

1 Alex Darcy, Esq. (CSBA No. 189315)  
2 Askounis & Darcy, PC  
3 444 N. Michigan Avenue, Suite 3270  
4 Chicago, IL 60611  
5 (312) 784-2400 (t)  
6 (312) 784-2410 (f)  
7 [adarcy@askounisdarcy.com](mailto:adarcy@askounisdarcy.com)  
8 Attorney for Defendant  
9 BALBOA CAPITAL CORPORATION

8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 SHOPKO STORES OPERATING CO., LLC,  
11  
12 Plaintiff,  
13 v.  
14  
15 BALBOA CAPITAL CORPORATION,  
16  
17 Defendant.

Case No. 8:16-cv-99

**DEFENDANT BALBOA  
CAPITAL  
CORPORATION'S  
MEMORANDUM OF  
POINTS AND  
AUTHORITIES IN  
SUPPORT OF ITS MOTION  
TO DISMISS COMPLAINT**

Date: April 15, 2016  
Time: 2:30 p.m. PDT

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1 NOW COMES Defendant BALBOA CAPITAL CORPORATION (“BCC”),  
2 and for its Memorandum of Law in Support of its Motion to Dismiss Plaintiff  
3 SHOPKO STORES OPERATING CO., LLC’s (“ShopKo”) Complaint, pursuant to  
4 Fed. R. Civ. P. 12(b)(1) and (6), states as follows:  
5

6 **INTRODUCTION**  
7

8 ShopKo complains that it was defrauded by BCC, because BCC collected  
9 prorated rent from ShopKo, pursuant to the express terms of a written equipment  
10 lease between the parties. BCC’s right to prorated rent payments was authorized  
11 by the parties’ contracts, and BCC, through written correspondence and invoices,  
12 notified Shopko of BCC’s intent to charge prorated rent, which ShopKo  
13 subsequently paid. ShopKo, a sophisticated commercial entity with 330 stores  
14 nationwide, should be precluded from re-negotiating the parties’ equipment lease  
15 through this Court, simply because it now second guesses its original decision.  
16  
17

18 **BACKGROUND**  
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20 On June 11, 2012, BCC, as lessor, and ShopKo, as lessee, entered into  
21 Master Lease Agreement No. 171984 (the “Master Lease”). See Master Lease, Ex.  
22 A to ShopKo’s Complaint, pp. 27-30. The Master Lease contemplated that the  
23 parties would enter into a series of lease schedules for the lease or finance of  
24 equipment (the “Schedules”). Id., ¶ 1. With respect to the effective date and  
25 commencement date of each Schedule, the Master Lease provided:  
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1 TERM. Each Schedule shall become effective upon acceptance by  
2 Lessor by signing and dating each Schedule and the term of any  
3 Schedule(s) shall commence on the day that the leased property has  
4 been delivered to and accepted by Lessee ('Commencement Date'). . .  
5 The base term ('Base Term') of each Lease shall commence at the  
6 Lessor's sole discretion on any day occurring in the quarter following  
the Commencement Date and terminate upon the expiration of the  
number of months specified in each Schedule.

7 Id., ¶ 2.

8 With respect to rent under the Schedules, the parties agreed:  
9

10 RENT. The rent payable with respect to any Schedule(s) shall be the  
11 amount shown on such Schedule(s). Lessee shall pay to Lessor the  
12 rent for each Schedule, in advance, for each period or any part thereof  
13 that each Lease is in effect as delineated on the Schedule. The first  
14 such payment, with respect to any Schedule, shall be made at the  
15 Lessor's discretion on any day occurring in the quarter following the  
16 Commencement Date. *A prorata portion of the rental charges based  
17 on a daily rental of one-ninetieth (1/90) of the aggregate average of  
the quarterly rentals calculated from the Commencement Date to  
the beginning of the Base Term shall be due and payable at the  
Commencement Date.*

18 Id., ¶ 3 (emphasis added).

19 BCC entered into 11 Schedules with ShopKo. See Ex. A-K to the  
20 Complaint. Each Schedule incorporated the Master Lease's terms: "This Schedule  
21 is made as of the Acceptance Date set forth below and is made pursuant to and  
22 incorporates by reference each and every term of that certain Master Lease  
23 Agreement dated 6/11/12 as though fully set forth herein." Id.  
24  
25

26 BCC also entered into Master Lease Agreement No. 211267 (the "SVS  
27 Master Lease") with non-party SVS Trucking, LLC ("SVS Trucking"). See Ex. L  
28

1 to the Complaint, pp. 151-154. The SVS Master Lease contained provisions  
2 identical to the Master Lease. Id., ¶¶ 1-3. BCC entered into 2 Schedules with SVS  
3 Trucking pursuant to the SVS Master Lease. See Ex. L and M to the Complaint.  
4 The 2 Schedules with SVS Trucking also incorporated the terms of the SVS Master  
5 Lease. Id. SVS Trucking is not a named plaintiff to the lawsuit.  
6  
7

8 In addition to the Master Lease authorizing prorated rent, the parties entered  
9 into various agreements (the “Hold Harmless Agreements”), under which ShopKo  
10 consented to BCC charging prorated rent. See Hold Harmless Agreements, Group  
11 Ex. 1 to the Affidavit of Michelle Chiongson (the “Affidavit”), Ex. A hereto.<sup>1</sup>  
12 Under the Hold Harmless Agreements, ShopKo agreed to pay BCC “a processing  
13 fee and interim rent from the date of the prefund verbal verification based on the  
14 aggregate amount of our payments(s) to your supplier(s) multiplied by the daily  
15 equivalent lease rate. (The daily equivalent lease rate is equal to 1/30<sup>th</sup> of the  
16 quotient that results when dividing the monthly rental payment of your Lease by  
17 the aggregate invoice amounts.)” Id.  
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23 <sup>1</sup> As discussed *infra*, pp. 8-9, BCC attaches the Hold Harmless Agreements,  
24 because the documents are incorporated by reference in the Complaint, through  
25 ShopKo’s allegations that BCC’s withdrawal of prorated rent payments was not  
26 authorized by the written agreements between the parties. See Complaint, ¶¶ 18,  
27 20-22, 27-29, 31-32, 34-36, 38-39, 41-46, 50-52, 56-58, 62-64, 68-70, 74-76, 80-  
28 82, 86-88, 92-94, 98-100, 104-106, 110-112, 116-118, 122-124, 127-130, 132-135;  
Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001); Warren v. Fox  
Family Worldwide, Inc., 328 F.3d 1136 (9th Cir. 2003); United States v. Ritchie,  
342 F.3d 903, 907-08 (9th Cir. 2003). ShopKo does not dispute their authenticity.

1           Shortly after ShopKo entered into the Schedules with BCC, BCC sent  
2 introductory letters to ShopKo and SVS Trucking (the “Welcome Letters”). See  
3 Welcome Letters, Ex. C (p. 41), D (p. 50), E (p. 55), F (p. 71), G (pp. 82-83), H  
4 (pp. 98-99), I (pp. 111-112), J (pp. 120-121), and K (pp. 135-136) to the  
5 Complaint; Affidavit, Ex. 2.<sup>2</sup> The Welcome Letters advised that “although Balboa  
6 Capital will continue to service [ShopKo’s] account, the monthly lease payments  
7 . . . have been assigned,” and that ShopKo would receive an invoice from BCC for  
8 prorated rent: “In the interim you will receive an invoice from Balboa Capital  
9 including any sales tax, prorated rental charges or other closing costs due.” Id.  
10 BCC subsequently sent letters (the “Notice of Assignment Letters”) to ShopKo and  
11 SVS Trucking, advising that specific payments under the Schedules were assigned  
12 to third parties. See Complaint, ¶ 12; Notice of Assignment Letters, Ex. A (p. 24),  
13 B (p. 38), C (p. 42), D (p. 51), E (p. 56), F (p. 72), H (p. 100), J (p. 122), K (p.  
14 137), and M (p. 189) to the Complaint; Ex. 3 to the Affidavit.<sup>3</sup>

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20           In conjunction with the prorated rent language contained in the Master  
21 Lease, Hold Harmless Agreements and Welcome Letters, BCC sent ShopKo and  
22 SVS Trucking invoices for each of the Schedules (the “Invoices”) for prorated rent.  
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26 <sup>2</sup> ShopKo failed to attach the Welcome Letters for Schedule Nos. 171984-001,  
27 171984-007 and 211267-001 to its Complaint.

28 <sup>3</sup> ShopKo failed to attach the Notice of Assignment Letters for Schedule Nos.  
171984-006 and -009 to its Complaint.

1 See Affidavit, Group Ex. 4.<sup>4</sup> Each of the Invoices clearly delineated “prorated  
2 rent” as a line item, and the start and end dates for the prorated rent timeframe. Id.  
3  
4 Each Invoice notes that after the due date of the Invoice, BCC will debit ShopKo’s  
5 bank account for the listed charges. Id.

6 ShopKo authorized BCC to withdraw payments for the 13 Schedules from  
7 ShopKo’s bank account. See Complaint, ¶ 11. In accordance with that  
8 authorization, and under the terms of the Master Lease, the SVS Master Lease,  
9 Hold Harmless Agreements, Welcome Letters and Invoices, BCC withdrew the  
10 prorated rent amounts from ShopKo’s bank account. See Complaint, ¶ 15.  
11  
12 ShopKo subsequently filed suit, claiming that BCC’s collection of prorated rent  
13 constituted fraud and breach of the Schedules. See Complaint.  
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## 16 ARGUMENT

### 17 **A. MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1)**

18 Lack of subject matter jurisdiction may be brought by motion pursuant to  
19 Rule 12(b)(1). Fed. R. Civ. P. 12(b)(1). “28 U.S.C. § 1332 confers subject matter  
20 jurisdiction on federal courts when each defendant is a citizen of a different state  
21 from each plaintiff.” Kienast v. Turner, 844 F.2d 792 (9th Cir. 1988). “Federal  
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25 <sup>4</sup> ShopKo claims that, “Balboa intentionally did not disclose to ShopKo its  
26 intentions to withdraw additional payments totaling 89/90<sup>th</sup> of a quarterly payment  
27 or a full quarterly payment under each capital lease.” See Complaint, ¶ 28.  
28 ShopKo’s allegation incorporates the Invoices by reference and opens the door to  
any correspondence in which BCC advised that it would withdraw additional  
payments. See Footnote 1.

1 courts are courts of limited jurisdiction...It is to be presumed that a cause lies  
2 outside this limited jurisdiction, and the burden of establishing the contrary rests  
3 upon the party asserting jurisdiction.” Kokkonen v. Guardian Life Ins. Co. of Am.,  
4 511 U.S. 375, 377 (1994). “Absent unusual circumstances, a party seeking to  
5 invoke diversity jurisdiction should be able to allege affirmatively the actual  
6 citizenship of the relevant parties.” Kanter v. Warner-Lambert Co., 265 F.3d 853,  
7 857 (9th Cir. 2001). “[A]n LLC is a citizen of every state of which its  
8 owners/members are citizens.” Johnson v. Columbia Properties Anchorage, LP.  
9 437 F.3d 894, 899 (9th Cir. 2006).

13 ShopKo pleads that it is a Delaware limited liability company, maintaining  
14 its principal place of business in Wisconsin, but does not disclose the citizenship of  
15 its members. See Complaint, ¶ 2. ShopKo alleges: “none of its members are  
16 citizens of California.” Id. However, ShopKo’s vague assertions are insufficient.  
17 See Robertson v. GMAC Mortgage, LLC, No. 14-35672, 2016 WL 145827, at \*2  
18 (9th Cir. Jan. 5, 2016) (“Given defendants-appellees’ burden to establish complete  
19 diversity, LSI must allege its actual citizenship, not vague assurances that it is not a  
20 citizen of Washington or Oregon.”). Because ShopKo failed to identify its  
21 member(s) and the citizenship of its member(s), the Court must dismiss the  
22 Complaint due to lack of subject matter jurisdiction.

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27 **B. MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)**

28 **1. STANDARD OF REVIEW**

1 A complaint may be dismissed for “failure to state a claim upon which relief  
2 can be granted[.]” Fed. R. Civ. P. 12(b)(6). “Dismissal can be based on the lack of  
3 a cognizable legal theory or the absence of sufficient facts alleged under a  
4 cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th  
5 Cir.1988). The pleading must contain “enough facts to state a claim to relief that is  
6 plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).  
7

8  
9 “All allegations of material fact are taken as true and construed in the light  
10 most favorable to the nonmoving party.” Cahill v. Liberty Mut. Ins. Co., 80 F.3d  
11 336, 338 (9th Cir.1996). The Court is not obligated to accept every conclusory  
12 allegation as true; rather, it “will examine whether conclusory allegations follow  
13 from the description of facts as alleged.” Holden v. Hagopian, 978 F.2d 1115, 1121  
14 (9th Cir.1992). “If a complaint is accompanied by attached documents . . . [t]hese  
15 documents are part of the complaint[.]” Durning v. First Boston Corp., 815 F.2d  
16 1265, 1267 (9th Cir. 1987).  
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19  
20 Moreover, when the exhibits contradict the allegations of the Complaint, the  
21 exhibits trump the allegations. Steckman v. Hart Brewing, Inc., 143 F.3d 1293,  
22 1295-96 (9th Cir. 1998); Van Hook v. Curry, No. C 06-3148 PJH (PR), 2009 WL  
23 773361, at \*3 (N.D. Cal. Mar. 23, 2009); Alvarez v. Yates, No. 1:09-CV-02148-  
24 MJS PC, 2011 WL 3319718, at \*4 (E.D. Cal. July 29, 2011); Gonzalez v. Mullen,  
25 No. C 09-00953 CW (PR), 2010 WL 1957376, at \*2 (N.D. Cal. May 14, 2010).  
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1           When a Complaint contains allegations of fraud, Rule 9(b) requires that the  
2 circumstances be stated with particularity. Fed. R. Civ. P. 9(b). Generally, this  
3 requires plaintiff to state the time, place, and specific content of the representations  
4 and to identify the parties. Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th  
5 Cir.2007). The Ninth Circuit has noted:  
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8           Averments of fraud must be accompanied by ‘the who, what, when,  
9 where, and how’ of the misconduct charged. A party alleging fraud  
10 must ‘set forth *more* than the neutral facts necessary to identify the  
11 transaction.’ Rule 9(b) serves three purposes: (1) to provide  
12 defendants with adequate notice to allow them to defend the charge  
13 and deter plaintiffs from the filing of complaints ‘as a pretext for the  
14 discovery of unknown wrongs’; (2) to protect those whose reputation  
15 would be harmed as a result of being subject to fraud charges; and (3)  
16 to ‘prohibit [ ] plaintiff[s] from unilaterally imposing upon the court,  
17 the parties and society enormous social and economic costs absent  
18 some factual basis.’

19 Kearns v. Ford Motor Co., 567 F.3d 1120, 1124-25 (9th Cir. 2009).

20           While the Court typically cannot consider extrinsic evidence in ruling on a  
21 motion to dismiss under Rule 12(b)(6), a court may consider:  
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23           ‘[M]aterial which is properly submitted as part of the complaint’ on a  
24 motion to dismiss without converting the motion to dismiss into a  
25 motion for summary judgment. If the documents are not physically  
26 attached to the complaint, they may be considered if the documents’  
27 ‘authenticity . . . is not contested’ and ‘the plaintiff’s complaint  
28 necessarily relies’ on them.

29 Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). “Even if a  
30 document is not attached to a complaint, it may be incorporated by reference into a  
31 complaint if the plaintiff refers extensively to the document or the document forms  
32

1 the basis of the plaintiff's claim.” United States v. Ritchie, 342 F.3d 903, 907-08  
2 (9th Cir. 2003). The “incorporation by reference” doctrine exists to prevent a  
3 plaintiff from mischaracterizing contractual terms or evidence by deliberately  
4 omitting critical documents. In re Easysaver Rewards Litig., 737 F. Supp. 2d  
5 1159, 1166 (S.D. Cal. 2010); Barnes v. Windsor Sec. LLC, No. 13-CV-01878-  
6 WHO, 2013 WL 4426244, at \*2 (N.D. Cal. Aug. 15, 2013); Birdsong v. AT & T  
7 Corp., No. C12-6175 TEH, 2013 WL 1120783, at \*2 (N.D. Cal. Mar. 18, 2013).

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10 The Court should not grant leave to amend the Complaint, if the amendment  
11 would not cure the defects of the Complaint. Blanchard v. Darmain, 10 F. App'x  
12 532 (9th Cir. 2001); Aintablian v. Madding, 21 F. App'x 661, 662 (9th Cir. 2001).

## 13 **2. CALIFORNIA LAW APPLIES TO THE CASE.**

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15  
16 “[I]n diversity cases[,] federal courts must apply the choice-of-law rules of  
17 the forum state.” Estate of Darulis v. Garate, 401 F.3d 1060, 1062 (9th Cir. 2005).  
18 California’s choice-of-law test is statutory, whereby “if [a contract] does not  
19 indicate a place of performance,” a contract is to be interpreted “according to the  
20 law and usage of the place where it is made.” Cal. Civ. Code § 1646. The  
21 contracts at issue in this case were “made” in California, because the contracts did  
22 not become binding until they were accepted by BCC in California, where BCC is  
23 incorporated and has its principal place of business. See Costco Wholesale Corp. v.  
24 Liberty Mut. Ins. Co., 472 F. Supp. 2d 1183, 1197 (S.D. Cal. 2007); Master Lease,

25 ¶ 20. The parties also agreed that by entering into the Master Lease, they  
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1 “TRANSACTIONED BUSINESS IN THE STATE OF CALIFORNIA[.]” See Master  
2 Lease, ¶ 30. Further, the parties agreed that the California Uniform Commercial  
3 Code applies to the Master Lease and Schedules. See Master Lease, ¶ 4. Thus,  
4 California law applies.<sup>5</sup>

6 **3. SHOPKO LACKS STANDING TO ASSERT CLAIMS UNDER SCHEDULE NOS.**  
7 **211267-000 AND 211267-001.**

8 BCC entered into Schedule Nos. 211267-000 and 21267-001 with SVS  
9 Trucking, not ShopKo; however, SVS Trucking is not a plaintiff. Because ShopKo  
10 fails to allege how it has standing to assert claims on SVS Trucking’s behalf, its  
11 claims with respect to Schedule Nos. 211267-000 and -001 must be dismissed.  
12

13  
14 A plaintiff must show the following to establish standing in federal court:

15 First, the plaintiff must have suffered an ‘injury in fact’ – an invasion  
16 of a legally protected interest which is (a) concrete and particularized;  
17 and (b) ‘actual or imminent, not “conjectural” or “hypothetical[.]”’  
18 Second, there must be a causal connection between the injury and the  
19 conduct complained of – the injury has to be ‘fairly ... trace[able] to  
20 the challenged action of the defendant, and not ... th[e] result [of] the  
21 independent action of some third party not before the court.’ Third, it  
22 must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury  
23 will be ‘redressed by a favorable decision.’ The party invoking  
24 federal jurisdiction bears the burden of establishing these elements.

25  
26 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

27  
28 <sup>5</sup> BCC understands that all of ShopKo’s statutory and tort claims are premised on  
the language contained in the Schedules. If ShopKo’s claims are based on  
anything other than the written terms of the Schedules, then Wisconsin law may  
apply, and BCC reserves the right to assert the same.

1 ShopKo has not alleged that it has standing to assert claims with respect to  
2 Schedule Nos. 211267-000 and 21267-001. First, ShopKo has not alleged an  
3 “injury in fact,” as SVS Trucking is the lessee under the contracts. Second, no  
4 causal connection exists between BCC’s alleged conduct under those Schedules  
5 and injury to ShopKo. Finally, the alleged injury to SVS Trucking under those  
6 contracts cannot be redressed by favorable decision, since SVS Trucking is not a  
7 named plaintiff. Thus, all of ShopKo’s claims involving Schedule Nos. 211267-  
8 000 and 21267-001 should be dismissed.  
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11  
12 **4. ALL OF SHOPKO’S CLAIMS MUST BE DISMISSED, BECAUSE THE MASTER**  
13 **LEASE AUTHORIZED BCC’S COLLECTION OF PRORATED RENT.**

14 ShopKo claims that BCC breached the Schedules and defrauded Shopko by  
15 collecting prorated rent. See Complaint, ¶ 28 and Counts 1-2, 4-16. ShopKo also  
16 contends that BCC engaged in negligent misrepresentations through its conduct;  
17 that BCC breached the implied covenant of good faith and fair dealing; and that  
18 BCC violated the California Unfair Competition Law. Id., Counts 17-18.  
19

20 All of ShopKo’s claims must be dismissed, because the Master Lease  
21 specifically authorized BCC’s collection of prorated rent. ShopKo takes a  
22 schizophrenic view of the Schedules, calling their terms “clear,” “false” and  
23 “fraudulent.” See Complaint, ¶¶ 18, 28, 34, 35, 42. ShopKo contends that the  
24 Schedules were fraudulent, because they did not include terms which authorized  
25 BCC’s withdrawal of prorated rent; the logical inference from ShopKo’s  
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1 allegations is that if the Schedules *had* contained such provisions, they would not  
2 be fraudulent. Id., ¶¶ 28, 34, 35, 42.

3  
4 Each Schedule specifically incorporated the terms of the Master Lease,  
5 which authorized BCC’s collection of prorated rent. See Ex. A-M to the  
6 Complaint. Shopko consented to BCC collecting prorated rent in the time period  
7 between the Commencement Date and the Base Term. See Master Lease, ¶ 3. The  
8 Base Term of any Schedule was to commence at BCC’s sole discretion on any day  
9 occurring in the quarter following the Commencement Date; the first payment  
10 under any Schedule was to be made at BCC’s discretion on any day occurring in  
11 the quarter following the Commencement Date. Id., ¶¶ 2- 3. Thus, under the terms  
12 of the Master Lease, though a Schedule could have a Commencement Date in the  
13 First Quarter, the Base Term may not begin until the Second Quarter, and BCC  
14 could charge prorated rent to ShopKo during that interim period. Id., ¶¶ 2-3.

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18 Since the exhibits contradict the allegations of the Complaint, the exhibits  
19 trump Shopko’s allegations. Steckman, 143 F.3d at 1295-96. ShopKo’s  
20 contention that the Schedules were fraudulent is contradicted by the Schedules  
21 themselves, which incorporate the Master Lease provisions regarding prorated  
22 rent; thus, the Court should enforce the plain terms of the contracts. Valencia v.  
23 Smyth, 110 Cal. Rptr. 3d 180, 185 (Cal. Ct. App. 2010) (“Under the plain meaning  
24 rule, courts give the words of the contract or statute their usual and ordinary  
25 meaning.”). The language of the Master Lease is bolstered by the Hold Harmless  
26  
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28

1 Agreements and Welcome Letters, which advise ShopKo that BCC would charge  
2 for interim rent, and the Invoices, which listed prorated rent as line items on each  
3 Invoice. Accordingly, all of ShopKo’s claims fail, as they are all premised on the  
4 notion that BCC was unauthorized to withdraw the prorata rent.  
5

6 Despite the clear terms of the Master Lease, ShopKo claims that it should  
7 not be held to its contractual obligations, because it was confused. See Complaint,  
8 ¶ 23 (“ShopKo did in fact believe the first withdrawal under each lease was the  
9 first quarterly payment, and not an extra payment outside of, and in addition to, the  
10 12 or 20 quarterly payments authorized under each lease.”). ShopKo’s contention  
11 is without merit, as a party is presumed to know and understand the contents of a  
12 contract it signs. See Roldan v. Callahan & Blaine, 161 Cal. Rptr. 3d 493, 497-98  
13 (Cal. Ct. App. 2013), as modified (Sept. 18, 2013) (“[T]he law effectively  
14 presumes that everyone who signs a contract has read it thoroughly, whether or not  
15 that is true. . . . courts must also presume parties understood the agreements they  
16 sign, and that the parties intended whatever the agreement objectively provides,  
17 whether or not they subjectively did[.]”); Operating Engineers Pension Trust v.  
18 Cecil Backhoe Service, Inc., 795 F.2d 1501, 1505 (9th Cir.1986); Bingham v.  
19 Holder, 637 F.3d 1040, 1045 (9th Cir. 2011); Rowland v. PaineWebber Inc., 6 Cal.  
20 Rptr. 2d 20, 24 (Cal. Ct. App. 1992).  
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27 These legal presumptions are particularly pertinent to ShopKo, a “\$3 billion  
28 *retailer* that operates over 330 stores in 21 states throughout the Midwest,

1 Mountain, North Central and Pacific Northwest regions.” See  
2 <http://www.shopko.com/category/Company/OurHistory/pc/2176/2179.uts?&pageS>  
3 [ize](#) (emphasis added). See also Complaint, ¶ 7. Thus, ShopKo should be held to  
4 its contractual obligations.  
5

6 Moreover, the provisions for prorated rent make sense, when the Court  
7 considers the time period when ShopKo retained the equipment leased under the  
8 Schedules, before making any payments to BCC (or BCC’s assignee) under the  
9 Schedule. For example, with respect to Schedule No. 171984-001, ShopKo signed  
10 the Schedule on July 19, 2012, but made payments under the Schedule from  
11 10/27/12 to 7/27/15 (as stated in the Notice of Assignment Letter). See Complaint,  
12 Ex. B, pp. 37-38. ShopKo’s payment of prorated rent for use of the equipment for  
13 that interim period (7/29/12 to 10/26/12)<sup>6</sup>, is logical, as it compensated BCC for:  
14 (1) ShopKo’s use of the equipment during that interim time period; and (2) BCC’s  
15 credit risk that ShopKo could go out of business before ShopKo’s first payment  
16 was due under the Schedule, while using the equipment.  
17

18 ShopKo also alleges that BCC did not have the authority to debit ShopKo’s  
19 account for the prorated rental payments, because BCC assigned the payments  
20 under the Schedules to third parties. See Complaint, ¶ 18. Notably, ShopKo does  
21 not attach the assignments themselves, but only the Notice of Assignment Letters.  
22 At best, ShopKo’s fraud claim is based on a guess as to the assignment rights  
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<sup>6</sup> See Invoice for Schedule No. 171984-001.

1 between BCC and its assignees, which is insufficient as a matter of law. Odom,  
2 486 F.3d at 553; Kearns, 567 F.3d at 1124-25. However, the terms of the Notice of  
3 Assignment Letters make clear that BCC assigned only the specific quarterly  
4 payments under the Schedules; BCC did not assign its right to the prorated rent due  
5 before the quarterly payments. See Notice of Assignment Letters. Even if ShopKo  
6 purported to be confused by the Notice of Assignment Letters lacking a reference  
7 to prorated rent, any claimed misunderstanding would have been cleared up by the  
8 Welcome Letters (which indicate that though BCC assigned the quarterly  
9 payments under the Schedules to third parties, ShopKo would receive an invoice  
10 from BCC for prorated rent); the Hold Harmless Agreements (under which  
11 ShopKo agreed to BCC charging interim rent); and the Invoices (which listed  
12 prorated rent as line items on each Invoice). Notably, Shopko does not allege that  
13 the prorated rent payments should have been paid to the assignees.  
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19 Thus, because the Master Lease specifically authorized BCC's collection of  
20 prorated rent, and because BCC assigned only the quarterly payments under the  
21 Schedules (and not BCC's right to collect prorated rent), all of ShopKo's claims  
22 must be dismissed with prejudice.  
23

24 **5. SHOPKO FAILS TO STATE A CLAIM FOR TORTIOUS FRAUD AND**  
25 **INTENTIONAL DECEIT.**

26 California Civil Code § 1709 provides, "Fraudulent deceit. One who  
27 willfully deceives another with intent to induce him to alter his position to his  
28

1 injury or risk, is liable for any damage which he thereby suffers.” Cal. Civ. Code §  
2 1709 (West). “The elements of fraud, which give rise to the tort action for deceit,  
3 are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to  
4 induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5)  
5 resulting damage.” Conroy v. Regents of Univ. of Cal., 203 P.3d 1127, 1135 (Cal.  
6 2009). “All of these elements must be present for actionable fraud to be found, and  
7 one missing element is fatal to recovery.” Diaz v. Fed. Express Corp., 373 F.  
8 Supp. 2d 1034, 1066-67 (C.D. Cal. 2005). Moreover, a plaintiff must show its  
9 justifiable reliance, and that its damages are related to defendant’s conduct:  
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13 Under California law, [a] complete causal relationship between the  
14 fraud or deceit and the plaintiff's damages is required. An essential  
15 element in recovery for deceit is proof of the plaintiff's justifiable  
16 reliance on the defendant's fraudulent representations. Reliance exists  
17 when the misrepresentation or nondisclosure was an immediate cause  
18 of the plaintiff's conduct which altered his or her legal relations, and  
19 when without such misrepresentation or nondisclosure he or she  
20 would not, in all reasonable probability, have entered into the contract  
21 or other transaction.

22 City Sols., Inc. v. Clear Channel Commc'ns, 365 F.3d 835, 840-41 (9th Cir. 2004).

23 ShopKo claims that BCC made false representations as to ShopKo’s  
24 payment terms through the Schedules and Notice of Assignment Letters, which  
25 allegedly did not disclose BCC’s authority to make additional withdrawals for  
26 prorated rent. See Complaint, ¶¶ 27, 28, 30. As discussed above, the Schedules  
27 specifically incorporated the terms of the Master Lease, which authorized BCC’s  
28 collection of additional payments from ShopKo for prorated rent. Moreover, the

1 Notice of Assignment Letters do not support ShopKo’s contention. To the extent  
2 that ShopKo claims that BCC made other written or oral representations to  
3 ShopKo (other than those contained in the Schedules and the Notice of Assignment  
4 Letters), then ShopKo has failed to plead any details – the who, what, when, where  
5 – of such misrepresentations, in violation of Rule 9. Odom, 486 F.3d at 553;  
6 Kearns, 567 F.3d at 1124-25.  
7  
8

9 Moreover, ShopKo fails to plead that it justifiably relied on BCC’s alleged  
10 representations as to the payment terms of the Schedules. As a party to the Master  
11 Lease and Schedules, ShopKo is presumed to know and understand the contents of  
12 the contracts it signed, including the prorated rent provision in the Master Lease.  
13 ShopKo cannot claim that it justifiably relied on any representations from BCC as  
14 to the terms of the Master Lease and Schedules.  
15  
16

17 Finally, ShopKo fails to plead that it suffered damages as a result of BCC’s  
18 alleged representations as to the payment terms. The “damages” ShopKo  
19 complains of are the amounts ShopKo was contractually obligated to pay for  
20 prorated rent, under the terms of the Master Lease.  
21  
22

23 **6. SHOPKO FAILS TO STATE A CLAIM FOR ACTUAL FRAUD.**

24 California Civil Code § 1572 provides:

25 Actual fraud, what. Actual fraud, within the meaning of this Chapter,  
26 consists in any of the following acts, committed by a party to the  
27 contract, or with his connivance, with intent to deceive another party  
28 thereto, or to induce him to enter into the contract:



- 1 1. The suggestion, as a fact, of that which is not true, by one who does
- 2 not believe it to be true;
- 3 2. The positive assertion, in a manner not warranted by the
- 4 information of the person making it, of that which is not true, though
- 5 he believes it to be true;
- 6 3. The suppression of that which is true, by one having knowledge or
- 7 belief of the fact;
- 8 4. A promise made without any intention of performing it; or,
- 9 5. Any other act fitted to deceive.

10 Cal. Civ. Code § 1572 (West). The plaintiff must show the following:

11 [T]he elements of an action for fraud and deceit based on concealment  
12 are: (1) the defendant must have concealed or suppressed a material  
13 fact, (2) the defendant must have been under a duty to disclose the fact  
14 to the plaintiff, (3) the defendant must have intentionally concealed or  
15 suppressed the fact with the intent to defraud the plaintiff, (4) the  
16 plaintiff must have been unaware of the fact and would not have acted  
17 as he did if he had known of the concealed or suppressed fact, and (5)  
18 as a result of the concealment or suppression of the fact, the plaintiff  
19 must have sustained damage.

20 Moncada v. W. Coast Quartz Corp., 164 Cal. Rptr. 3d 601, 607 (Cal. Ct. App.  
21 2013); Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1156 (9th Cir. 2000).

22 “Fraud by concealment is actionable only if the defendant had a duty to  
23 disclose the concealed fact.” In re Toyota Motor Corp. Unintended Acceleration  
24 Mktg., Sales Practices, & Products Liab. Litig., 826 F. Supp. 2d 1180, 1205 (C.D.  
25 Cal. 2011). A duty to disclose arises in only four circumstances:

- 26 (1) when the defendant is in a fiduciary relationship with the plaintiff;
- 27 (2) when the defendant had exclusive knowledge of material facts not
- 28 known to the plaintiff; (3) when the defendant actively conceals a
- material fact from the plaintiff; and (4) when the defendant makes
- partial representations but also suppresses some material facts.

1 Stickrath v. Globalstar, Inc., 527 F. Supp. 2d 992, 1000-01 (N.D. Cal. 2007); Falk  
2 v. Gen. Motors Corp., 496 F. Supp. 2d 1088, 1094-95 (N.D. Cal. 2007).

3  
4 ShopKo fails to state a claim for actual fraud under California Civil Code §  
5 1572. First, ShopKo fails to adequately allege that BCC concealed or suppressed  
6 the fact that ShopKo was contractually obligated to pay prorated rent. As  
7 discussed, ShopKo’s agreement to prorated rent was plainly written in the Master  
8 Lease, and in the *nine* Hold Harmless Agreements ShopKo subsequently signed.  
9 The Welcome Letters and Invoices also expressly disclosed that BCC charged  
10 ShopKo for prorated rent.  
11  
12

13 Second, ShopKo has not alleged – nor can it show as a matter of law – that  
14 BCC was under a duty to disclose that fact to ShopKo. BCC was not in a fiduciary  
15 relationship with ShopKo, and ShopKo does not make this allegation. BCC did  
16 not have “exclusive knowledge of material facts not known to” ShopKo, nor did  
17 BCC “actively conceal a material fact” from ShopKo, since ShopKo’s obligation  
18 to pay prorated rent was expressly disclosed in the Master Lease, the Hold  
19 Harmless Agreements, the Welcome Letters and the Invoices. BCC also did not  
20 make “partial representations” to ShopKo while “suppressing some material facts,”  
21 as the terms were clearly disclosed in the written contracts. Thus, BCC did not  
22 have a duty to disclose to ShopKo.  
23  
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26

27 ShopKo also fails to plead that it was unaware of its obligation to pay  
28 prorated rent, and it would have acted differently had it known of the concealed or

1 suppressed fact. Since ShopKo is presumed to know and understand the contents  
2 of the contracts it signed, ShopKo was aware that it had to pay prorated rent to  
3 BCC, and that fact was never “concealed” or “suppressed” as a matter of law.  
4 Finally, ShopKo fails to plead that it suffered damage, since it was contractually  
5 obligated to pay those amounts.  
6

7  
8 **7. SHOPKO FAILS TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION.**  
9

10 “The tort of negligent misrepresentation, a species of the tort of deceit, does  
11 not require intent to defraud but only the assertion, as a fact, of that which is not  
12 true, by one who has no reasonable ground for believing it to be true.” Conroy v.  
13 Regents of Univ. of Cal., 203 P.3d 1127, 1135-36 (Cal. 2009); Gilmore v. Wells  
14 Fargo Bank N.A., 75 F. Supp. 3d 1255, 1269 (N.D. Cal. 2014). The plaintiff must  
15 show the following:  
16

- 17  
18 (1) The defendant must have made a representation as to a past or  
19 existing material fact, (2) which was untrue, (3) which, regardless of  
20 the defendant's actual belief, was made without any reasonable  
21 grounds for believing it was true, and (4) which was made with the  
22 intent to induce the plaintiff to rely upon it; (5) the plaintiff justifiably  
23 relied on the statement, and (6) plaintiff sustained damages.

24 Cedars Sinai Med. Ctr. v. Mid-W. Nat. Life Ins. Co., 118 F. Supp. 2d 1002, 1010  
(C.D. Cal. 2000).

25 ShopKo fails to state a claim for negligent misrepresentation under  
26 California Civil Code § 1572. For the reasons already addressed, BCC did not  
27  
28

1 make misrepresentations under the Schedules or Notice of Assignment Letters, and  
2 ShopKo fails to plead justifiable reliance and damages.

3  
4 **8. SHOPKO FAILS TO STATE A CLAIM FOR BREACH OF THE SCHEDULES.**

5 The elements of a claim for breach of contract are: (1) the contract; (2)  
6 plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and  
7 (4) damage to plaintiff. Abdelhamid v. Fire Ins. Exch., 106 Cal.Rptr.3d 26 (Cal.  
8 Ct. App. 2010). ShopKo alleges that BCC breached the Schedules by deducting  
9 the prorated rent payments. See Complaint, ¶¶ 47-124. However, BCC's  
10 collection of prorated rent was specifically authorized under the Master Lease.  
11 Moreover, ShopKo fails to allege damages, since ShopKo was liable for those  
12 amounts under the Master Lease's prorated rent provision.  
13  
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15

16 **9. SHOPKO FAILS TO STATE A CLAIM FOR BREACH OF THE IMPLIED**  
17 **COVENANT OF GOOD FAITH AND FAIR DEALING.**

18 A plaintiff asserting a claim for breach of the implied covenant of  
19 good faith and fair dealing must allege the following elements: (1) the  
20 existence of a contract; (2) the plaintiff did all, or substantially all of  
21 the significant things the contract required; (3) the conditions required  
22 for the defendant's performance had occurred; (4) the defendant  
23 unfairly interfered with the plaintiff's right to receive the benefits of  
24 the contract; and (5) the plaintiff was harmed by the defendant's  
25 conduct.

24 Oculus Innovative Scis., Inc. v. Nofil Corp., No. C 06-01686 SI, 2007 WL  
25 2600746, at \*4 (N.D. Cal. Sept. 10, 2007). "The implied covenant of good faith  
26 and fair dealing is limited to protecting express terms of the contract, and cannot  
27 itself override an express contractual provision. Good faith and fair dealing is  
28

1 satisfied where the conduct at issue is either expressly permitted or at least not  
2 prohibited.” Jurin v. Google Inc., 768 F. Supp. 2d 1064, 1073 (E.D. Cal. 2011).  
3  
4 See also Schloss v. Sick Optic Elec., Inc., No. CIV. 96-20236 SW, 1996 WL  
5 708374, at \*3 (N.D. Cal. Nov. 22, 1996) (“[A]n implied covenant of fair dealing  
6 cannot override an express provision of the contract.”).

7  
8 First, ShopKo fails to allege that it did all of the significant things the Master  
9 Lease and Schedules required. ShopKo was required to pay prorated rent under  
10 the Master Lease; however, after BCC collected the same, ShopKo sued to have  
11 the prorated rental payments returned. Second, ShopKo fails to allege that BCC is  
12 “unfairly interfering with” ShopKo’s “right to receive the benefits of the contract,”  
13 nor can ShopKo do so, since BCC seeks to enforce the contracts as written.  
14  
15 Finally, ShopKo fails to allege damages, for the reasons discussed above.  
16

17 **10.SHOPKO FAILS TO STATE A CLAIM FOR VIOLATION OF THE**  
18 **CALIFORNIA UNFAIR COMPETITION LAW.**

19 California Business & Professions Code § 17200 provides, “As used in this  
20 chapter, unfair competition shall mean and include any unlawful, unfair or  
21 fraudulent business act or practice and unfair, deceptive, untrue or misleading  
22 advertising and any act prohibited by Chapter 1 (commencing with Section 17500)  
23 of Part 3 of Division 7 of the Business and Professions Code.” Cal. Bus. & Prof.  
24 Code § 17200 (West). “An act can be alleged to violate any or all of the three  
25  
26  
27  
28

1 prongs of the UCL unlawful, unfair, or fraudulent.” Langan v. United Servs. Auto.  
2 Ass'n, 69 F. Supp. 3d 965, 983-85 (N.D. Cal. 2014).

3  
4 “An act is unlawful under the UCL if it violates another law. ‘[V]irtually any  
5 state, federal or local law can serve as the predicate for an action under section  
6 17200.’” Id. See also Garcia v. Sony Computer Entm't Am., LLC, 859 F. Supp.  
7 2d 1056, 1061-63 (N.D. Cal. 2012) (“‘[U]nlawful’ conduct that violates another  
8 law is independently actionable under § 17200.”) (citing Cel-Tech Commc'ns, Inc.  
9 v. Los Angeles Cellular Telephone Co., 973 P.2d 527 (Cal. 1999)). ShopKo fails  
10 to allege an adequate basis for BCC’s allegedly “unlawful” conduct. Presumably,  
11 ShopKo would contend that BCC’s conduct violates Cal. Civ. Code §§ 1709 and  
12 1572, but as discussed above, ShopKo has failed to adequately allege a claim under  
13 those statutes.  
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17 ShopKo similarly fails to allege that BCC’s conduct is “unfair” within the  
18 meaning of the UCL. “[T]he determination of whether a particular business  
19 practice is unfair necessarily involves an examination of its impact on its alleged  
20 victim, balanced against the reasons, justifications and motives of the alleged  
21 wrongdoing. The UCL does not define the term ‘unfair’ as used in Business and  
22 Professions Code section 17200, and the standard for determining what business  
23 acts or practices are ‘unfair’ in consumer actions under the UCL is currently  
24 unsettled[.]” Langan, 69 F. Supp. 3d at 983-85. California courts have created  
25 various standards for “unfairness”:  
26  
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28

1 [A] plaintiff may plead that defendants' conduct is 'unfair' within the  
2 meaning of the several standards developed by the courts. Id. at 186–  
3 87, 973 P.2d 527 (finding of unfairness must be 'tethered to some  
4 legislatively declared policy or proof of some actual or threatened  
5 impact on competition'); Camacho v. Auto. Club of So. Cal., 48  
6 Cal.Rptr.3d 770 (2006) (applying test for violations of § 5 of the  
7 Federal Trade Commission Act to evaluate unfair business acts or  
8 practices); McKell v. Washington Mut., Inc., 49 Cal.Rptr.3d 227  
9 (2006) ('business practice is unfair within the meaning of the UCL if  
10 it violates established public policy or if it is immoral, unethical,  
11 oppressive or unscrupulous and causes injury to consumers which  
12 outweighs its benefits'); Lozano v. AT & T Wireless Servs., Inc., 504  
13 F.3d 718, 736 (9th Cir.2007) (requiring, in consumer cases,  
14 'unfairness be tied to a "legislatively declared" policy' or that the  
15 harm to consumers outweighs the utility of the challenged conduct).

16 Garcia, 859 F. Supp. 2d at 1061-63. BCC's conduct cannot be "unfair" as a matter  
17 of law, as BCC seeks to enforce the terms of the written contracts ShopKo signed.  
18 Moreover, ShopKo cannot point to a legislatively declared policy that would  
19 permit a \$3 billion retailer to avoid its contractual obligations.

20 Finally, ShopKo fails to allege that BCC's conduct is "fraudulent" within the  
21 meaning of the UCL. "To state a claim for fraud under the UCL, a plaintiff must  
22 allege the existence of (1) a duty to disclose, and (2) reliance. [A] claim for  
23 fraudulent conduct under the UCL must meet the heightened pleading  
24 requirements of Rule 9(b)." Langan, 69 F. Supp. 3d at 983-85. Courts emphasize:

25 To be actionable, a 'fraudulent' representation may include a false  
26 statement, or one which, though strictly accurate, nonetheless has the  
27 likely effect of misleading or deceiving the public. 'Likely to deceive'  
28 implies more than a mere possibility that the [representation] might  
conceivably be misunderstood by some few consumers viewing it in  
an unreasonable manner. Rather, the phrase indicates that the  
[representation] is such that it is probable that a significant portion of

1 the general consuming public or of targeted consumers, acting  
2 reasonably in the circumstances, could be misled.

3 Garcia, 859 F. Supp. 2d at 1061-63. To proceed with an action for fraudulent  
4 conduct under the UCL, the plaintiff must establish standing:  
5

6 Section 17204 provides that a private individual may bring suit only if  
7 he or she has ‘suffered injury in fact and has lost money or property as  
8 a result of the unfair competition.’ The California Supreme Court has  
9 thus interpreted § 17204 to require a representative plaintiff to plead  
10 an injury in fact – e.g., the loss of money or property – and ‘actual  
11 reliance’ on the alleged fraudulent conduct.

12 Id. See also Turcios v. Carma Labs., Inc., 296 F.R.D. 638, 644 (C.D. Cal. 2014).

13 ShopKo has failed to allege: (1) that BCC had a duty to disclose information to  
14 ShopKo; or (2) that a significant portion of the general public could be misled by  
15 BCC’s conduct, since the Master Lease expressly disclosed the prorated rental  
16 charges. Moreover, since ShopKo cannot allege reliance or damages for the  
17 reasons set forth above, ShopKo does not have standing to assert a claim under  
18 California Business & Professions Code § 17200.  
19

20 WHEREFORE, Defendant BALBOA CAPITAL CORPORATION  
21 respectfully requests that this Court grant its Motion to Dismiss Complaint  
22 pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) and dismiss the  
23 Complaint with prejudice.  
24

25 Dated: March 15, 2016 BALBOA CAPITAL CORPORATION

26  
27 By: /s/ Alex Darcy \_\_\_\_\_  
28 Attorney for Defendant