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 11/03/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 40, 41
were read on this motion to/for DISMISSAL.

Plaintiff Newage Garden Grove, LLC (Newage) brings this action, as amended on September 5, 2023, 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, and violations of the California Unfair Competition Law (UCL), Cal. Bus. & Prof. Code. § 1720 *et seq.* Before the court is defendants' partial motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7). Newage opposes the motion. For the following reasons, defendants' motion is granted in part and denied in part.

Background

The below facts are drawn from the First Amended Complaint (NYSCEF # 23 – FAC) and are assumed true solely for purposes of this motion.

The Loan Agreement

Newage is a limited liability company affiliated with Kam Sang, a family-owned real estate company, that was formed in or around 2006 for purposes of

developing and operating a Sheraton-branded hotel and real property at 12221 Harbor Boulevard, Garden Grove, CA 92840 (the Property) (FAC ¶¶ 14, 67-68). The Property is closely situated to Disneyland and generates substantial revenue from lodging Disneyland guests (*id.* ¶ 67).

On May 31, 2017, Newage, as borrower, and Column Financial, Inc., as original lender, executed a loan agreement (the Loan Agreement) evidencing a $20,500,000 loan to Newage (the Loan), which was secured by the Property (*id.* ¶ 69). The Loan Agreement required Newage to make monthly payments at an interest rate of 5.18% per annum (the Interest Rate) and had a maturity date of June 6, 2022 (FAC ¶ 75). If, however, an Event of Default (as defined and enumerated in the Loan Agreement) was triggered, interest on the Loan would begin accruing at an additional rate of 5% per annum on top of the Interest Rate (the Default Rate) (*id.* ¶ 76). Newage would also be responsible for, among other things, late payment charges "in order to defray the expense incurred by Lender in handling and processing such delinquent payment" (the Late Fee) and "promptly reimburs[ing] Lender on demand" for certain fees and expenses stemming from the special servicing of the Loan (the Special Servicing Fee) (*id.* ¶¶ 76-78).

The Loan Agreement also set forth the parties' agreement concerning modifications of its provisions, performance of the parties' obligations, and available remedies. For example, Section 10.4 of the Loan Agreement provided that "[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" (NYSCEF # 33 – Agreement § 10.4). Meanwhile, pursuant to Section 10.12, "[i]n the event that a claim or adjudication is made that Lender or its agents have acted unreasonably or unreasonably delayed acting," Newage agreed "that neither Lender nor its agents shall be liable for any monetary damages, and Borrower's sole remedies shall be limited to commencing an action seeking injunctive relief or declaratory judgment" (*id.* § 10.12).

Following the Loan's origination, Column assigned its rights to Lender, and the Loan was securitized and pooled into a commercial mortgage-backed security (CMBS) pass-through trust (the Trust), with Lender serving as Trustee (*see* FAC ¶¶ 3, 71). Although not identified in the Loan Agreement, Rialto was retained as special servicer for the Loan (*see id.* ¶¶ 70-71). Newage had no role in or control over this securitization, pooling, and assignment process (*see id.* ¶ 70).

Newage's Forbearance Negotiations, Alleged Nonmonetary Default, and Disputed Loan Payoff

Beginning in March 2020, Newage faced financial hardships driven by the COVID-19 pandemic and the resulting closure of Disneyland (*see* FAC ¶ 90). Although it timely paid its May 2020 monthly payment, Newage had requested that

a portion of its payment come from a reserve fund (*id.* ¶ 91). After taking the position that it had only received partial payment, Lender's master servicer deemed Newage in default (*id.*). Newage concurrently asked for COVID-19 relief, and the Loan was transferred to Rialto (*id.*). Upon transfer, Rialto became the exclusive contact for all issues related to the Loan and obtained significant power and authority over the servicing and administration of the Loan (*see id.* ¶¶ 72-74).

Entering discussions on Newage's request for COVID-19 relief, Rialto demanded that Newage sign a pre-negotiation letter waiving past and future claims against Rialto, Lender, or the master servicer (*see* FAC ¶ 93). The parties thereafter engaged in forbearance and modification negotiations for a year and a half (*id.* ¶ 94). Newage first corresponded with Rialto on July 27, 2020, and August 6, 2020, with updated proposals for requested relief, including terms for deferring principal and interest payments and waiving late charges and default interest (*id.* ¶ 95). Rialto responded over two months later in October 2020 with feedback and a representation that it would require Newage to pay a forbearance fee of 1% of the unpaid principal balance (*id.*). Although Newage incorporated this feedback in a new proposal circulated on November 3, 2020, Rialto did not respond until December 17, 2020, and, at this point, only raised the issue of fees and costs (*id.* ¶ 96). Thereafter, over the next several months, Newage continued to modify its proposed forbearance fee payment proposal, but it had difficulty obtaining any meaningful response or counterproposal from Rialto (*see id.* ¶¶ 96-97). Eventually, on April 16, 2021, Rialto circulated proposed settlement terms that largely mirrored those circulated by Newage in November 2020, and on July 20, 2021, Newage agreed to those terms (*see id.* ¶¶ 97-98). The settlement terms provided for, among other things, deferred payments, a waiver of late charges and default interest during the forbearance period, and a forbearance fee (*id.* ¶ 98).

Newage alleges that, two days after accepting these settlement terms, Rialto informed Newage that it was documenting the agreement (FAC ¶ 98). However, despite claiming that it was "putting the final touches" on a package on August 24, 2021, Rialto apparently abandoned the agreement and in September 2021, began seizing, without explanation, Newage's daily proceeds and holding them in a cash management account (*id.* ¶¶ 99-100). The next month, on October 5, 2021, Rialto declared, on behalf of Lender, a non-monetary Event of Default under section 8.1(a)(x) of the Loan Agreement (*id.* ¶ 101). Rialto asserted that certain capital contributions made by Newage's members in 2017, 2020, and 2021 were "non-permitted debt[s]" that violated Newage's representations and warranties pursuant to Section 4.1.30 of the Loan Agreement that it was, and shall continue to be, a Special Purposes Entity (as defined in the "SPE Definition" of the Loan Agreement) and would not acquire any indebtedness other than those expressly permitted under the Loan Agreement (*id.* ¶¶ 82-84, 101). For its part, Newage alleges that these non-monetary defaults did not exist and were "invented" by Rialto (*id.* ¶ 102). Specifically, Newage avers, the purported "non-permitted debt[s]" were, in fact,

expressly permitted capital contributions under the Loan Agreement about which Rialto was fully aware (*see id.* ¶¶ 84-89, 102).[1]

Three days later, on October 8, 2021, Rialto emailed a payoff demand statement to Newage (*id.* ¶ 104). The payoff demand 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.* ¶ 105). In response, the parties held a conference call on October 15, 2021, during which Newage offered to pay all amounts owed except for the default interest claimed by Rialto (*id.* ¶ 106).[2] Rialto, however, responded that it had no interest in any offer that did not include default interest (*id.*). Accordingly, on October 18, 2021, Newage wrote to Rialto to explain that no nonmonetary default had occurred because the alleged "loans" were capital contributions, and, on October 27, 2021, it sent a letter from a certified public accountant explaining the same (*id.* ¶ 107). Rialto soon after engaged an independent professional to evaluate Newage's claims, while simultaneously reporting to the Trust's beneficiaries that it was dual tracking Newage's settlement offer and a foreclosure strategy (*id.* ¶ 108).

Following its investigation, Rialto changed course and instead asserted that Newage improperly transferred funds between itself and related companies between June 2017 and June 2020 (FAC ¶ 111). Rialto's email, dated December 8, 2021, 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.* ¶ 112). Three weeks later, on January 28, 2022, Rialto rejected Newage's position (*see id.* ¶ 113).

Newage eventually pursued and obtained a refinancing opportunity with another lender that it expected would close on or before April 1, 2022 (FAC ¶ 114). Consequently, on January 7, 2022, and again on January 26, 2022, Newage requested a payoff statement from Rialto (*id.*). In doing so, Newage reiterated its willingness to pay the amounts owed to reinstate the Loan if Rialto withdrew its position on default interest (*id.*). Newage also noted that Rialto's erroneous defaults were a significant impediment to its refinancing efforts (*id.*). As alleged, Rialto responded to Newage's request by stalling (*id.* ¶ 115). It waited until March 21, 2022—nearly two and half months after receiving Newage's request and just eleven days before the expected to refinancing closing date—to provide a payoff statement (*id.*). All throughout this time, default interest and fees continued to accrue (*id.*).

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[1] Rialto also claimed that Newage's guarantor was personally liable for amounts owed pursuant to Section 9.4(c)(II)(G) of the Loan Agreement (FAC ¶ 103). Newage contends that Rialto invoked this section to specifically threaten Newage's principals with personal liability for the Loan (*id.*).
[2] As alleged, Newage's offer would have paid all amounts due and owing to the Trust's beneficiaries (FAC ¶ 106).

Rialto requested a total payoff amount of $24,769,672.19 (*see* FAC ¶¶ 116-117). On March 29, 2022, Newage paid the $24,769,672.19 requested by Rialto expressly under prior written protest (*id.* ¶ 118). 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 Late Fee, a $114,198.93 in Special Servicing Fee, and a $225,280.75 liquidation fee (*see id.* ¶¶ 117, 121). Newage also reiterated 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.* ¶ 119).

Rialto's Alleged Scheme to Extract Default Interest Payments and Fees

According to Newage, Rialto demanded default interest and fees from Newage because it could retain those amounts in its individual capacity (FAC ¶ 120). Newage further contends that Rialto's conduct directed at Newage was no isolated incident (*id.* ¶¶ 12, 120). Specifically, Rialto exploited skewed incentives in the CMBS market and acted pursuant to a larger overall strategy by which it would manufacture non-existent defaults against commercial real estate borrowers to solicit excessive default interest and fees (*see id.* ¶¶ 12, 23-28, 120).

Newage claims that Rialto followed a "standard playbook" (FAC ¶ 38). Upon a missed payment or a transfer of a loan to special servicing, and with default interest and fees accruing, Rialto would demand that borrowers sign a pre-negotiation letter to unilaterally waive some or all past or future claims against Rialto, the CMBS trustee/lender, and any master servicer (*id.*). Rialto would then prolong and delay negotiations with borrowers and use these delays to allow default interest to accrue and to identify nonmonetary defaults (*id.* ¶¶ 39-41). During this time, Rialto prevented borrowers from repaying or refinancing their loans until they acceded to Rialto's demands for these fees (*id.* ¶ 41). And to apply further pressure, Rialto would initiate foreclosure proceedings, file lawsuits against guarantors, and deny borrowers any access to funds (*see id.* ¶¶ 41-44).

According to Newage, Rialto has used this "standard playbook" against dozens, if not hundreds, of commercial real estate borrowers, including Newage (*see id.* ¶¶ 44-46, 120). To support this assertion, Newage identifies various lawsuits and foreclosure actions involving other commercial real estate borrowers who, Newage suggests, were subjected to Rialto's scheme (*see id.* ¶¶ 47-65).[3] Although some these actions were eventually voluntarily dismissed and/or settled (*see id.* ¶¶ 50, 52, 56, 60, 65), some remain pending (*see id.* ¶¶ 54, 58, 62, 64). In all events, Newage avers,

[3] These alleged borrowers included (i) Golden Hotel LLC and Golden Capital Venture LLC, (ii) Midas Little Rock, LLC, (iii) SL Civic Wacker LLC, (iv) Fulton Hotel, LLC, (v) Mattone Group Jamaica Co., LLC, (vi) Envision Highland, LLC, (vii) MikeOne EK Houston Holdings, LLC and MikeOne EK Chicago Holdings, LLC, and (viii) Winta Asset Management, LLC (FAC ¶¶ 47-64). Newage also avers that Rialto forced borrowers to pay "thousands of dollars in 'consent fees' . . . to waive purported defaults arising from their receipt of emergency PPP loans" (*id.* ¶ 65).

these lawsuits are emblematic of the allegedly "essential component" of Rialto's business model (*see id.* ¶¶ 46, 66, 120).

Procedural History

Newage first commenced this action on October 12, 2022, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory judgment, fraud, violations of the UCL, economic duress, and fraudulent inducement (NYSCEF # 1). On December 12, 2022, defendants moved for an order pursuant to CPLR 3211(a)(1) and (a)(7) partially dismissing the complaint with prejudice (NYSCEF # 9). By Decision and Order, issued July 17, 2023, this court granted defendants' motion in part and denied it in part (NYSCEF # 18 – July 2023 Order).

As relevant here, the July 2023 order first addressed and dismissed Newage's UCL claim (July 2023 Order at 7-10). Although the July 2023 Order found that the Loan Agreement's choice-of-law provision did not preclude Newage from asserting a UCL claim, nonetheless, this claim was dismissed because the complaint failed to allege sufficient facts to establish anything more than a business dispute between Newage and defendants arising out of the Loan Agreement (*id.* at 7-9). Turning to Newage's claim for declaratory judgment, it was determined in the July 2023 Order that the Default Rate was not "grossly disproportionate" as a matter of law, and thus there was no basis for Newage to challenge the enforceability of the Default Rate (*id.* at 14-15). However, a different conclusion was reached as to Newage's challenge to the Late Fee and Special Servicing Fee (*id.* at 15). Although observing that the Loan Agreement and its provisions had been negotiated by sophisticated parties, this court was unable to ascertain from the limited factual record whether, as a matter of law, these fees were reasonably proportionate to defendants' probable loss or whether actual loss was incapable of estimation (*id.*). The declaratory judgment claim was therefore only partially dismissed (*id.*). Finally, with regard to Newage's claim for breach of the implied covenant of good faith and fair dealing (*id.* at 17-18), this claim was dismissed as duplicative to the breach of contract claim given the identical allegations and damages supporting both claims (*id.* at 18).[4]

On September 5, 2023, Newage filed the FAC. Like the original complaint, Newage alleged claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory judgment against all defendants, although it added additional allegations in support of its implied covenant and declaratory

[4] The July 2023 Order also dismissed Newage's fraud-based and economic duress claims. As for the fraud-based claims, the court identified numerous deficiencies, including Newage's failure to sufficiently allege that (1) defendants made "knowingly" false assertions regarding nonmonetary defaults, (2) defendants intended to fraudulently induce Newage into forbearance negotiations to accrue additional default interest, and (3) Newage justifiably relied on defendants' purported misrepresentations (July 2023 Order at 11-14). As for economic duress, the court concluded that Newage failed to establish that the $6.1 million payment was made against its free will (*id.* at 16-17).

judgment claims (*see* FAC ¶¶ 122-142). Newage, however, now alleged its UCL claim solely against Rialto and added additional factual allegations regarding Rialto's conduct vis-à-vis other commercial real estate borrowers (*id.* ¶¶ 137-149). Finally, Newage re-alleged claims for economic duress and fraudulent inducement "solely to preserve the claim[s] for appeal" (*id.* ¶¶ 150-157 & nn 4-5). The next month, on October 11, 2023, defendants again moved for an order pursuant to CPLR 3211(a)(1) and (a)(7) partially dismissing the complaint with prejudice (NYSCEF # 31). This decision followed.

Legal Standard

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 plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *accord Pavich v Pavich*, 189 AD3d 548, 549 [1st Dept 2020]).

Whether a plaintiff can ultimately establish its allegations is not taken into consideration when determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). 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" (*Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). Nevertheless, dismissal based on documentary evidence is warranted "only where '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 N.Y. Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [alterations omitted]).

Discussion

I. UCL Claim (Count IV)

As noted above, in the FAC, Newage again asserts a claim under the unfair prong of the UCL. In seeking dismissal, defendants argue that this re-alleged claim fails to cure the legal deficiencies identified in the July 2023 Order (NYSCEF # 35 – MOL at 14-17). Specifically, defendants aver, Newage still fails to allege a business-to-business dispute that implicates the public in general or individual consumes (*id.* at 14-15; NYSCEF # 40 – Reply at 2-6). Newage counters that the UCL permits claims related to private business-to-business contract disputes (NYSCEF # 36 –

Opp at 11-12). It further claims that, as a small business, it was in an imbalanced bargaining position with Rialto, which allows it to invoke the UCL's protections (*see id.* at 14-15). Newage further contends that it has sufficiently alleged that Rialto's servicing practices is a matter of public concern that implicates issues well beyond the Loan Agreement (*see id.* at 15-17).

The UCL "'prohibits unfair competition, including unlawful, unfair, and fraudulent business acts'" (*Korea Supply Co. v Lockheed Martin Corp.*, 63 P3d 937, 943 [Cal. 2003]). The statute was enacted to "protect both consumers and competitors by promoting fair competition in commercial markets for goods and services" (*Kasky v Nike Inc.*, 45 P3d 243, 249 [Cal 2002]). Thus, the central issue presented under the UCL is "whether the public at large, or consumers generally, are affected by the alleged unlawful business practices of defendants" (*In re Webkinz Antitrust Litig.*, 695 F Supp 2d 987, 989-999 [ND Cal 2010]; *accord Sacramento E.D.M., Inc. v Hynes Aviation Indus., Inc.*, 965 F Supp 2d 1141, 1154-1155 [ED Cal 2013] ["a UCL claim fails if it lacks any connection to the protection of fair competition or the general public"]).

The UCL is undoubtedly broad in scope and can encompass "anything that can properly be called a business practice" (*see Cel-Tech Communications, Inc. v L.A. Cellular Tel. Co.*, 973 P2d 527, 539 [Cal 1999]). But its reach is not limitless. For example, it does not cover claims based on contracts between commercial entities that do not otherwise involve the public in general or individual consumers who are parties to the contract (*see Linear Tech. Corp. v Applied Materials, Inc.*, 152 Cal App 4th 115, 135 [Cal Ct App 2007], citing *Rosenbluth Intl., Inc. v Superior Court*, 101 Cal App 4th 1073, 1078 [Cal Ct App 2002] [affirming dismissal of UCL claim where source of fraudulent and unfair practices was misrepresentation made in purchase orders between sellers and buyer]; *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 the public or individual consumers]). For this reason, courts applying California law generally dismiss unfair competition claims that are either contractual in nature or "have no connection to competition or the general public" (*see U.S. for Use of Integrated Energy, LLC v Siemens Gov't Techs., Inc.*, 2016 WL 11520823, at *3 [CD Cal Aug. 25, 2016, No. SACV 15-01534 JVS (DFMx)]; *see also Open Text, Inc. v Northwell Health, Inc.*, 2021 WL 1235254, at * [CD Cal Feb. 19, 2021, No. 2:19-cv-09216-SB-AS] [observing that a "substantial" line of cases have held that "a dispute between commercial parties over their economic relationship" does not give rise to a UCL claim]).

Here, the crux of Newage's UCL claim is that Rialto, acting as an agent for Lender, engaged in unfair competition by (i) artificially delaying and extending negotiation periods, (ii) concocting "bogus" nonmonetary defaults, (iii) demanding excessive default interest as a precondition to any resolution or financing, and (iv) threatening foreclosure and guarantor liability (FAC ¶¶ 93-99, 101-113, 118-120,

145). Newage also avers, as it did in the original complaint, that Rialto's actions were consistent with a broader scheme to exploit the financial struggles created by the COVID-19 pandemic (*see id.* ¶¶ 36-45, 144). But unlike the original complaint, Newage now points to certain lawsuits, claims, and foreclosure actions filed by Rialto against borrowers and guarantors, as well as lawsuits filed by borrowers that are against, or otherwise involve, Rialto—each of which Newage claims are representative of Rialto's "systemic conduct" (*id.* ¶¶ 47-64, 146-148). Newage goes on to postulate that these alleged examples are just "the tip of the proverbial iceberg," claiming that there are likely "hundreds of [commercial real estate] loan borrowers" targeted by Rialto (*id.* ¶¶ 13, 44, 66, 147).

Although these new allegations address this court's prior critique of the original complaint (*see* July 2023 Order at 10), they fail to change the court's original determination. Indeed, nothing in the FAC supports a conclusion or reasonable inference that Rialto's alleged conduct implicates the public at large or consumers in general. Rather, even accepting Newage's speculative insinuation (based on the mere existence of litigation) that Rialto deployed similar tactics when acting as a special servicer to other commercial real estate borrowers who had their own specific loan agreements with other lenders, Newage's UCL claim, as alleged, still fundamentally sounds in a private contract dispute.[5] That is because, at its core, the crux of Newage's claim still concerns defendants' (purportedly improper) enforcement of the Loan Agreement's specific representations, warranties, and obligations. And hence, as was the case for the UCL claim alleged in the original complaint, Newage's harm arises solely and directly from the alleged contractual breach[6] (*compare* FAC ¶¶ 123-126 *with id.* ¶¶ 146, 149). At bottom, this is precisely the type of business-to-business contractual dispute that courts applying California law have foreclosed from coverage under the UCL (*see Linear Tech. Corp*, 152 Cal App 4th at 135; *Dollar Tree Stores*, 875 F Supp 2d at 1083; *see also Macedonia Distrib., Inc. v S-L Distrib. Co., LLC*, 2018 WL 6190592, at *9 [CD Cal Aug. 7, 2018,

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[5] The cases cited by Newage to argue that allegations of "systemic conduct" will support UCL claims are not to the contrary. For example, *Davis v Capitol Records, LLC* involved an alleged "nationwide class action for breach of *standard* recording contracts" (2013 WL 1701746, at *1 [ND Cal Apr. 18, 2013, No. 12-cv-1602 YGR] [emphasis added]). Hence, even though the *Davis* court did not actually address UCL standing, plaintiff's contract-based UCL claim appeared to be consistent with California case law because it involved "individual consumers who are parties to the contract" (*Linear Tech. Corp.*, 152 CalApp4th at 135). Here, by contrast, there is no indication that Newage's claim involves standardized loan agreements across a class of commercial real estate borrowers or that it otherwise implicates individual consumers who were parties to a specific contract (*see generally* FAC ¶¶ 47-64).

[6] This conclusion is buttressed by the remedy Newage is pursuing. In the FAC, Newage alleges that it seeks "restitution in an amount to be determined at trial" (FAC ¶ 149). However, as made clear in Newage's opposition, the restitution Newage seeks is "for costs that [it] incurred[] as a victim of Rialto's scheme" (Opp at 1). As a result, any purported harm to consumers "would not be remedied by awarding restitution" to Newage under the UCL because such an award "would only benefit [Newage], not the public at large" (*see AIDS Healthcare Found. v Express Scripts, Inc.*, 658 FSupp3d 693, 707 n3 [ED Mo 2023] [dismissing UCL claim involving contract dispute where plaintiff only offered tenuous and conclusory allegations "of possible downstream effects to consumers"]).

No. SACV 17-1692 JVS (KESx)] [dismissing UCL claim brought under unfairness prong where plaintiff alleged a "system-wide termination of distributors" that was part of a scheme to resell distribution routes at profit]).

In resisting this conclusion, Newage contends that the court fails to provide an "accurate statement of UCL jurisprudence" by failing to appreciate that the "broad scope of the UCL" permits claims regarding private business-to-business contract disputes (*see* Opp at 11-12, citing, *inter alia*, *TBS Bus. Solutions USA Inc. v Studebaker Defense Group, LLC*, 2022 WL 17363059, at *13 [CD Cal Aug. 5, 2022, No. EDCV 22-758 JGB (KKx)] and *Comercializadora Recmaq Limitada v Hollywood Auto Mall, LLC*, 2013 WL 2248140, at *11 [SD Cal May 20, 2013, No. 12cv0945 AJB (MDD)]). But nothing in the above analysis or in the July 2023 Order is at odds with this unremarkable position. To the contrary, as stated earlier, business contracts can serve as a basis for a claim under the UCL, but it remains essential that such contract-based disputes must have a "connection to the protection of fair competition or the general public" (*see Sacramento E.D.M.*, 965 F Supp 2d at 1154). That is not the case here. Despite Newage's best efforts to broaden the reach of its contractual dispute, Rialto's claims of nonmonetary default against Newage pursuant to the Loan Agreement and its failure to timely negotiate any forbearance, settlement, or payoff agreement when dealing with Newage flows from a purely economic relationship lacking any broader implications on the public (*see Martin Saturn of Ontario Inc. v Subaru of Am. Inc.*, 2023 WL 9417499, at *8 [CD Cal July 21, 2023, No. ED CV23-00853 JAK (SHKx)] ["'[A] dispute between commercial parties over their economic relationship' does not qualify for relief under the UCL"]).[7]

The remainder of Newage's opposition attacks the court's reliance on *Linear Tech.* and its applicability to the facts of this case (Opp at 13-14). Newage first argues that courts have rejected the *Linear Tech.* framework when applied to contract-based UCL claims in actions by an individual plaintiff because the due process concerns of a representative action are not present (*id.*). The cases cited by Newage, however, do not support this conclusion. For example, in *Copart, Inc. v Sparta Consulting, Inc.* (339 F Supp 3d 959 [ED Cal 2018]), a jury, after trial, determined that plaintiff had established its claims for fraud by concealment and professional negligence because defendants had extracted payments from plaintiff while withholding project information and providing incomplete and worthless products and services (*id.* at 985, 993-994). Relying on this determination by the

[7] Among other cases cited, Newage again relies on the federal court decision in *Oakland v GCCFC 2005-GG5 Hegenberger Ltd. Partnership* (2019 WL 1571881, at *8 [ND Cal Apr. 11, 2019, No. 19-cv-00403-SI]) for the proposition that allegations of Rialto's bad faith scheme to extract unwarranted default interest and fees states a claim under the UCL. But Newage's reliance is again misplaced. As previously noted by the court, *Oakland* lacks any analysis supporting its conclusions, and it relies 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] [reversing dismissal of UCL claim that AARP's retention of fees as a commission for the sale of insurance]).

jury, the court concluded that plaintiff had established an "economic injury" for purposes of the UCL standing inquiry at hand (*see id.* at 985-986). In so concluding, the court rejected defendants' argument that a "sophisticated publicly-traded corporation" lacks standing under the UCL (*id.* at 986). But it nevertheless observed that to "prove a claim under the unfair or fraudulent prongs, a plaintiff 'must show that members of the public are likely to be deceived by the [unfair] practice'" (*see id.* at 986-987). Here, by contrast, Newage fails to sufficiently allege, beyond supposition and speculation, that, even if Rialto's conduct was purportedly without justification, its enforcement of the specific terms and default provisions provided by the Loan Agreement had any type of negative impact beyond Newage.[8]

Newage also argues that *Linear Tech.* and its progeny only preclude sophisticated, large corporations from asserting UCL claims based on business-to-business contracts. It is true that some federal district courts interpreting California law have attempted to distinguish *Linear Tech.* in this manner (*see e.g., AdTrader, Inc. v Google LLC*, 2019 WL 1767206, at *10 [ND Cal, Apr 22, 2019, No. 17-cv-07082-BLF] [observing that "courts have held that *Linear Tech.* does not prevent all corporate plaintiffs from proceeding under the UCL where the contract-at-issue does not involve either the public or individual consumers, but rather that *Linear Tech.* only precludes 'sophisticated corporations' or "large corporations' from seeking such relief"]; *Circle Click Media LLC v Regus Mgt. Group LLC*, 2015 WL 6638929, at *4-5 [ND Cal Oct. 30, 2015, No. 3:12-CV-04000-SC] [observing that the holding in *Linear Tech.* "turn[ed] less on the fact that the alleged victims in those cases were businesses, and more on the fact that these entities were sophisticated and individually capable of seeking relief"]).

However, from a review of relevant case law, it appears that the weight of federal authority has not cabined *Linear Tech.* in such a manner (*see e.g., Courtesy Auto. Group, Inc. v Subaru of Am., Inc.*, 2023 WL 8699161, at *7 [ED Cal Dec. 15, 2023, No. 2:22-cv-00997 WBS DMC] ["Because the complaint, as pled, fails 'to establish the requisite public or individual consumer interest as required under California law,' it fails to state a viable UCL claim"]; *Crescent Point Energy Corp. v Tachyus Corp.*, 2022 WL 409693, at *14 [ND Cal Feb. 10, 2022, No. 20-cv-06850-MMC] [dismissing UCL unfair practices claim where it was "wholly based on conduct alleged to be in breach of the parties' Agreement"]; *Nnydens Intl., Inc. v*

[8] Newage also cites to *1440 Sports Mgt. Ltd. v PGA Tour, Inc.* (2023 WL 3149249 [ND Cal Mar. 13, 2023, No. 22-cv-02774-TLT]) and *In re Yahoo! Litig.* (251 FRD 459 [CD Cal. 2008]). In *1440 Sports*, defendants allegedly refused to compensate plaintiff for an introduction it had facilitated that had directly resulted in the execution of the defendants' sponsorship agreement (2023 WL 3149249 at *1). In declining to dismiss plaintiff's UCL claim, the court rejected defendants' contention that plaintiff was neither a consumer nor competitor of the PGA tour, and it allowed plaintiff's UCL claim to proceed because plaintiff had sufficiently alleged "unfair business practices" (*id.* at *8). Although the court distinguished *Linear Tech.*, nothing in the decision rejected its central premise that alleged unfair business practices must impact the public even if dealing with individual, rather than representative, plaintiffs. Meanwhile, in *In re Yahoo! Litig.*, the court confronted a "proposed class of plaintiffs" challenging defendants' alleged advertising scheme (251 FRD at 474-475).

Textron Aviation, Inc., 2020 WL 7414732, at *8 [CD Cal June 11, 2020, No. CV 18-9455-DMG (SKx] [adopting *Linear Tech.*'s holding that "where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on the UCL for the relief it seeks"]; *MH Pillars ltd. v Realini*, 2017 WL 916414, at *10 [ND Cal Mar. 8, 2017, No. 15-cv-1383-PJH] [dismissing UCL claim where case involved "a dispute between commercial parties over their economic relationship"]).

Newage otherwise fails to identify any binding California state-court authority that has condoned such a limitation. Thus, in the absence of any binding authority to the contrary, there is no basis to follow the limited number of federal district courts that have attempted to limit the reach of *Linear Tech.* and its progeny. At any rate, even if *Linear Tech.*'s analysis did only apply to sophisticated business entities, Newage's characterization of itself as a "small business" that is an "affiliate of Kam Sang, a family-owned real estate investment company" (FAC ¶¶ 67-69; Opp at 14-15) does not, in and of itself, support a conclusion or reasonable inference that it is an unsophisticated business entity (*cf. AdTrader*, 2019 WL 1767206 at *10 [observing that the "[t]hree named plaintiffs are restaurants . . . each with approximately 25 or fewer employees"]; *Circle Click Media LLC*, 2015 WL 6638929 at *4 [observing that plaintiff was "comprised of only two individuals" and the action involved "form contracts" rather than an "individually negotiated contracts"]).

To be clear, Newage's allegations, accepted as true, raise genuine concerns as to how Rialto has leveraged the COVID-19 pandemic and Newage's financial situation to extract a potentially unwarranted economic benefit under the terms of the Loan Agreement. But that does not automatically allow Newage to avail itself to the UCL. The UCL's purpose is, and has always been, to "safeguard the public" by "prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices" (*see Cel-Tech Communications*, 973 P2d at 539). It was not, and is not, designed to reach purely private contractual disputes like the one at issue here (*see Cortez v Purolator Air Filtration Prods. Co.*, 999 P2d 706, 712 [Cal 2000] [explaining that the UCL is "not an all-purpose substitute for a tort or contract action"]). Because Newage has failed to sufficiently plead that its contractual dispute with Lender and Rialto falls within the ambit of the UCL, Count IV must be dismissed, with prejudice.

II. Breach of the Implied Covenant of Good Faith and Fair Dealing Claim (Count II)

In the July 2023 Order, the court dismissed Newage's claim for breach of the implied covenant of good faith and fair dealing on the grounds that it was duplicative of its breach of contract claim (July 2023 Order at 17-18). Newage accordingly has buttressed its implied covenant claim with additional factual allegations. Defendants now offer two independent bases for dismissal of Newage's

implied covenant claim. *First*, defendants contend that they had no duty to negotiate any modification or forbearance of the Loan Agreement, thereby precluding any basis to imply obligations to do so through the implied covenant of good faith and fair dealing (*see* MOL at 12-13; Reply at 10-11). *Second*, responding to Newage's contention that defendants unreasonably delayed providing a payoff statement to Newage, defendants contend that Newage waived any right to seek monetary damages for "unreasonable delay" under Section 10.12 of the Loan Agreement (MOL at 10-12; Reply at 7-9). Newage retorts that it has sufficiently alleged actions taken by defendants that were intended to frustrate its ability to cure or otherwise repay the loan (Opp at 18-19). And addressing defendants' contention that it waived its right to seek monetary damages, Newage avers that Section 10.12 should not be enforced considering defendants' intentional misconduct (*id.* at 19).

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (*Atlas El. Corp. v United El. Group, Inc.*, 77 AD3d 859, 861 [2d Dept 2010]). "This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*id.*). Hence, to establish a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege that defendant sought to prevent performance of the contract or deprive plaintiff of the right to receive benefits under the agreement (*see Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 [1st Dept 1996]).

Here, the focus of Newage's implied covenant claim is that Rialto deliberately and unreasonably delayed (1) finalizing settlement terms and providing a written agreement reflecting those terms, and (2) providing Newage with the payoff statement needed to retire the Loan (FAC ¶¶ 94-99, 111-119, 132). Newage avers that it expected Rialto to negotiate in good faith and free of self-interest (*id.* ¶ 134). But Rialto instead delayed and obfuscated the process in a manner that improperly induced Newage from acting more quickly to cure any default, repay the Loan, and mitigate damages (*id.*). Rialto's conduct, in turn, allowed for default interest and fees to accumulate against Newage (*id.* ¶ 132). These allegations sufficiently establish conduct at the pleading stage that, although not expressly addressed or proscribed by the Loan Agreement, essentially frustrated Newage's ability to perform under the Loan Agreement and violated Newage's reasonable expectations arising thereunder. And unlike the circumstances supporting the implied covenant claim in the original complaint, the circumstances alleged in the FAC do not arise out of the same set of facts as Newage's breach of contract claim (*AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC*, 214 AD3d 111, 134 [1st Dept 2023] [concluding that implied covenant claim was not duplicative of breach of contract claim where claim "did not arise from the same set of facts as the breach of contract claims"]).

This conclusion is not altered by the fact the Loan Agreement prohibits "modification, amendment, extension, discharge, termination or waiver" of any of its provisions without written consent (Agreement § 10.4). Nor is it relevant, as defendants aver, that the implied covenant of good faith and fair dealing does not typically "encompass future dealings or negotiations between the parties" (Reply at 10, citing *Resolution Tr. Corp. v. Lesal Assocs.*, 1992 WL 98843, at *5 [SD NY May 6, 1992, No. 91 CIV. 2025 (MBM)]). As alleged, Newage's claim is not premised on whether defendants did or did not modify the Loan Agreement or discharge Newage's duties to perform. It instead stems from defendants' alleged stonewalling and delay during the negotiation process, which prevented Newage from exercising its and rights and options under the Loan Agreement, including the possibility of "chang[ing] course in time to avoid accruing additional fees and interest" (*see 360 N. Rodeo Drive LP v Wells Fargo Bank, Natl. Assoc.*, 2023 WL 2574180, at *6-7 [SD NY Mar. 20, 2023, No. 22-cv-767 (ER)] [denying motion to dismiss claim for breach of the implied covenant of good faith and fair dealing where plaintiff sufficiently alleged that defendants' "unjustifiable delay in taking the position that default interest had actually been accruing all along[,] deprived Plaintiff of its rights and options under the Loan Agreement to prevent or mitigate the accrual of any default interest"). That the Loan Agreement could not be modified or amended without Lender's consent is therefore of no moment here.

Defendants otherwise argue that Newage's implied covenant claim is foreclosed by Section 10.12 of the Loan Agreement, which (1) limits Newage's remedies for any claim that Lender or Rialto "acted unreasonably or unreasonably delayed acting" to "injunctive relief or declaratory judgment," and (2) expressly states that "neither Lender nor its agents shall be liable for any monetary damages" (Agreement § 10.12). The court disagrees.

It is true that New York courts "routinely enforce such liability-limitation provisions, especially when negotiated by sophisticated parties" (*Electron Trading, LLC v Morgan Stanley & Co. LLC*, 157 AD3d 579, 580 [1st Dept 2018]). Such clauses, however, are unenforceable when "in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing" or bad faith (*see id.* at 580-581, quoting *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]). The "type of intentional wrongdoing that could render a [contractual liability] limitation . . . unenforceable is that which is 'unrelated to any legitimate economic self-interest'" (*Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 77 [1st Dept 2013]; *accord Meridian Capital Partners, Inc. v Fifth Ave 58/59 Acquisition Co. LP*, 60 AD3d 434, 434 [1st Dept 2009]). Here, accepting the allegations in the FAC as true and drawing all reasonable inferences in Newage's favor (as this court must), there are sufficient facts alleged to support a pleading-stage inference that Rialto's actions were unrelated to any legitimate economic self-interest and purposefully calculated to delay Newage from exercising its rights and options under the Loan Agreement. For this reason, although Section

10.12 may ultimately prove to be an issue for Newage down the line, it does not warrant dismissal of this claim at this early juncture.

In sum, Newage has sufficiently stated a non-duplicative claim for breach of the implied covenant of good faith and fair dealing in its FAC. Defendants' motion to dismiss Count II of the FAC is denied.

III. Declaratory Judgment Claim (Count III)

Defendants again seek dismissal of the entirety of Newage's declaratory judgment claim (MOL at 18-22). A review of the FAC reveals that the only new allegations added for Newage's declaratory judgement claim are references to purported "equitable exceptions to enforcing" nonmonetary defaults (*see* FAC ¶¶ 139-140). Newage identifies those equitable considerations as whether "(i) 'the lender suffered actual damages as a result of the default'; (ii) 'the default impaired . . . the collateral securing the debt'; and (iii) 'the default ma[de] the future payment of principal and interest less likely'" (Opp at 20). The cases upon which Newage relies, however, both recognize that a key consideration underlying these equitable exceptions is whether the alleged default was "significant or insignificant" (*see In re 53 Stanhope LLC*, 625 BR 573, 584 [Bankr SD NY 2021]; *Karas v Wasserman*, 91 AD2d 812, 812 [3d Dept 1982] [noting that "remedy of foreclosure may be denied in the case of an inadvertent, inconsequential default"]). Here, as the allegations and documentary evidence indicate, both contractual provisions invoked by Rialto relate to Newage's representation that it would not incur additional debts and liabilities without Lender's consent (*see* FAC ¶¶ 82-84; *see also* Agreement § 4.1.30 and SPE Definition). A breach of these representations would seemingly be material to Lender because additional debt obligations could, at minimum, make future payments less likely by virtue of increasing the number of creditors with claims to repayment (*cf. In re 53 Stanhope LLC*, 625 Br at 585-586 [declining to enforce nonmonetary default related to enforcement of default interest tied to violations of New York City Building Code that were cured and removed]; *see also id.* at 586 [enforcing nonmonetary default where encumbrances "impaired [lender's] interests in the collateral"]). Newage, of course, disputes the factual premise of the nonmonetary defaults claimed by Rialto, and nothing in this decision should be construed as making a final determination on that issue. But given the nature of the alleged nonmonetary defaults, nothing in the FAC supports a conclusion or reasonable inference that the Default Rate is in and of itself unenforceable upon consideration of any equitable exception.

The remainder of Newage's default judgment claim relies on the same allegations as previously considered in the prior decision (*see* NYSCEF # 25 at 46-47). Therefore, the present decision will accordingly adhere to the same determinations previously rendered in the July 2023 Order (*see generally Aspen Specialty Ins. Co. v RLI Ins. Co., Inc.*, 194 AD3d 206, 212 [1st Dept 2021] [the law of the case doctrine "generally operates to preclude successive motions by the same

party upon the same proof"). Defendants' motion to dismiss Count III is again granted insofar as it seeks a declaration regarding the Default Rate and again denied in all other respects.

IV. Fraudulent Inducement and Economic Duress Claims (Counts V & VI)

Newage reasserts claims for economic duress and fraudulent inducement "solely to preserve the claim[s] for appeal pursuant to CPLR 5501." Defendant again seeks dismissal of these claims for the avoidance of doubt (MOL at 23). For the reasons articulated in the July 2023 Order, Counts V and IV are dismissed.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendants' motion to dismiss the First Amended Complaint is (1) granted in its entirety with respect to Counts IV, V, and VI, (2) granted in part and denied in part with respect to Count III, and (3) denied with respect to Count II; and it is further

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

ORDERED that counsel for defendants shall serve a copy of this decision, along with notice of entry, on plaintiff within ten days of this filing

This constitutes the Decision and Order of the court.

03/11/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE