York law (Agreement § 10.3). Section 10.3 then further specifies that this applies to "matters of constructions, validity and performance" (*id.*)

Notably, however, there is no indication from this section's plain text that New York law is to govern "all issues" or "all matters" relating to the Loan Agreement. For this reason, Section 10.3 is far narrower in scope than the sweeping choice-of-law provisions at issue in the two First Department cases upon which Defendants principally rely in their moving papers (*see Cap. Z Fin. Servs.*, 43 AD3d at 103 [purchase agreement designated that the laws of Delaware "shall govern **all issues concerning** the validity of this Agreement, the construction of its terms and the interpretation and enforcement of the rights and duties of the parties" [emphasis added]]; *Avnet*, 187 AD3d at 430 ["This Agreement and each Work Order, and **all matters relating to** this Agreement and each Work Order, shall be governed by. . . the laws of the State of New York (without giving effect to the choice of law principles thereof)" [emphasis added]]; *see generally Ramiro Aviles v S & P Global, Inc.*, 380 FSupp 3d 221, 270-71 [SD NY 2019] [acknowledging that, under New York law, "[a]s a general rule of thumb, 'provisions applying to disputes arising out of' or relating to a contract are capacious enough to reach related tort claims, while provisions stating that a contract will be governed by or construed in accordance with the law of a state are not."]) [internal quotations omitted]).

Insofar as Defendants rely on certain terms included in Section 10.3—such as "in all respects," "performance" and "obligations arising hereunder"—as supporting its interpretation that the Loan Agreement's choice-of-law provision intended to apply to extra-contractual claims, that reliance is misplaced. Indeed, courts applying New York law that have confronted similarly drafted choice-of-law provisions have consistently concluded that such language is not broad enough to encompass extracontractual claims. For example, in *J&R Multifamily, Ltd. v U.S Bank Assoc., as Trustee for the Registered Holders of UBS-Barclays Commercial Bank Mortgage Trust 2012-C4*, the court confronted a choice-of-law provision that was nearly identical to the one at issue here (2019 WL 6619329, at \*3-5 [SD NY Dec. 5, 2019, No. 19-cv-1878 (PKC)] [provision stated, in relevant part, that "in all respects, including . . . matters of construction, validity and performance, this agreement, the note and the other loan documents and the obligations arising hereunder and thereunder shall be governed by" New York law]). The court, applying New York's choice-of-law rules, concluded that this language was "insufficiently broad to bring a tort claim within the scope of the choice-of-law provision" (*id.* at \*4). Similarly, in *Twinlab Corp. v Paulson*, the Second Department rejected application of a choice-of-law provision to a statutory claim brought by plaintiff, where the provision stated that "the 'validity, interpretation, construction

and performance' of the agreement would be governed by and construed in accordance with New York law" (283 AD2d 570, 571 [2d Dept 2001]).

In short, the Loan Agreement's choice-of-law provision does not preclude Newage's UCL claim.<sup>5</sup>

## B. Merits of the UCL Claim

The UCL "prohibits unfair competition, including unlawful, unfair, and fraudulent business acts' in violation of California law" (*Korea Supply Co. v Lockheed Martin Corp.*, 63 P3d 937, 943 [Cal. 2003]). In determining whether a defendant's business practices constitute unfair competition under the UCL, courts must focus on "whether the public at large, or consumers generally, are affected by the alleged unlawful business practices of defendants (*In re Webkinz Antitrust Litig.*, 695 FSupp 2d 987, 989-99 [ND Cal. 2010]). Although the scope of UCL is broad, it does not reach claims based on contracts between commercial entities that do not otherwise implicate the public in general or individual consumers (*see Dollar Tree Stores Inc. v Toyama Partners LLC*, 875 F Supp 2d 1058, 1083 [ND Cal. 2012] [dismissing UCL claim based on breach of contract that did not implicate public]; *Linear Tech. Corp v Applied Materials, Inc.*, 152 CalApp4th 115, 135 [Cal Ct App 2007] [affirming dismissal of UCL claim where source of fraudulent and unfair practices was misrepresentation made in purchase orders between sellers and buyer]; *O.F.I. Imports Inc. v Gen. Elec. Cap. Corp.*, 2016 WL 5376208, at \*7 [SD NY Sept. 26, 2016, 15-CV-7231 (VEC)] [dismissing UCL claim where plaintiff did not allege any injury other than in its capacity as a counterparty to the financing and purchase of certain assets and did not allege that the harm suffered by plaintiff also impacted a class of similarly situated businesses]). For this reason, "courts must dismiss unfair competition claims when based on contractual disputes between two private parties that otherwise have no connection to competition or the general public" (*United States for Use of Integrated Energy, LLC v Siemens Gov't Techs., Inc.*, 2016 WL 11520823, at \* [CD Cal. Aug. 25, 2016, No. SACV 15-01534 JVS (DFMx)], citing *Dollar Tree*, 875 F Supp 2d at 1083; *Webkinz*, 695 F Supp 2d at 999; *Linear Tech.*, 152 Cal App4th at 135).

The crux of Newage's UCL claim is that Rialto, in its capacity as an agent for Lender, engaged in unfair competition by (i) purposely delaying when it provided Newage a payoff statement, (ii) concocting unfounded nonmonetary defaults, and (iii) providing Newage with a payoff statement that was "knowingly false" (Compl. ¶¶ 36-37, 49-52, 53, 82). Put bluntly, these facts do nothing more than paint a picture of a business dispute between Newage and Defendants arising out of the Loan Agreement, as well as Newage's injury arising therefrom. As explained above,

<sup>5</sup> To the extent Defendants rely on the broader language used in the Loan Agreement's forum-selection clause (MOL at 10 n.5), that contention can be rejected out of hand (*see Fin. One Pub. Co.*, 414 F3d at 335 [concluding that extra-contractual set off rights were not encompassed by agreement's choice-of-law clause notwithstanding the broader forum-selection clause in the agreement]).

such allegations, without more, cannot give rise to a claim under the UCL (*see Linear Tech.* 152 CalApp4th at 135; *Dollar Tree*, 875 F Supp 2d at 1083).

To avoid this outcome, Newage cites to a string of cases for the proposition that “courts routinely hold that borrower claims against loan servicers for attempting to collect unwarranted default fees state a claim under the UCL” (Opp. at 9). Newage’s reliance on these cases is misplaced. Critically, none of the UCL claims in these cases related to a garden-variety contractual business dispute. For example, in *Jordan v Nationstar Mortgage LLC*, the court declined to dismiss plaintiff’s UCL claim because, in part, plaintiff had established a predicate for her UCL claim by sufficiently alleging that defendant had violated the Rosenthal Act, which broadly governs debt collection practices (2020 WL 425615, at \*4 [ED Cal Jan. 27, 2020, No. 2:18-cv-02717-KJM-AC]). Meanwhile *Roling v E\*Trade Secs., LLC*, involved a putative class action challenging E\*Trade’s practice of assessing a quarterly fee of \$40 for each quarter that plaintiffs did not make at least one trade on the E\*Trade platform (756 F Supp 2d 1179, 1183 [ND Cal 2010]). In analyzing the “unfair” and “fraudulent conduct” prongs of the UCL analysis, the court acknowledged that plaintiffs sufficiently alleged that defendant breached the UCL by charging its customers this \$40 fee (*id.* at 1196). Here, by contrast, the conduct about which Newage complains solely impacted it in its capacity as a party to the Loan Agreement. Undeterred, Newage nevertheless attempts to shoehorn the parties’ business dispute into a matter of public concern by alleging that Rialto purportedly engaged in the same conduct with other unspecified borrowers (*see* Compl. ¶¶ 55, 83). Newage’s contentions, however, are at best conclusory and do nothing to disturb the conclusion that its UCL claim is related to a purely contractual dispute between private parties.

To be sure, Newage has identified one case, *Oakland v GCCFC 2005-GG5 Hegenberger Ltd. P’Ship* (2019 WL 1571881, at \*8 [ND Cal Apr. 11, 2019, No. 19-cv-00403-SI]), where a court did permit a UCL claim to proceed under somewhat similar circumstances to the case at bar. But that unpublished decision is of limited persuasive value. Indeed, the *Oakland* court’s UCL analysis is confined to a single paragraph lacking any analysis about why it concluded that specific allegations identified by plaintiff in its opposition papers supported its UCL claim (*id.*). And, as Defendants note in their reply, the *Oakland* court also relied exclusively on cases involving conduct that impacted the public and/or a class of consumers (*see e.g. Friedman v AARP, Inc.*, 855 F3d 1047, 1049-50 [9th Cir 2017] [regarding AARP’s retention of fees as commission for the sale of insurance]).

Defendants’ motion to dismiss Count V of the Complaint is granted.

## II. Newage’s Fraud-Based Claims (Counts IV & VII)

In seeking dismissal of Counts IV and VII, Defendants argue that Newage has failed to plead fraud with particularity, explaining that the claim is a re-

packaged breach-of-contract claim with conclusory allegations regarding Rialto's false statements concerning the nonmonetary defaults (MOL at 12-13). They further aver that Newage has failed to establish reasonable reliance on any purported misrepresentation because it expressly paid the Payoff Amount under written protest (*id.* at 13).

In its opposition, Newage somewhat re-states the focus of its fraud-based claims. It now argues that the basis for these claims is that, after Newage defaulted on its payments, Rialto knowingly and deliberately engaged in "sham negotiations" and advanced shifting default theories to induce Newage to continue negotiating with Rialto, all while default interest accrued (Opp. at 16-18). Newage also claims in its opposition that Rialto purportedly induced Newage to continue forbearance discussions by concealing (i) its lack of intent to agree to any forbearance or modification on any terms, (ii) its purported attempt to fabricate nonmonetary default events, and (iii) its alleged conflicts of interest (*id.* at 16). Defendants respond that they had no obligation to consider forbearance under the Loan Agreement, and that the mere fact that the parties engaged in forbearance discussions without reaching an agreement is insufficient to establish fraudulent intent (Reply at 8-9).

To state a claim for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Gomez-Jiminez v New York Law School*, 103 AD3d 13, 17-18 [1st Dept 2012]). These are largely the same elements required to state a claim of fraudulent inducement (*see MBIA Ins. Corp. v Credit Suisse Secs. (USA) LLC*, 32 Misc 3d 758, 773 [Sup Cty NY County 2011], citing *Schumaker v Mather*, 133 NY 590 [1892]). Where a fraud claim is based on concealment or omission, a plaintiff must also allege that defendant had a duty to disclose material information and that it failed to do so (*see Mitschele v Schultz*, 36 AD3d 249, 254-255 [1st Dept 2006]). And "[a]bsent a fiduciary duty between the parties, a duty to disclose arises only under the special facts doctrine" (*Silver Point Cap. Fund, L.P. v Riviera Resources, Inc.*, 69 Misc 3d 1213[A], at \*7 [Sup Ct, NY County, Nov. 5, 2020], citing *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005], *affd* 198 AD3d 432 [1st Dept 2021]; *see also HOV Servs., Inc. v ASG Techs. Grp., Inc.*, 212 AD3d 503, 505 [1st Dept 2023] [no duty to disclose absent a fiduciary relationship or contractual duty). In all cases, the allegations of fraud must be pleaded with particularity (CPLR 3016 [b] ["Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."]).

Here, there are several bases to dismiss Newage's fraud claims. To start, Newage fails to plead fraudulent intent beyond relying on various conclusory assertions. For example, Newage avers that Defendants made allegedly false

statements concerning the nonmonetary defaults (Opp. at 16-17). The Complaint, however, only supports an inference that Defendants asserted these defaults based on its interpretation of the Loan Agreement (*see* Compl. ¶¶ 36-37). Although Newage may dispute the contractual basis of Defendants' calculations of default interest and any associated fees, such a dispute does not establish that Defendants made "knowingly" false assertions regarding the nonmonetary defaults (*see e.g. Wall Street Transcript Corp. v Cohn*, 1997 WL 187343, at \* 3 [SD NY Apr. 16, 1997, No. 96 Civ. 4964(RPP)] [concluding that complaint failed to allege facts giving rise to inference of fraudulent intent where plaintiff alleged defendant committed fraud based on its interpretation of a contractual provision concerning certain porter wage charges]). Newage's repeated and conclusory characterizations in its Complaint and its opposition that the alleged nonmonetary defaults were "invented," "fictitious," or "false" does nothing to disturb this conclusion.

Newage otherwise contends that Defendants fraudulently concealed that it did not intend to enter into a forbearance agreement despite the parties' negotiations (Opp. at 16). Yet, on this point, the Complaint only contains stray, conclusory assertions concerning Defendants' intentions to negotiate (*see* Compl. ¶ 9, 77-78). In any event, insofar as Newage asks this court to infer fraudulent intent from Defendants entering into, and then continuing to engage with, forbearance and modification negotiations without reaching an actual agreement, such an inference, without more, is unwarranted (*see Capricorn Investors III, L.P. v Coolbrands Intern., Inc.*, 66 AD3d 409, 409 [1st Dept 2009] [declining to infer intent without specific allegations where plaintiff alleged defendants "did not keep their oral promises to consolidate the operations of their Arkansas plant and plaintiff's Texas plant and that defendants never intended to keep those promises"]). Nor is the fact that Newage continued to incur additional default interest during the parties' negotiations probative of any fraudulent intent (*cf. 360 N. Rodeo Drive LP v Wells Fargo Bank, National Association*, 2023 WL 2574180, at \*8-9 [SD NY, Mar. 20, 2023, No. 22-cv-767 (ER)] [concluding that plaintiff failed to sufficiently plead that defendant's statements were knowingly false even though the statements induced plaintiff to continue paying a loan that was accruing default interest, as well as incurring additional associated fees]).<sup>6</sup>

Aside from the above deficiencies, Newage also fails to sufficiently plead justifiable reliance on or inducement by Defendants' purported misrepresentations and omissions. In essence, Newage contends that, because of Rialto's false representations and omissions, it lost the opportunity to renegotiate or repay the

<sup>6</sup> Newage also attempts to establish fraudulent intent by averring that Defendants purportedly concealed that Rialto would retain any interest payments and fees related to the nonmonetary defaults, as well as that Rialto has apparently extracted similar payments from other, unspecified borrowers (Compl. ¶ 55). These allegations, however, are both pleaded upon information and belief and do not provide any supporting details for the basis of that belief. Without more, these allegations are insufficient to establish fraudulent intent at the pleading stage (*see Brennan v 3250 Rawlins Ave. Partners, LLC*, 171 AD3d 603, 604 [1st Dept 2019] [allegations of fraud insufficient where "they were made upon information and belief, and the source of the information was not disclosed"]).

Loan for nearly two years and incurred additional default interest and fees (Opp. at 17; Compl. ¶¶ 79, 90). Newage's reliance, however, is belied by the plain terms of the Loan Agreement and even the allegations set forth in the Complaint.

As previously noted, the Loan Agreement established that there would be "no modification, amendment, extension, discharge, termination or waiver" without specific consent (Agreement § 10.4). It further stated that any delay in insisting on strict performance of the Loan Agreement's obligations would not constitute waiver of those obligations (*id.* § 10.5). Thus, going into forbearance or modification negotiations, Newage was, or at least should have been, aware that Defendants did not need to agree to any changes to the terms of the Loan Agreement or its enforcement rights (*cf.* Compl. ¶¶ 32-33 [alleging that Newage requested that Rialto engage in forbearance negotiations and Rialto, in turn, provided pre-negotiation letters to govern discussions]). Put differently, Newage cannot claim that it relied on Rialto's omissions during negotiations over a *potential* agreement when Rialto never had an obligation to provide the relief Newage sought in the first place (*see Bank Leumi Tr. Co.*, 163 AD2d 26, 32 [1st Dep 1990] [concluding that proposed affirmative defense of fraud failed to plead justifiable reliance on bank's promise to advance funds where loan agreement left such decisions to the bank's sole discretion]). To the extent Newage avers that it lost out on the opportunity to refinance the Loan at an earlier date, the Complaint itself establishes that Newage was free to explore refinancing without Defendants' consent or intervention, and it eventually did so (*see id.* ¶ 49). Moreover, as reflected in the Complaint, Newage was apprised of Rialto's position concerning any potential payoff at various points throughout the course of the parties' negotiations before ultimately seeking to refinance (*see id.* ¶¶ 39, 41, 48, 55). All told, even accepting the allegations as true and drawing all reasonable inferences in Newage's favor, the Complaint fails to sufficiently plead allegations establishing that Newage reasonably relied on, or was otherwise induced by, any purported fraudulent statements or omissions by Defendants.

Finally, Newage's fraud-based claims are also deficient for another independent reason: they are duplicative of Newage's breach-of-contract claim (*see Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54, 63 [1st Dept 2017] [explaining that "a fraud claim that 'ar[ises] from the same facts [as an accompanying contract claim], s[ee]ks identical damages and d[oes] not allege a breach of any duty collateral to or independent of the parties' agreements' is subject to dismissal as 'redundant of the contract claim'"]). In fact, not only does the Complaint rely on the same allegations of misconduct in support of its fraud and breach-of-contract claims, as well as fail to identify any separate duty collateral to or independent of the Loan Agreement, but it also does not allege any independent loss outside of the damages incurred because of the alleged contractual breach by Defendants (*see* Compl. ¶ 61 [seeking at least \$6,181,598.88], ¶ 80 [seeking at least \$6,181,598.88], ¶ 90 [alleging harm in the form of accrued interests and fees under the Loan Agreement]).

Given the foregoing deficiencies, Defendants' motion to dismiss counts IV and VII of the Complaint is granted.

### III. Newage's Declaratory Judgment Claim (Count III)

Defendants move to dismiss Count III of the Complaint, which seeks declaratory judgment that the Default Rate, the Late Fees, and the Special Servicing Fees are unenforceable penalties, arguing that these fees are, in fact, enforceable as a matter of law (MOL at 14-15; Reply at 10). Newage counters that these purported penalty provisions are not *per se* permissible, and that resolution of this claims is inappropriate on a motion to dismiss (Opp. at 18-20).

In general, “[a] contractual provision fixing damages in the event of breach will be sustained if the amount . . . bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation” (*Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977]). Furthermore, parties “are free to agree that a contract rate of interest shall increase upon default, so long as [the] interest rate is not usurious [and] does not constitute a penalty” (*Emigrant Funding Corp. v 7021 LLC*, 25 Misc 3d 1220[A], at \*3 [Sup Ct, Queens County, Oct. 26, 2009], citing *Union Estates Co. v Adlon Constr. Co.*, 221 NY 183, 188-89 [1917]; *accord Jamaica Sav. Bank v Ascot Owners*, 245 AD2d 20 [1st Dept 1997] [“It is well settled that an agreement to pay interest at a higher rate in the event of default or maturity is an agreement to pay interest and not a penalty”]; *Emery v Fishmarket Inn of Granite Springs, Inc.*, 173 AD2d 765, 766 [2d Dept 1991] [“so long as an interest rate is not usurious or does not constitute a penalty, the parties are similarly free to agree that the contract rate of interest shall increase upon default.”]). Ultimately, whether a damages provision or default interest rate amounts to a penalty is a question of law (*See AXA Inv. Managers UK Ltd. v Endeavor Cap. Mgmt. LLC*, 890 FSupp 2d 373, 388 [SD NY 2012] [explaining that default interest rates are subject to the “same level of scrutiny” as liquidated damages provisions when determining enforceability]).

Here, the gist of Newage's declaratory judgment claim is that the “amount fixed” by the Default Rate, the Late Fee, and the Special Servicing Fees was “grossly disproportionate to the probable loss” because the Default Rate was twice as high as the regular interest rate (*see* Compl. ¶ 73). The court first addresses Defendants' motion to dismiss Count III as it relates to the Default Rate. On this point, there is no dispute that the Loan Agreement unambiguously set the Default Rate at 5% per annum on top of the standard 5.18% per annum interest rate established under the Loan Agreement, meaning that, upon an Event of Default, interest accrued at a rate of 10.18% per annum (Agreement at pp. 6, 13). Courts applying New York law have routinely concluded, at various procedural postures, that similar differentials between a regular interest rate and a default rate are valid and enforceable (*see, e.g., In re Northeast Indus. Dev. Corp.*, 513 B.R. 825, 844-45 [Bankr. SD NY 2014] [granting motion to dismiss claim that default interest

rate constituted a penalty where interest rate increased by 6% upon event of default]; *In re 111 Myrtle Ave. Grp., LLC*, 598 BR 729, 742 [Bankr. SD NY 2019], *adopted by* 2015 WL 3776390 [SD NY June 16, 2015, No. 14-cv-7056 (NSR)] [concluding, on motion to allow payment of default interest, that 7% differential between non-default rate and default rate was not a penalty]; *Jamaica Sav. Bank*, 245 AD2d at 20 [affirming that default rate of 2% per month did not amount to a penalty]. As a result, the court here sees no basis to conclude that Newage has stated a claim for relief as to the enforceability of the Default Rate.<sup>7</sup>

The court reaches a different conclusion regarding the Late Fee and Special Service Fee. Specifically, the record before the court on this motion is devoid of sufficient facts to allow it to determine the enforceability of these provisions as matter of law. To be sure, there is no serious dispute that the Loan Agreement and its provisions were negotiated by sophisticated parties. And the plain terms of the Loan Agreement are clear about the purpose of the Late Fee and Special Servicing Fee. Specifically, the Late Fee was charged to “defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate for the loss of the use of such delinquent payment” (Agreement § 2.3.4), while the parties contemplated the Special Servicing Fee would promptly “reimburse Lender on demand” for certain fees and expenses stemming from special servicing of the Loan after an event of default (*id.* §§ 9.6, 10.13[a]). Although these facts may ultimately go toward the reasonableness of the actual fees charged by Defendants, the court is unable to ascertain from this limited record whether, as a matter of law, these fees did, in fact, bear a reasonable proportion to Defendants’ probable loss, or whether the amount of actual loss to Defendants was incapable or difficult of precise estimation at the time of contracting (*see Beltway 7 & Properties, Ltd. v Blackrock Realty Advisers, Inc.*, 167 AD3d 100, 106-07 [1st Dept 2018] [declining to declare that late fee was not an unenforceable penalty at the motion to dismiss stage because of the limited record before the court]).

At bottom, it will be Newage’s burden to show that the Late Fee and Special Servicing Fee were, in fact, penalties (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]). But on this motion to dismiss, Defendants had the burden to establish that Newage’s claim for declaratory judgment regarding these fees does not fit within any cognizable legal theory. They have failed to do so. The court therefore grants Defendants’ motion to dismiss Count III insofar as it seeks a declaration regarding the Default Rate, but it denies the motion to dismiss this cause of action in all other respects.

<sup>7</sup> Newage’s reliance on *412 W. 12th Street 1N LLC v C and C Cap. LLC* is unavailing (2013 WL NY Slip Op 33099[U], [Sup Ct, NY County, Dec. 6, 2013]). In that case, the default interest rate was set at 24% and defendant had otherwise failed to establish the basis for the other late charges that were incurred by plaintiff (*id.* at \*3-4; *cf. also Union Capital LLC v Vape Holdings Inc.*, 2017 WL 1406278, at \*8 [SD NY Mar. 31, 2017] [acknowledging that while a 24% per annum default interest rate would “normally be permissible,” the “due diligence and legal fees” in addition to increased default may result in a usurious rate if those fees were “hidden interest payments”]).

#### IV. Newage's Economic Duress Claim (Count VI)

Defendants argue that Newage's economic duress claim should be dismissed because the purported misconduct underlying this claim is that Lender exercised its rights under the Loan Agreement in the event of a default (MOL at 18-19). Furthermore, Defendants continue, the true basis for this claim is a disagreement over the Loan Agreement's contractual terms, which cannot support an economic duress claim (*id.* at 19). In response, Newage argues that it has sufficiently alleged that the payments sought by Rialto were not permissible, and that it had no choice but to accede to Rialto's wrongful demand so that it could refinance the Loan and avoid losing the Property (Opp. at 12-14).

Under New York law, “[e]conomic duress exists where a party is compelled to agree to terms set by another party because of a wrongful threat by the other party that prevents it from exercising its free will” (*Beltway 7 & Properties, Ltd.*, 167 AD3d at 105, citing *805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]). A party, however, “cannot be guilty of economic duress for refusing to do that which it is not legally required to do” (*805 Third Ave.*, 58 NY2d at 453; *MLI Indus., Inc. v N.Y.S. Urban Dev. Corp.*, 205 AD2d 998, 1000 [3d Dept 1994] [“it is axiomatic that they cannot be guilty of economic duress for failing to grant further forbearance when they had no legal duty to do so”]). Similarly, “threats to enforce a party’s legal rights under a contract—or even that party’s interpretation of its rights— cannot constitute a wrongful threat sufficient to establish a claim of economic duress” (*PNC Bank, N.A. v Dana Transp., Inc.*, 2022 WL 3701441, at \*6 [SD NY Aug. 26, 2022, No. 16-CV-7797 (RA)]. That a party is financially vulnerable and lacks equal bargaining power, alone, is not sufficient to state a claim for economic duress (*see Bethlehem Steel Corp v Solow*, 63 AD2d 611, 611 [1st Dept 1978] [noting that “[a]lthough it appears that defendant was subject to financial pressures and may have lacked equal bargaining power there nonetheless was insufficient showing to constitute economic duress”]).

Here, the Complaint alleges that Rialto “coerced” Newage into paying an unwarranted amount of interest, fees, and expenses by (1) claiming nonmonetary defaults and (2) refusing to release the liens on the Property (*see* Compl. ¶¶ 49-56, 86). Newage further avers that it had no choice but to accede to Defendants’ unwarranted fees (under protest) to avoid foreclosure on the Property and further accrual of interest, fees, and expenses (*id.* ¶ 86; Opp. at 13). Yet even accepting these facts as true and drawing all reasonable inferences, the court cannot conclude that Newage has stated a plausible claim of economic duress. Rather, the Complaint only supports a conclusion that Newage, made a calculated risk to pay off the Loan at a disputed amount and under protest in response to Defendants exercising their perceived contractual rights under the Loan Agreement (*see* Compl. ¶¶ 52-53; *see also* Default Notice at 2). Although Newage may have felt economic pressure to pay Defendants and secure removal of the lien on the Property, nothing in the complaint suggests that Lender or Rialto acted in a threatening or unlawful manner beyond

seeking a disputed payoff amount from Newage (*see e.g. Wilmaud Realty Corp. v Shaw*, 2021 WL 2480068, at \*2 [Sup Ct, Kings County, June 10, 2021] [concluding that there was no duress where plaintiff alleged it had “no choice but to pay . . . the amount demanded by the Lender Defendants” to allow plaintiff to remove a lien on a property and, in turn, close on a sale because “while plaintiff may have felt pressured or ‘forced’ to pay off the debt to secure a sale . . . that is not economic duress” given that defendant exercised a contractual right]).

Relying on the First Department’s analysis in *Beltway 7 Props. Ltd.*, Newage counters that its allegations of a forced payment under fear of foreclosure does adequately support a claim for economic duress (Opp. at 14-15, citing *Beltway 7 Props. Ltd., Inc.*, 167 AD3d at 108). The court disagrees. In *Beltway*, plaintiff had appealed a ruling that the voluntary payment doctrine precluded its ability to sue defendants for allegedly improper late fee charges and interest payments that it had paid them to allow it to refinance its loan (*see Beltway 7 Props. Ltd., Inc.*, 167 AD3d at 101, 103). One basis advanced by plaintiff to avoid application of the voluntary payment doctrine was economic duress (*id.* at 107). Specifically, plaintiff alleged a fear that defendants, who were the assignees of plaintiff’s loan, would foreclose on the property securing the loan should plaintiff fail to pay them the amount demanded (*Beltway 7 Props. Ltd., Inc.*, 167 AD3d at 108). In ultimately affirming dismissal of plaintiff’s claim, the First Department notably did not hold that plaintiff adequately alleged a claim for economic duress. Rather, it merely acknowledged as part of its analysis that plaintiff *may* have “established *a question* whether [defendant] may have had a right to extract [a] late charge from it” (*id.* [emphasis added]).

Turning back to the case at hand, even assuming the First Department’s observation in *Beltway* has any precedential effect, the Complaint is devoid of any allegations that Defendants threatened to foreclose on the property in the absence of a payment (or even had a right to do so), or that Newage made its payment based on a fear (legitimate or otherwise) that Defendants would do so (*cf.* Compl. ¶¶ 49, 53-58). At most, the Complaint alleges that Defendants would not release liens held on the Property absent payment (*id.* ¶ 58), and it otherwise advances a stray, unsupported assertion that Newage faced losing the value of the Property in foreclosure (*id.* ¶ 86). This lone conclusory allegation is insufficient to establish that Newage made its payment of \$6.1 million in accrued default interest and fees against its free will.

Defendants’ motion to dismiss Count VI of the complaint is granted.

#### V. **Newage’s Breach of the Implied Covenant of Good Faith and Fair Dealing (Count II)**

Newage’s claim for breach of the implied covenant and good faith (Count II) is dismissed as it is duplicative of its breach-of-contract claim.

Where a claim for breach of the implied covenant of good faith and fair dealing is predicated on the exact same allegations as a breach-of-contract claim and seeks the exact same damages, dismissal is warranted (*see Salomon v Citigroup Inc.*, 123 AD3d 517, 518 [1st Dept 2014]). Here, the allegations and damages underlying Newage’s breach-of-contract claim are the exact same as those underlying its claim for breach of the implied covenant of good faith dealing. On the one hand, Newage alleges that Defendants breached the Loan Agreement by erroneously charging default interest and associated fees (Compl. ¶¶ 57-61). On the other hand, in support of its claim for breach of the implied covenant of good faith and fair dealing, Newage alleges that Defendants deprived it of the benefits due under the Loan Agreement by erroneously calling nonmonetary defaults and charging default interest and associated fees (*id.* ¶¶ 62-70). And not only are the allegations supporting these claims two sides of the same coin, but also both claims seek identical damages of at least \$6,181,598.88. Accordingly, as alleged, Newage’s first and second causes of action are entirely duplicative of each other.

**CONCLUSION**

For the foregoing reasons, it is

ORDERED that defendants’ motion to dismiss the Complaint is granted in its entirety with respect to Counts II, IV, V, VI, and VII; and it is further

ORDERED that defendants’ motion to dismiss is granted in part and denied in part with respect to Count III of the Complaint; and it is further

ORDERED that within 30 days of the e-filing of this order, defendants shall file an answer to the verified amended counterclaims; and it is further

ORDERED that a preliminary conference shall be held via Microsoft Teams on September 13, 2023, at 2:30 p.m. or at such other time that the parties shall set with the court’s law clerk.

This constitutes the Decision and Order of the court.



07/14/2023

DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE