UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:16-cv-00099-JLS-KES Date: July 13, 2017

Title: ShopKo Stores Operating Co., LLC et al. v. Balboa Capital Corporation

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING IN PART AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Doc. 94) (REDACTED VERSION)

Before the Court is Defendant Balboa Capital Corporation's Motion for Summary Judgment. (Mot., Doc. 94.) Plaintiffs ShopKo Stores Operating Co., LLC and SVS Trucking, LLC (collectively, "ShopKo") have submitted an Opposition (Opp'n, Doc. 106), and Balboa replied (Reply, Doc. 113.) After reviewing the parties' submissions and holding oral argument, the Court GRANTS IN PART and DENIES IN PART Balboa's Motion.

I. BACKGROUND

Plaintiff ShopKo is a retailer with over $3 billion in annual sales and over 300 stores in more than 20 states. (Genuine Issues ¶¶ 1–4, Doc. 117-1.) In January 2012, David White, a senior salesperson at Balboa, reached out to Gary Gibson, a Vice President and Treasurer of ShopKo Stores, about potentially financing ShopKo's acquisition of equipment. (*Id.* ¶ 6.) White also worked with ShopKo's Assistant Treasurer, Bethany Bouche, who was responsible for forecasting ShopKo's cash flow and various expenses as well as overseeing compliance reporting, bank relationships, and risk finance. (*Id.* ¶ 7.) Gibson testified that he informed White during their preliminary negotiations that ShopKo would not accept an effective interest rate greater than 8% on a capital lease and that White agree to this demand. (Gibson Decl. ¶¶ 6–8, Doc. 107-6.)

To corroborate Gibson's testimony, ShopKo points to a subsequent email where, in response to any inquiry from Gibson about the terms for a tractor lease, White stated to Gibson, "You and I discussed 36 months at 8%. Nothing has changed." (Oct. 21 Email, Exh. 1, Doc. 107-6.) White denies that he made such a commitment during their initial conversations and contends they discussed only "lease rate factors." (White Dep. 93:21–94:18, 417:10–426:8, Docs. 96-12, 96-14, 96-15.)

On March 9, 2012, White sent Gibson a Lease Proposal outlining the proposed terms for the equipment lease transaction. (Proposal, Exh. 10, Doc. 96-9.) Gibson testified that he used the proposal's monthly payments, anticipated equipment cost, and lease term to confirm that the contemplated effective interest rate would be less than 8%. (Gibson Decl. ¶ 7.) The Lease Proposal contemplated Balboa financing $25 million in equipment leases to Specialty Retail Shops Holding Corp., but the parties ultimately designated Shopko as the lessee and agreed to far less than $25 million in financing. (Genuine Issues ¶ 18.) On March 21, 2012, Bouche returned a countersigned copy of the lease agreement to Balboa. (*Id.* ¶ 20.)

On April 2, 2012, White provided Gibson with a copy of Balboa's form Master Lease Agreement. (Master Lease Agreement, Exh. 12, Doc. 96-9; Genuine Issues ¶ 21.) Paragraph 2 of this agreement provides in part that "[e]ach Schedule shall become effective upon acceptance by Lessor by signing and dating each Schedule and the term for any Schedule(s) shall commence on the day that the leased property has been delivered to and accepted by Lessee ('Commencement Date')." (Master Lease Agreement ¶ 2, Exh. 12.) The paragraph continues by providing that "[t]he base term ('Base Term') of each Lease shall commence at the 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." (*Id.*) Under Paragraph 3:

> The rent payable with respect to any Schedule(s) shall be the amount shown on such Schedule(s). Lessee shall pay to Lessor the rent for each Schedule, in advance, for each period or any part thereof that each Lease is in effect as delineated on the Schedule. The first such payment, with respect to any

> Schedule, shall be made at the Lessor[']s discretion on any day occurring in the quarter following the Commencement Date. A prorata portion of the rental charges based on a daily rental of one-ninetieth (1/90) of the aggregated 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.

(*Id.* ¶ 3.)

On May 2, 2012, Gibson reviewed the Master Lease Agreement, making handwritten comments and changes. (Genuine Issues ¶ 25.) Gibson asserted that he did not change Paragraph 3 because he believed that Balboa could not charge rent under this provision unless it was "shown on such Schedule(s)." (Master Lease Agreement ¶ 3, Exh. 12; Gibson Decl. ¶¶ 10–11, 13.) Gibson was not surprised to see the provision about prorated rent in the agreement because he "underst[ood] at the time that Balboa used this form Master Lease Agreement for both operating leases and capital leases." (*Id.* ¶ 12.) Thus, Gibson believed that "in the unlikely event that ShopKo later entered into any operating lease Schedules with Balboa, . . . Balboa would have the right . . . to charge prorated rent." (*Id.*) To dispute Gibson's interpretation, Balboa notes that Gibson underlined a portion of Paragraph 14 and wrote next to it, "N/A for capital lease because the residual is $1." (Master Lease Agreement Revisions ¶ 14, Exh. 15, Doc. 96-9.) But Gibson asserts that he made this comment simply to ensure the Master Lease Agreement would reflect the difference between a capital and operating lease. (Genuine Issues ¶ 26; *see* Gibson Dep. 224:24–225:16, Doc. 96-9.)

On May 3, 2012, during a conference call between White and Gibson, White stated that he would speak with Balboa about whether it would agree to White's proposed changes. (Genuine Issues ¶ 31.) A few weeks later, on May 23, 2012, White informed Gibson by email that Balboa had accepted Gibson's revisions. (*Id.*) On June 11, 2012, ShopKo signed the Master Lease Agreement. (*Id.* ¶ 47.) In an internal "Contract Approval Request Form" completed a few days later, Gibson described the Master Lease Agreement as a "Capital Lease structure at ~7.0% APR – the rate will vary slightly depending upon the class of the equipment." (Contract Approval Request Form, Exh. 22,

Doc. 96-10.) One month later, Balboa countersigned the document. (Genuine Issues ¶ 47.)

Before signing any schedule, Gibson and Bouche verified that the schedule conformed to their understanding of the lease agreement. (*Id.* ¶ 55.) Each schedule specifies the deposit, base term, quarterly payment amount ("[p]lus Sales/Use Tax if applicable") and notes there will be a 1% documentation fee, but no schedule indicates that Balboa would charge prorated rent. (*See* Schedules, Exh. 44, Doc. 96-10.) Each schedule, however, does state that "[t]his Schedule is made as of the Acceptance Date set forth below and is made pursuant to and incorporates by reference each and every term of . . . [the] Master Lease Agreement . . . ." (*See id.*) Ultimately, ShopKo Stores entered into 11 lease schedules, and SVS Trucking entered into two lease schedules under an identical version of the Master Lease Agreement. (Genuine Issues ¶¶ 50–52.)

Although the schedules do not mention prorated rent, Balboa sent ShopKo "invoices" for the thirteen schedules which, among other line items, included one for "Prorated Rnt." (*Id.* ¶ 60.) The amount owed under each invoice was within one percent of the first payment due under the corresponding schedule. (*See* Rausser Report at 39, Exh. I, Doc. 117-5.) Balboa automatically withdrew the amount stated on these invoices from ShopKo's account through the Automated Clearing House (ACH) network. (Genuine Issues ¶ 69.) Taking into consideration these additional prorated rent payments, the effective interest rate under the schedules was much higher than 8%, often reaching upwards of 13%. (Rausser Report at 40, Exh. I.) During his deposition, White provided no reason for why Balboa charged ShopKo 89 days of prorated rent other than that Balboa had the right to do so under its interpretation of the Master Lease Agreement. (White Dep. 24:7–34:19, Doc. 96-11.) As White testified, "The business purpose is to bill rent for those time periods." (*Id.* at 34:18–19.)

Balboa insists that Bouche must have known that these invoices were not for the first quarterly payment because she carefully checked the numbers using adding tape. (Mem. at 13–17; Reply at 8–9.) On August 23, 2012, Bouche sent White an email with a copy of the first invoice attached. (*See* Invoice, Exh. 13, Doc. 96-1; *see also* Invoice, Exh. F, Doc. 96-19.) Attached to the invoice were Bouche's adding tape calculations that showed she divided 129,565.78, which corresponds with the quarterly payment owed

under the schedule, by 90 and multiplied the result by 89. (*See id.*) Further, White testified that after the first invoice was sent to ShopKo, Bouche contacted him about the invoice, and White explained the prorated rent calculation. (White Dep. 197:24–203:9, Doc. 96-13.) In addition, Balboa maintains that Bouche would have recognized that the first ACH withdrawal for each schedule was not for the first quarterly payment by comparing the notice of assignment with the entity withdrawing that ACH payment. (Mem. at 16-17; Reply at 3.) The notices of assignment reflect that Balboa had assigned all the monthly payments due under the schedule, so the assignee should have been the withdrawing entity if the first ACH withdrawal were for the first quarterly payment. (*Id.*) Balboa also sent ShopKo "welcome letters," stating that it had assigned each schedule but that "[i]n the interim you will receive an invoice from Balboa Capital including any sales tax, prorated rental charges or other closing costs due." (*See* Welcome Letters, Exh. 4, Doc. 96-1.) There is no welcome letter in the record for the first schedule.

Responding to these charges, Bouche testified that the calculations shown on the invoice merely reflect her attempt to deduce why the invoice amount "was approximately 1% less than the full quarterly payment," and that she did not raise any concerns because the amount was small and in ShopKo's favor. (Bouche Decl. ¶¶ 18–19, Doc. 107-10; Bouche Dep. 108:2–110:16, Doc. 107-9.) Bouche vigorously disputes speaking with White about the interim rent payments prior to September 2015 and affirms that she did not make much of the ACH withdrawing entity as long as the amount withdrawn was consistent with the quarterly payment. (Bouche Decl. ¶¶ 10, 13–15, 21–24.)

In internal communications, Balboa employees discussed why the company charged ShopKo 89/90ths of a quarterly payment in interim charges, even when—under its interpretation of the Master Lease Agreement—it could have charged more. In an email from Don Hansen, a senior Balboa executive, to White on August 14, 2012, Hansen wrote, "We don't want to bill the client for any more than 89 days. We will not be able to explain well why the interim payment is greater than a regular payment." (Aug. 14 Email, Exh. 3, Doc. 96-15.) Accordingly, Hansen ordered that the interim payment be reduced from 100 days to 89 days. (*See id.*) Two weeks later, in deciding not to charge ShopKo more than a quarterly payment in interim charges (including prorated rent), Hansen wrote to White, "Hogs get fat and pigs get slaughtered. Why rock

the boat for 2k?" (Aug. 28 Email, Exh. 4, Doc. 96-15.) At the time Hansen wrote these emails, Balboa was negotiating eight additional schedules with ShopKo. (White Dep. 73:13–18.) ShopKo asserts that these emails illustrate that Balboa tried to make its large prorated rent withdrawals appear to be the first quarterly payment for the schedules (Opp'n at 10–12), while Balboa claims that these emails merely reflect its desire not to upset its business relationship with ShopKo (Reply at 12–13).

ShopKo further claims that White was intentionally vague or concealed information in email correspondence with ShopKo employees so as not to alert them to the large prorated rent withdrawals. (Opp'n at 13.) On June 7, 2012, Gibson asked White whether ShopKo would owe the "[r]emaining book value" if it elected to pay off a schedule early. (Additional Facts ¶ 167, Doc. 115-4; June 7 Email, Exh. 23, Doc. 107-1.) White responded that, "You would simply pay off the remaining balance." (*Id.*) A couple months later, Bouche inquired about when the first "payments" were due under the schedules, and White provided two responses that used the word "invoices" instead of "payments." (Aug. 28 Email, Exh. 25, Doc. 107-1; Aug. 29 Email, Exh. 26, Doc. 107-1.) In another exchange, when ShopKo treasury analyst Aaron Spaulding inquired about the "expected first payment date," White replied that the "first invoice will be due approximately 30 days from funding." (Apr. 29 Email, Exh. 27, Doc. 107-1.) Two weeks later, after receiving the initial invoice for Schedule 9, Spaulding inquired, "This morning I received a copy of invoice 1699723 from Balboa stating we owe $69,400.41 by 5/23/13. Is this correct? According to the lease documents you sent back to ShopKo our first payment would be due 7/23/13 . . . ." (May 14 Email, Exh. 28, Doc. 107-1.) Rather than correcting Spaulding's apparent conflation of the first quarterly payment with the interim rent payment, White responded, "Yes, invoice 1699723 is correct and is due 05/23/13. The 07/23/13 refers to the first payment that will be due to Bank of Birmingham." (*Id.*) On August 10, 2012, a Balboa employee sent White an email, asking "what column you want to hide/delete before sending to your client." (Aug. 10 Email, Exh. 29, Doc. 96-16.) The columns in the spreadsheet related to prorated rent were deleted before Balboa provided the document to ShopKo. (*See* Edited Spreadsheet, Exh. 31, Doc. 107-2.)

Bouche testified that she realized that the amount withdrawn on March 31, 2015 (which would have been the twelfth quarterly payment under Gibson and Bouche's interpretation of the contract) was wrong shortly after Pacific Western withdrew a full quarterly payment ($129,565.78), instead of crediting ShopKo for its $43,188.59 deposit. (Genuine Issues ¶¶ 78–79.) On September 2, 2015, about two months after Pacific Western withdrew the thirteenth payment on June 29, 2015, Bouche wrote to White to demand that Balboa wire the amount that Bouche asserted ShopKo overpaid under schedules 000, 001, 002, and 005. (Sept. 2 Email, Exh. 36, Doc. 96-10.)

ShopKo also submits complaints where other Balboa customers claimed to have been misled by Balboa's prorated rent charges. For example, one complaint Balboa received states in part:

> I believed we were signing up for a cost of capital lease of less than 5%. Even without the equipment delay, it appears you would still have been able to balloon that cost to over 10% via your prorated rent clause . . . . I know that we are a more sophisticated borrower than the average small business coming to you. That's just by nature of the fact we serve almost 6,000 small business customers each year and help them with other types of financing transactions. Yet we didn't even catch the nuances of your contract because it's so outside the norm of what we've come to expect from equipment lessors.

(6/19 Email, Exh. 10, Doc. 117-4.) In a Better Business Bureau Complaint, one customer reported that he did not realize Balbo charged his company 87 days of interim rent until after the customer seemingly paid the eighth quarterly payment due under the schedule. (BBB Complaint, Exh. 17, Doc. 117-4.) At that point, Balboa sent the customer a notice stating that the company would deduct the customer's security deposit from a final, ninth payment. (*Id.*) Another customer filed a Better Business Bureau complaint, stating that he learned about the interim rent payments after contacting Balboa about paying off his company's leases early. (BBB Complaint, Exh. 21, Doc. 117-4.) The customer stated in his complaint that Balboa's customer service agent informed him that "they were having

problems with sales representatives failing to inform customers of this specific portion of the contract." (*Id.*)

In total, between January 1, 2013 and December 31, 2015, Balboa received at least 36 complaints from customers alleging deceptive or fraudulent prorated rent charges, and 13 customers filed complaints with the Better Business Bureau or state attorneys general about the same practice. (Additional Facts ¶ 177.) Notes from one customer service inquiry reveal that Balboa's consumer service department had developed a process for addressing customer calls about its prorated rent payments. (*See* Customer Inquiry, Exh. 5, Doc. 117-7.) Specifically, "[w]hen we [*i.e.*, Balboa] have customers that call customer service about their first invoice, we try to briefly explain what this is for. When they push back and don't agree or tell us the pro-rated rent wasn't explained upfront in the sales process, we route these calls back to the Sales Rep to help explain." (*Id.*)

ShopKo contends that these complaints are unsurprising because Balboa's compensation rewarded sales representatives for charging large amounts in prorated rent. Sales representatives received [redacted] commissions on prorated rent charges. (White Dep. 122:9–15, 125:20–126:16, 129:7–130:12, Doc. 117-2.) As a result, prorated rent charges accounted for [redacted] of White's commission on the ShopKo schedules. (*Id.* at 119:25–121:3.) ShopKo provides three written complaints from other customers alleging that White failed to disclose Balboa's intent to charge nearly a quarterly payment's worth of prorated rent before these customers entered into their agreements with Balboa. (Feb. 13 Complaint, Exh. 39, Doc. 117-2; Feb. 24 Complaint, Exh. 41, Doc. 117-2; BBB Complaint, Exh. 17.)

On January 22, 2016, ShopKo filed this suit against Balboa. (Compl., Doc. 1.) In their First Amended Complaint, the ShopKo Plaintiffs allege claims for (1) tortious fraud and intentional deceit, (2) actual fraud, (3) negligent misrepresentation, (4) breach of contract, (5) breach of the implied covenant of good faith and fair dealing, and (6) violations of the Unfair Competition Law. (FAC ¶¶ 26–135, Doc. 53.)

II. LEGAL STANDARD

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is proper "if the [moving party] shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is "genuine" when there is sufficient evidence such that a reasonable trier of fact could resolve the issue in the non-movant's favor, and a fact is "material" when it might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. But "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Acosta v. City of Costa Mesa*, 718 F.3d 800, 828 (9th Cir. 2013) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (internal quotation marks omitted)).

The role of the Court is not to resolve disputes of fact but to assess whether there are any factual disputes to be tried. The moving party bears the initial burden of demonstrating the absence of a genuine dispute of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Once the moving party carries its initial burden, the adverse party 'may not rest upon the mere allegations or denials of the adverse party's pleading,' but must provide affidavits or other sources of evidence that 'set forth specific facts showing that there is a genuine issue for trial.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting Fed. R. Civ. P. 56(e)).

III. DISCUSSION

In its Motion, Balboa moves for summary judgment on all of the ShopKo Plaintiffs' claims and on its statute of limitations affirmative defense. (Mot.) The Court will address Balboa's statute of limitations defense before turning to ShopKo's claims.

A. Statute of Limitations

Balboa contends that ShopKo's tortious fraud and intentional deceit, actual fraud, and negligent misrepresentation claims for schedules 000, 001, 002, 003, 004, 005, and 006, and 007, as well as ShopKo's claims for breach of the covenant of good faith and fair dealing for schedules 000, 001, 002, 003, 004, 005, 006, 007, 009, 010, 011, are barred by the statute of limitations. (Mem. 7–11.) ShopKo rejoins that the statute of limitations for these claims were tolled under the discovery rule and doctrine of fraudulent concealment. (Opp'n at 8–13.)

California has a three-year statute of limitations for fraud and negligent misrepresentation claims, but "[t]he cause of action . . . is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Cal. Civ. Proc. Code § 338(d). Similarly, an action for breach of the implied covenant of good faith and fair dealing must be brought within two years, except that the claim "shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder." Cal. Civ. Proc. Code § 339(1). Under the discovery rule, the statute of limitations commences when "one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry . . . ." *Cleveland v. Internet Specialties W., Inc.*, 88 Cal. Rptr. 3d 892, 897 (Ct. App. 2009) (citation omitted). "A close cousin of the discovery rule is the 'well accepted principle . . . of fraudulent concealment.'" *Bernson v. Browning-Ferris Indus.*, 873 P.2d 613, 615 (Cal. 1994) (quoting *Sanchez v. S. Hoover Hosp.*, 553 P.2d 1129, 1133 (Cal. 1976)). If a defendant takes active steps to conceal its misdeed, the statute of limitation is tolled until the plaintiff discovers the claim or would have through "the exercise of reasonable diligence." *Id.* Whether a party had constructive or actual knowledge is usually a question of fact, but "when the uncontradicted facts are susceptible of only one legitimate inference, summary judgment is proper." *Kline v. Turner*, 105 Cal. Rptr. 2d 699, 703 (Ct. App. 2001) (citation omitted).

Balboa contends that Bouche's adding tape calculations prove that she knew the invoice did not account for the first quarterly payment (Mem. at 15–16; Reply at 4–5), while Bouche testified that her calculations merely reflect her attempt to deduce why the

invoice amount was approximately 1% less that the first quarterly payment. (Bouche Dep. 108:2–21; Bouche Decl. ¶ 18.) Essentially, Balboa asks this Court to conclude as a matter of law based on a paper record that Bouche is not a credible witness. But "[t]he credibility of witnesses is almost categorically a trial issue." *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1042–43 (9th Cir. 2011) (citation omitted). Although Balboa invokes the "sham declaration" exception to exclude Bouche's declaration, "the non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 999 (9th Cir. 2009) (citation omitted). Balboa has not identified anything in Bouche's declaration that would warrant discrediting it as a "sham."[1]

Balboa's assertion that Gibson must have known about Balboa's intent to charge prorated rent merely because he reviewed the Master Lease Agreement proves even less convincing. Gibson testified that he did not think much of the prorated rent provision because Balboa used the same standard form Master Lease Agreement for both capital and equipment leases. (Gibson Decl. ¶¶ 10–13.) Charging almost a full quarterly payment in prorated rent would also violate the representations that White purportedly made to Gibson about the effective interest rate under the schedules. (*Id.* ¶¶ 6–8.)

Nor can the Court conclude that ShopKo had constructive knowledge of the alleged fraud more than three years before it filed suit. Whether ShopKo had constructive knowledge does not depend on a determination—with the benefit of hindsight—that ShopKo could conceivably have uncovered the alleged fraud earlier. One must consider the limited information available to ShopKo at the time, the alleged false representations Balboa made about the effective interest rate before ShopKo entered

[1] In its Reply brief, Balboa makes much of Bouche's failure to confront Balboa about the thirteenth withdrawal for about two months. (Reply at 5–6.) This evidence, while probative of Bouche's knowledge in March 2015, does little to establish as a matter of law what Bouche knew two years earlier.

the Master Lease Agreement, and Balboa's failure to provide ShopKo with any document that detailed all the expenses a customer would owe under a schedule.

With these considerations in mind, the evidence upon which Balboa relies cannot establish constructive notice as a matter of law. Balboa relies on the invoices' mention (among other line items) of "Prorated Rnt," but a reasonable jury could conclude that a customer would confuse this first automatic withdrawal with the first quarterly payment because the prorated rent amounts were always within 1% of the first quarterly payment. By the same token, the notices of assignment and "welcome letters" provide few clues about Balboa's practices: The "welcome letters"—which ShopKo contends were provided several weeks after the leases were executed—are standard form letters that a reasonable jury could conclude a business would not scour for evidence of unauthorized payments. There is no financial information in these letters, the space reserved to specify the assignee was left blank, and the only hint the letter offered is that ShopKo would receive—and perhaps had already paid—"an invoice from Balboa Capital" that would "*includ[e]* any sales tax, prorated rental charges or other closing costs due." (*See* Welcome Letters, Exh. 4 (emphasis added).) Likewise, to uncover Balboa's prorated rent practices from the notices of assignment, ShopKo would have had to compare the withdrawing entity on the ACH transaction to the notice of assignment and then correctly deduce that the discrepancy was due to Balboa's practices of charging an additional quarterly payment in prorated rent.

Indeed, when viewing the facts in the light most favorable to ShopKo, Balboa's internal communications suggest that its sales representatives understood that ShopKo and other customers confused the prorated rent invoice with the first quarterly payment and that Balboa sales representatives chose to charge 89/90ths of a quarterly payment in prorated rent to perpetuate the confusion. Twice, when a Balboa employee suggested that the company could charge more than a quarterly payment in prorated rent and other fees, Hansen instructed that Balboa reduce the amount owed to slightly less than the first regular payment, stating: "Hogs get fat and pigs get slaughtered. Why rock the boat for 2k?" and "We don't want to bill the client for any more than 89 days. We will not be able to explain well why the interim payment is greater than a regular payment." (Aug. 14 Email, Exh. 3; Aug. 28 Email, Exh. 4.) Balboa contends that these emails merely

reveal its desire not to harm its business relationship with ShopKo (Reply at 12–13), but it is unclear why a few more days in prorated fees would have damaged a business relationship if ShopKo understood Balboa's practices. A reasonable jury could further find that White provided ShopKo employees with evasive responses to avoid mentioning Balboa's prorated rent charges. For example, when Spaulding confused the prorated rent charge with the first quarterly payment, White did not correct Spaulding. (May 14 Email, Exh. 28.) And a Balboa employee deleted provisions in an excel spreadsheet related to prorated rent before providing the otherwise detailed document to ShopKo. (*See* Edited Spreadsheet, Exh. 31.)

Yet, perhaps the strongest evidence that ShopKo acted reasonably is that other Balboa customers apparently did not "connect the dots" until well after they made the first prorated rent payment to Balboa. As one customer stated, "[W]e serve almost 6,000 small business customers each year and help them with other types of financing transactions. Yet we didn't even catch the nuances of your contract because it's so outside the norm of what we've come to expect from equipment lessors." (June 19 Email, Exh. 10.) That other customers did not realize Balboa's practice until years after the first invoice further supports ShopKo's argument that a reasonably prudent person would not have suspected the alleged fraud within seven months of receiving the invoice, welcome letter, and notice of assignment.

In sum, a genuine dispute of material fact remains over when ShopKo knew or should have known about Balboa's prorated rent practices. As such, the Court DENIES Balboa's motion for summary judgment on its statute of limitations defense.

B. Breach of Contract Claims

A claim for breach of contract requires "[1] the existence of the contract, [2] performance by the plaintiff or excuse for nonperformance, [3] breach by the defendant[,] and [4] damages." *First Commercial Mortg. Co. v. Reece*, 108 Cal. Rptr. 2d 23, 33 (Ct. App. 2001) (citation omitted). Under California law, the interpretation of a contract is a two-step inquiry: A court must first "provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a

particular meaning." *Morey v. Vannucci*, 75 Cal. Rptr. 2d 573, 578 (Ct. App. 1998). "If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract." *Wolf v. Walt Disney Pictures & Television*, 76 Cal. Rptr. 3d 585, 602 (Ct. App. 2008) (citations omitted). Where there is no material conflict in the extrinsic evidence, contract interpretation is a matter of law for the Court. *Id.* "If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury." *Id.* (citations omitted).

The disputed provision in the parties' Master Lease Agreement provides:

> The rent payable with respect to any Schedule(s) shall be the amount shown on such Schedule(s). Lessee shall pay to Lessor the rent for each Schedule, in advance, for each period or any part thereof that each Lease is in effect as delineated on the Schedule. The first such payment, with respect to any Schedule, shall be made at the Lessor[']s discretion on any day occurring in the quarter following the Commencement Date. A prorata portion of the rental charges based on a daily rental of one-ninetieth (1/90) of the aggregated 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.

(Master Lease Agreement ¶ 3, Exh. 1, Doc. 113-1.) ShopKo contends that any rent owed must be "shown on such Schedule(s)." (Opp'n at 2–3, 10.) Because no prorated rent was included on the schedules, ShopKo insists that it did not owe any. (*Id.*) Balboa, by contrast, argues that the last two quoted sentences and the schedules' incorporation of the Master Lease Agreement's terms mean that it could charge prorated rent without stating so on the schedules. (Mem. at 17–22.)

On Balboa's Motion to Dismiss, this Court found that the contract was "more than reasonably susceptible of ShopKo's interpretation." (MTD Order at 9, Doc. 42.) At summary judgment, the Court believes that the proper interpretation of the contract depends on the credibility of extrinsic evidence. Looking first to the text of the

provision, the contract uses the word "show" to describe how the rent owed will be reflected on the schedule. (Master Lease Agreement ¶ 3, Exh. 1.) In this context, the verb "show" means "to cause or permit *to be seen*." Merriam-Webster's Collegiate Dictionary 1152 (11th ed. 2003) (emphasis added). To say that an amount is "shown" on a document because it is incorporated by reference into that document contradicts the word's ordinary meaning. In fact, under its interpretation of the contract, Balboa need not "show"—or, for that matter, "delineate"—how much it would charge in prorated rent in *any* document before ShopKo agreed to the schedule. At the hearing on this matter, Balboa attempted to craft an atextual distinction between the regular quarterly rent payments (which were shown on the schedules) and prorated rent (which were not). But both fit within the plain meaning of "rent," and therefore a reasonable jury could conclude that they both must be "shown on such Schedule(s)." (Master Lease Agreement ¶ 3, Exh. 1.) And, contrary to Balboa's argument, ShopKo's interpretation of Paragraph 3 does not render the latter two sentences superfluous: Although these sentences do not determine *whether* Balboa will charge prorated rent, they describe *how* prorated rent, if charged, will be calculated.

As for the extrinsic evidence, Gibson and White dispute whether White represented to Gibson during their negotiations that the effective interest rate would be no greater than 8%. (Genuine Issues ¶ 96.) ShopKo supports Gibson's testimony with White's Lease Proposal, which suggests an interest rate of 7% (Proposal, Exh. 10), and the Contract Approval Form that Gibson submitted to ShopKo executives, which stated that the effective interest rate on the schedules would be "~7% APR" (Contract Approval Request Form, Exh. 22). As further evidence, ShopKo points to later communications that it contends confirm that White represented the effective interest rate would be less than 8%. In response to a request for a quote, White told Gibson, "You and I discussed 36 months at 8%. Nothing has changed." (Oct. 12 Email, Exh. 1.)

Apart from the parties' dealings, ShopKo and Balboa dispute the industry custom: ShopKo contends that rent charges are uncommon under capital leases where a lessor does not assume any financial risk prior to the lease term. (Rausser Report at 30–31, Exh. I.) Under Balboa's interpretation of the contract, these prorated rent fees made the effective interest rate due under the agreements uncompetitive and unknowable before

ShopKo entered into the schedules. (*Id.* at 38–47.) Balboa, pointing to its own expert, denies that its prorated rent practices depart from the standard industry practice.[2] (Bent Report at 8–16, Doc. 124-4.)

In sum, the contract is reasonably susceptible to ShopKo's proffered construction. Because the proper meaning of this contract will depend on the credibility of witnesses and an evaluation of industry custom, summary judgment must be DENIED.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

Under California, every contract includes an implied covenant of good faith and fair dealing, which precludes either party from taking measures to deprive the other of the benefits of their agreement. *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 2 P.3d 1, 8 (Cal. 2000). In *Carma Developers (California), Inc. v. Marathon Development California, Inc.*, the California Supreme Court articulated two, somewhat conflicting principles about the relationship between the covenant of good faith and fair dealing and discretionary clauses: The Court initially observed that "[t]he covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." 826 P.2d 710, 726 (Cal. 1992); *see also Locke v. Warner Bros.*, 66 Cal. Rptr. 2d 921, 925 (Ct. App. 1997) ("[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing." (citation omitted)). Yet, the Court later noted that "the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." *Carma*, 826 P.2d at 727; *see also Guz v. Bechtel Nat. Inc.*, 8 P.3d 1089, 1110 (Cal. 2000) (observing that covenant cannot "impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement"). Thus, when a contract vests discretionary power in

[2] The Court's mention of the parties' dueling expert reports should not be construed as presaging the Court's disposition of the parties' competing *Daubert* motions. Those motions were not filed in conjunction with this Motion for Summary Judgment.

one of the parties, that party may "exercise it 'for any purpose within the reasonable contemplation of the parties at the time of formation.'" *Carma*, 826 P.2d at 727 (citation omitted); *Gabana Gulf Distribution, Ltd. v. GAP Int'l Sales, Inc.*, No. C 06-02584 CRB, 2008 WL 111223, at *8 (N.D. Cal. Jan. 9, 2008).

After *Carma*, the California Court of Appeal held in *Third Story Music, Inc. v. Waits* that the covenant of good faith and fair dealing does not limit a party's contractual discretion, "except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement." 48 Cal. Rptr. 2d 747, 753 (Ct. App. 1995); *see also Wolf*, 76 Cal. Rptr. 3d at 598–600 & n.9; *PMC, Inc. v. Porthole Yachts, Ltd.*, 76 Cal. Rptr. 2d 832, 837 (Ct. App. 1998); *Haggarty v. Wells Fargo Bank, N.A.*, No. C 10-02416 CRB, 2012 WL 4742815, at *5–6 (N.D. Cal. Oct. 3, 2012).

For a breach of the covenant of good faith and fair dealing to be a freestanding cause of action, the plaintiff must identify how the defendant breached the covenant other than through violating an express term in the agreement. *See Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 400 (Ct. App. 1990) ("If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated."). In this instance, Shopko must therefore show that a reasonable jury could conclude that Balboa breached the implied covenant *even if* the Master Lease Agreement allowed Balboa to charge prorated rent that was not "shown" on the schedules. Although the only reason Balboa has supplied for charging 89/90ths of a quarter in prorated rent is that the contract purportedly allowed it to do so, Balboa did not breach the covenant by extracting the highest amount possible in prorated rent. The plain terms of the agreement grant Balboa the "sole discretion" to determine the amount charged in prorated rent, and the covenant of good faith and fair dealing need not be read into this provision to save the agreement from a lack of mutuality. *See Third Story Music, Inc.*, 48 Cal. Rptr. 2d at 751. Thus, because ShopKo's breach of the implied covenant of good faith and fair dealing claim is redundant of its breach of contract claims, the Court GRANTS summary judgment to Balboa on ShopKo's breach of the implied covenant claim. *See Wells v.*

Hair Sols. By M E, Inc., No. LA CV 12-00996-JAK (PLAx), 2012 WL 12882426, at *10 (C.D. Cal. Dec. 28, 2012) (granting summary judgment on a breach of the implied covenant of good faith and fair dealing claim that was redundant of the plaintiff's breach of contract claim).

D. Tortious Fraud and Intentional Deceit, Actual Fraud, and Negligent Misrepresentation

A claim for violation of California Civil Code section 1709, the state's general antifraud statute, shares the same elements as one under California Civil Code section 1572, which relates specifically to fraud in contract formation: "[1] misrepresentation (false representation, concealment, or nondisclosure); [2] knowledge of falsity (or 'scienter'); [3] intent to defraud, i.e., to induce reliance; [4] justifiable reliance; and [5] resulting damage." *Lazar v. Super. Ct.*, 909 P.2d 981, 984 (Cal. 1996) (citations omitted); *see* Judicial Council of California, California Civil Jury Instructions 1900–1901 (2017). Negligent misrepresentation has the same elements, except the defendant need only have "made the representation without reasonable ground for believing it to be true." *West v. JPMorgan Chase Bank, N.A.*, 154 Cal. Rptr. 3d 285, 295 (Ct. App. 2013) (citations omitted).

Although the parties separately examine ShopKo's claims under sections 1709 and 1572, ShopKo's fraud claims can be more easily understood as an affirmative fraud and fraudulent concealment theory. Under its affirmative fraud theory, ShopKo alleges that Balboa misrepresented the interest rate Balboa would charge to induce ShopKo to enter into the Master Lease Agreement and the schedules. (FAC ¶¶ 8, 23, 30, 37.) ShopKo's fraudulent concealment theory is based on Balboa's alleged active concealment of its prorated rent practices after making the alleged misrepresentations about the effective interest rate. (*Id.* ¶¶ 27–30, 35–37.) Both theories withstand summary judgment.

Essentially, Balboa's argument in favor of summary judgment on ShopKo's affirmative fraud claim reduces to asking this Court to find Gibson and Bouche's testimony lacking in credibility as a matter of law. This the Court cannot do. Gibson testified that he told White in their preliminary negotiations that ShopKo would not enter

capital leases with an effective interest rate greater than 8 percent and that White agreed. (Gibson Decl. ¶¶ 6–7.) ShopKo contends that Balboa's misrepresentations are reflected in the Lease Proposal, which suggests an effective interest rate of less than 8 percent. (Proposal, Exh. 10; Gibson Decl. ¶ 7.) If ShopKo proves that Balboa misrepresented the effective interest rate due under the capital leases, ShopKo has sufficient evidence that Balboa knew its representations were false: Balboa regularly charged customers nearly a full quarter in prorated rent, which would raise the effective interest rate on ShopKo's schedules well above 8 percent. (Additional Facts ¶¶ 174–75, 177, 179–84, 187.) There also remains a genuine issue of material fact over whether ShopKo's reliance was justifiable: Besides the initial alleged misrepresentations, ShopKo argues that its reliance was reasonable because the schedules did not disclose that Balboa would be charging almost a full quarterly payment in prorated rent and White provided supposedly evasive responses when ShopKo inquired about these initial payments. (Opp'n at 20.)

In response, Balboa notes that Gibson did not demand that Balboa remove the prorated rent provision from the Master Lease Agreement and that Bouche checked the invoice amounts. (Mem. at 22–24.) But this evidence merely shows there is a genuine dispute: Gibson testified that he did not remove the prorated rent provision because he believed that Balboa used this same standard form contract for both capital and equipment leases and thought that Balboa could not invoke the prorated rent provision unless it specified the prorated rent due on the schedule. (Gibson Decl. ¶¶ 10–13.) Likewise, just as Bouche's adding tape calculations do not establish as a matter of law that Balboa should prevail on its statute of limitations defense, these calculations would not compel a reasonable jury to conclude that ShopKo's reliance was unjustifiable.

As for ShopKo's fraudulent concealment theory, the parties agree that Balboa would owe ShopKo a duty to disclose its prorated rent practices if (1) the parties were in an fiduciary relationship, (2) Balbo had exclusive knowledge of material facts not known to ShopKo, (3) Balboa actively concealed a material fact from ShopKo, and (4) Balboa made partial representations but suppressed some material facts. (Mem. at 25; Opp'n at 21.) *See Heliotis v. Schuman*, 226 Cal. Rptr. 509, 512 (Ct. App. 1986). Here, ShopKo avers that Balboa took affirmative steps to conceal the prorated rent payments and made representations that were misleading in light of the information Balboa failed to disclose.

Twice, Balboa reduced the amount charged in interim rent so that it would not exceed the first quarterly payment. In so doing, Balboa employees explained, "We will not be able to explain well why the interim payment is greater than a regular payment[,]" and, "Hogs get fat and pigs get slaughtered. Why rock the boat for 2k?" (Aug. 14 Email, Exh. 3; Aug. 28 Email, Exh. 4.) Balboa also deleted columns about prorated rent in an otherwise detailed spreadsheet before providing the document to ShopKo. (Aug. 10 Email, Exh. 29; Edited Spreadsheet, Exh. 31.) Finally, ShopKo contends that, when Spaulding asked questions that revealed he thought Balboa's first withdrawals were for the first quarterly payments, White provided elusive answers so as not to alert ShopKo about Balboa's large prorated rent withdrawals. (Apr. 29 Email, Exh. 27; May 14 Email, Exh. 28.)

To be sure, Balboa offers innocent explanations for its conduct. But, as there is sufficient evidence to withstand summary judgment, a jury must decide whether Balboa made fraudulent statements or omissions about its prorated rent practices. The Court, therefore, DENIES summary judgment on ShopKo's tortious fraud and intentional deceit, actual fraud, and negligent misrepresentation claims.

E. <u>Unfair Competition Law Claim</u>

California's Unfair Competition Law permits those who have lost "money or property" as a result of "any unlawful, unfair or fraudulent business act or practice" to bring suit for equitable relief. Cal. Bus. & Prof. Code §§ 17200, 17204. For "fraudulent" conduct to be actionable under the UCL, "it is necessary only to show that 'members of the public are likely to be 'deceived.'" *In re Tobacco II Cases*, 207 P.3d 20, 29 (Cal. 2009) (quoting *Kasky v. Nike, Inc.*, 45 P.3d 243, 250 (Cal. 2002)). "Section 17200's 'unlawful' prong 'borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL.'" *Klein v. Chevron U.S.A., Inc.*, 137 Cal. Rptr. 3d 293, 326 (Ct. App. 2012) (citation omitted). After the California Supreme Court's decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 973 P.2d 527 (Cal. 1999), there is considerable uncertainty over what standard to apply to consumer claims under the Unfair Competition Law's "unfair" prong. *See Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007) (identifying the various tests

adopted by the courts of appeal). Under the balancing approach a court "must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim," *Smith v. State Farm Mut. Auto. Ins. Co.*, 113 Cal. Rptr. 2d 399, 415 (Ct. App. 2001), while another test requires the alleged public policy "be 'tethered' to specific constitutional, statutory or regulatory provisions." *Gregory v. Albertson's, Inc.*, 128 Cal. Rptr. 2d 389, 395 (Ct. App. 2002). Finally, the "section 5 test," which seems to be gaining currency in the California courts of appeal but has been rejected by the Ninth Circuit, considers whether the conduct would be actionable under the Federal Trade Commission Act. *See Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 776 (Ct. App. 2006); *Davis v. Ford Motor Credit Co.,* 101 Cal. Rptr. 3d 697, 708–710 (Ct. App. 2009); *Lozano*, 504 F.3d at 736.

As an initial matter, Balboa's contention that ShopKo lacks statutory standing because it did not lose "money or property" as a result of Balboa's conduct can be easily dismissed as a repackaged version of its argument that ShopKo's reliance was not justifiable. (*See* Mem. at 28.). As for whether Balboa's prorated rent practices are actionable under the UCL, the conduct alleged here fits within each of the prongs. If Balboa regularly misrepresented or fraudulently concealed the prorated rent due under its schedules, consumers undoubtedly would "likely" be deceived. *See In re Tobacco II Cases*, 207 P.3d at 29. In fact, ShopKo has identified forty-nine complaints from other customers asserting they were also misled by Balboa's prorated rent practices. (Genuine Issues ¶ 177.) Customer complaints regarding the prorated rent charges were common enough for Balboa to develop a specific process for handling them. (*See* Customer Inquiry, Exh. 5.) Committing fraud would also be "unlawful" and, under any of the articulated tests, "unfair." Thus, the Court DENIES Balboa's Motion for Summary Judgment on ShopKo's UCL claim.

IV. <u>CONCLUSION</u>

For the aforementioned reasons, the Court GRANTS Balboa's Motion on Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. The Motion is otherwise DENIED.

Initials of Preparer: tg