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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Shopko Stores Operating Co., LLC,

Plaintiff,

vs.

Balboa Capital Corporation,

Defendant.

Case No. 8:16-cv-00099 JLS (KESx)

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: May 20, 2016
Time: 2:30 PM
Judge: Judge Staton
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INTRODUCTION

ShopKo's Complaint contains a detailed and nearly exhaustive cataloging of the factual allegations supporting its claims of breaches of contract and deceptive, fraudulent and otherwise actionable conduct against Balboa. In short, Balboa devised a deceptive scheme that was effective and achieved its desired result: namely, to secure the withdraw of extra "payments" from ShopKo's accounts at strategic times when the withdrawals would likely be, and were in fact as alleged, confused by ShopKo for proper quarterly payments owed under the leases. Indeed, in every phase of Balboa's interactions with ShopKo, its conduct was geared towards deception in order to keep ShopKo in the dark about Balboa's unauthorized withdrawals, which fundamentally altered the negotiated terms and the value of the leases at issue. These actions are clearly alleged in the Complaint, including through myriad omissions of material fact, and are further reinforced by the contradictions in the extrinsic documents that Balboa attaches to its own motion (which, in any event, should not even be considered on a motion to dismiss).

ShopKo has identified and attached a series of capital lease schedules for the financing of capital equipment (the "Lease Schedules"), and Notices of Assignment regarding same, all of which contain material omissions. Specifically, Balboa expressly represented throughout negotiations with ShopKo that the payment terms included 12 or 20 quarterly payments (depending on the Lease Schedule), after which ShopKo could purchase the equipment for a nominal fee of $1. However, in negotiations and through the strategically confused timing and inconsistent terms and language contained in various documents, letters, "invoices" and other correspondence delivered from Balboa to ShopKo, Balboa fraudulently omitted its intent to withdraw an extra quarterly payment above and beyond the 12 or 20 quarterly payments explicitly stated in these documents. ShopKo relied on these documents, and the contemporaneous negotiations regarding same, as being complete and accurate representations of the negotiated payment terms, and for

what amounted to an effective purchase price for the capital equipment at a market-competitive interest rate under the Lease Schedules.

However, as a direct and proximate result of Balboa's deceptive practice of disguising the unauthorized, extra quarterly payment as an actual scheduled quarterly payment owed under the Lease Schedule, ShopKo was unable to discover Balboa's deceptive scheme and fraudulent intent until **after** all of the agreed quarterly payments on the first Lease Schedule were withdrawn and, for the first time, ShopKo saw that Balboa had made an extra, unauthorized withdrawal of an amount masquerading as an agreed quarterly payment. The effect of Balboa's actions is that it unilaterally increased the purchase price for the capital equipment by an amount nearly matching a full quarterly payment. Had ShopKo known of this effective purchase price increase, it would have never entered into the Lease Schedules in the first place. In total, Balboa deceptively withdrew more than $781,401.46 from ShopKo's bank accounts. ShopKo brought this Action to recover these unauthorized payments and other associated damages.

In its Motion to Dismiss and accompanying Memorandum of Law ("Mem."), Balboa does not argue that ShopKo's allegations, as pleaded, are inadequate to state a claim. Instead, it attempts to raise factual disputes over ShopKo's allegations by introducing extensive extrinsic evidence – which comprises documents developed **after** Balboa's initial deceit of ShopKo completed – and Balboa's counter-interpretation of events. Balboa argues that this Court should reject ShopKo's extensive allegations and interpretation of events, should accept as true Balboa's counter-interpretation, and should foreclose ShopKo's claims as a matter of law, at the pleading stage. In short, Balboa argues that ShopKo is a big and sophisticated company, and shame on it if it fell for Balboa's deceptive scheme. Such arguments, based on a factual attack of ShopKo's well-pleaded allegations, are not proper on a motion to dismiss for several reasons:

First, and foremost, it is axiomatic that on a motion to dismiss, a plaintiff's well-pleaded allegations must be accepted as true and ShopKo's allegations undoubtedly set forth actionable claims.

Second, Balboa's contested interpretation of the Parties' agreements cannot be the basis for dismissal under California law. In particular, when the meaning of a contract is disputed, as is demonstrably the case here, the Parties must be afforded the opportunity to discover and present extrinsic evidence to support their positions. Accordingly, ShopKo's claims cannot be dismissed at the motion to dismiss stage.

Third, while Balboa's reference to extrinsic evidence is either entirely improper because the documents referenced fall outside the pleading (and thus, cannot be considered) and/or is of no relevance because it cannot supplant ShopKo's well-pleaded allegations, even a cursory look at these documents reveal that they actually **support** ShopKo's claims, or at minimum, highlight substantial factual disputes that must be addressed through discovery, and ultimately by a jury.

Accordingly, because Balboa does not assert any pleading failures and only raises purported factual disputes, its Motion must be denied in its entirety.

SUMMARY OF ALLEGATIONS

ShopKo is a retailer, operating more than 330 stores in small to mid-sized cities throughout the Central, Western and Pacific Northwestern regions of the United States. Compl. ¶ 7. In connection with its desire to finance its acquisition of certain capital equipment, ShopKo entered into discussions with Balboa regarding Balboa's capital equipment leasing program. *Id.* ¶ 8. Following such discussions, and based on representations made by Balboa during direct negotiations, which were memorialized in the Leasing Schedules and subsequent Notices of Assignment, ShopKo entered into 13 capital leases with Balboa, each under similar terms.[1] *Id.* ¶¶ 8, 12. These Lease Schedules generally included terms

[1] Two of the leases were executed by ShopKo's wholly-owned subsidiary SVS Trucking LLC.

based on either 12 or 20 quarterly payments (depending on whether the term of the lease was three or five years). *Id.* ¶¶ 9-10. At the end of the term, for a nominal payment of $1, ShopKo would own the capital equipment at issue. *Id.* ¶ 10.

When negotiating the terms of each Lease Schedule, ShopKo evaluated the value of the equipment subject to the lease amortized over the term of the lease, and the competitive interest rates that would be applicable to same. Affidavit of Gary Gibson ("Gibson Aff." ¶¶ 8, 10). Ultimately, its decision to enter into the Lease Schedules was upon a determination that the number of quarterly payments multiplied by the quarterly payment amount equaled the fair value for the purchase of the equipment, inclusive of a market-competitive interest rate. *Id.* ¶ 10. Thus, the payment terms in the Lease Schedule set the effective purchase price for the equipment subject to the lease.

Balboa, a company whose business is attracting prospective lessees with competitive leasing terms, knew that ShopKo would not overpay for equipment with a definite market value. *Id.* ¶ 11. Accordingly, to induce ShopKo into a business relationship, it presented one set of terms to ShopKo that reflected the fair value for the equipment at a competitive interest rate of no greater than 8%, while omitting its true intent to take an extra "payment" that it knew ShopKo would not agree to and that ultimately made the contract uncompetitive and well above prevailing market rates for a party such as ShopKo. *Id.*

Accordingly, Balboa's actions and conduct were always geared towards hiding these extra, uncompetitive payments. Indeed, while terms clearly set forth the number of payments and the amount of each quarterly payment (which equals the fair value for the capital lease purchase), they make no reference to an additional quarterly payment – as any such material term would have doomed the contract and caused ShopKo to go elsewhere for its capital leasing needs. Compl. ¶¶ 9, 10, 27; *see also* Gibson Aff. ¶ 12. In fact, Balboa's efforts to conceal from ShopKo its deceptive scheme are reinforced by contemporaneous communications.

For example, for 11 of these Lease Schedules, almost immediately after execution, Balboa assigned its rights and interests in the leases to third parties. Compl. ¶ 12. These assignments were memorialized by a Notice of Assignment letter generally dated the same date as the corresponding Lease Schedule or shortly thereafter. *Id.* ¶ 13. In most of these letters, Balboa listed the exact terms of the quarterly payments required under the lease and the number of quarterly payments. *Id.* ¶ 14. Again, Balboa did not disclose its intent to withdraw, at the front end of the lease, an extra quarterly "payment" masquerading as an agreed and scheduled quarterly payment.

Balboa's deceptive scheme continued beyond execution of the Lease Schedules, through its carefully timed withdrawals of the unauthorized, extra "quarterly" payments. For all 13 leases, even after 11 of them were assigned to third parties, Balboa made an unauthorized withdraw from ShopKo's bank account in an amount approximately equal to 89/90th of the amount of the authorized quarterly payment under the lease, in close proximity to when the actual first quarterly payment was due. *Id.* ¶ 15. Such action not only concealed Balboa's fraudulent withdrawals, but allowed it to continue its fraudulent scheme without detection until the first capital lease matured three years later. *Id.* ¶ 22.

As a result of Balboa's deceptive tactics and misrepresentations, ShopKo was unable to discover these unauthorized withdrawals until the end of the term for the first Lease Schedule, at which point ShopKo's reconciliation showed that an extra 13th payment was made for a capital lease permitting only 12 quarterly payments. *Id.*. ¶¶ 20, 23. Thus, ShopKo discovered that Balboa had taken an unauthorized, extra quarterly payment for each of the Lease Schedules. *Id.* ¶ 24. In total, Balboa has defrauded ShopKo in excess of $781,401.46. *Id.* ¶ 25.

ARGUMENT

A. The Court Has Subject Matter Jurisdiction over this Action.

Balboa argues that the Court must dismiss this case for lack of subject matter jurisdiction (Mem. at 5-6), even though ShopKo pleaded the Parties are diverse and

the facts underlying the Court's jurisdiction are readily determinable and undisputed. Tellingly, even though Balboa claims diversity jurisdiction is not properly pleaded, it does not dispute that diversity between the Parties – as a factual matter – exists, and it does not argue that clarification of the facts supporting diversity is not easily corrected. To put any lingering questions to rest, ShopKo submits the Gibson Affidavit, which unequivocally establishes diversity.[2]

First, Balboa argues that ShopKo's allegation that "none of its members are citizens of California" is insufficient to plead diversity. Mem. at 6. ShopKo disagrees. This allegation, accepted as true, shows that none of ShopKo's members are citizens of California, while Balboa is a California corporation that maintains its principal place of business in California. Compl. ¶ 3. Accordingly, the Complaint alleges complete diversity between the Parties.

Second, in any event, the Court need not dismiss the Action where it is able to determine that it does, in fact, have jurisdiction. This is because an "inadequate pleading does not in itself constitute an actual defect of federal jurisdiction." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 858 (9th Cir. 2001). "A district court 'may properly look beyond the complaint's jurisdictional allegations and view whatever evidence has been submitted to determine whether in fact subject matter jurisdiction exists.'" *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 728 (9th Cir. 1997); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003)("[I]n ruling on a 12(b)(1) jurisdictional challenge, a court may look beyond the complaint and consider extrinsic evidence."). As recognized in cases cited by

[2] In an email exchange leading up to the Parties' Local Rule 7-3 conference, Balboa's counsel raised its jurisdictional argument and stated "[m]y guess is that you will be able to cure the defect, but Balboa will not know for certain until you actually do so." ShopKo's counsel, Troy S. Brown, then shared with Balboa's counsel the detailed information provided in the Gibson Affidavit and stated that, if necessary, ShopKo will seek to amend its pleading after the Court rules on Balboa's motion to dismiss. Balboa nonetheless pursues this dismissal argument.

Balboa, the Court may look to submitted declarations, which clarify or correct a pleading defect. *See Robertson v. GMAC Mortg., LLC*, No. 14-35672, 2016 WL 145827, at *2 (9th Cir. Jan 5, 2016) (noting certain pleading "defects were cured by later-filed declarations, which we are entitled to consider"); *see also Adler*, 107 F.3d at 728 (holding district court did not err in considering outside declaration, and district courts have broad discretion to find facts pertinent to jurisdiction).

The Gibson Affidavit, submitted with this Opposition, establishes diversity jurisdiction. Gibson declared that:

> ShopKo Stores Operating Co., LLC is a Delaware Limited Liability Company that maintains its principal place of business in Wisconsin and has as its sole member, ShopKo Holding Co., which is a Wisconsin Limited Liability Company with a principal place of business in Wisconsin, who has as its sole member Specialty Retail Shops Holding Corp., a Delaware corporation whose principal place of business is in Wisconsin.

Gibson Aff. ¶ 21. This sworn statement establishes – as ShopKo – alleged that none of ShopKo's members are citizens of California.[3]

Thus, the Court has subject matter jurisdiction over this Action.[4]

B. <u>Balboa's Rule 12(b)(6) Motion to Dismiss Should Be Denied.</u>

1. Standard of Review

The Federal Rules require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[O]rdinary pleading rules are not meant to impose a great burden upon a plaintiff." *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1265 (C.D. Cal. 2007) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . .

[3] As discussed *infra*, if ShopKo should join SVS Trucking, LLC as a party, then there would still be diversity. The Gibson Affidavit confirms with specificity that no member of SVS Trucking, LLC is a citizen of California. *See* Gibson Aff. ¶ 22.

[4] To the extent necessary, and with leave of the Court, ShopKo can amend its pleading after the Court's ruling on Balboa's motion to dismiss to conform its pleading to these undisputed diversity facts.

claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Accordingly, on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a plaintiff must only "allege 'enough facts to state a claim to relief that is plausible on its face.'" *Alexander v. Am. Express Co.*, No. SACV 11-0843-JST (MLGx), 2011 WL 6046928, at *1 (C.D. Cal. Nov. 10, 2011) (Staton, J.) (quoting *Twombly*, 550 U.S. at 570). "The issue on a motion to dismiss for failure to state a claim 'is not whether the [claimant] will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims' asserted." *Id.* (alteration in original) (quoting *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). While the Court need not accept legal conclusions as true, "[t]he Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff." *Baggett*, 582 F. Supp. 2d at 1265.

There is a heightened pleading standard for allegations of fraud. *See* Fed. R. Civ. P. 9(b). Fraud claims "require allegations of particular facts going to the circumstances of the fraud, including time, place, persons, statements made and an explanation of how or why such statements are false or misleading." *Baggett*, 582 F. Supp. 2d at 1265.[5]

"[D]ismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment." *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

2. Balboa's Factual Attacks Are Improper on a Motion to Dismiss and Cannot Defeat ShopKo's Well-Pleaded Allegations

Balboa concedes, as it must, that at the motion to dismiss stage, all allegations of material fact must be accepted as true and construed in the light most

[5] Notably, Balboa does not argue that ShopKo's claims fail for lack of specificity under Rule 9(b).

favorable to ShopKo. Mem. at 7. Nevertheless, Balboa takes great lengths to dispute ShopKo's allegations by offering alternative interpretations of the facts and by introducing extrinsic documents (Mem. at 11-15), none of which are proper in deciding a motion to dismiss, where the Court's only focus is on the adequacy of a plaintiff's allegations. *See Ronpak, Inc. v. Elecs. for Imaging, Inc.*, No. 14-cv-04058-JST, 2015 WL 179560, at *5 (N.D. Cal. Jan. 14, 2015) ("These arguments—which dispute the accuracy, rather than the adequacy, of [Plaintiff's] allegations—are not well taken in a motion to dismiss. Factual disputes are not relevant at this stage of the proceedings."); *Zander v. Tropicana Entm't, Inc.*, No. 2:13-cv-00848-GMN, 2014 WL 794212, at *2 (D. Nev. Feb. 26, 2014) ("[A] motion to dismiss is not the appropriate procedural vehicle to dispute the facts alleged in a complaint.").

Balboa's singular theory, which it claims warrants the dismissal of all of ShopKo's claims, is that the Court should accept Balboa's counter-interpretation of the Parties' agreements – without any opportunity for discovery or factual rebuttal. Namely, Balboa argues that the Court should find, as a matter of law at the pleading stage, that the Master Lease authorized Balboa's withdrawal of an extra quarterly payment even though such payments were fraudulently omitted from the applicable Lease Schedules and Notices of Assignment, and even though Balboa concealed such intention during the Parties' direct negotiations. *See* Mem. at 12. To be clear, this is not a proper argument on a motion to dismiss, where the Court must accept ShopKo's factual allegations as true and draw inferences that are most favorable to the plaintiff. Therefore, the Court need not indulge Balboa's factual inquiry at this stage. Indeed, regardless of the merits, ShopKo is entitled to take discovery to rebut Balboa's counter-interpretation of the agreements between the Parties.

Under California law, a plaintiff must be afforded the opportunity to discover and present extrinsic evidence that supports its interpretation of a contract. *See Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 569-70 (9th Cir. 1988) (reversing and remanding district court's order dismissing contract action "to give

plaintiff an opportunity to present extrinsic evidence as to the intention of the parties in drafting the contract"). This is true even where the words may not appear ambiguous to a court. *See Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 39 (1968) ("The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended."); *Trident Ctr.*, 847 F.2d at 569. In following California law, the Ninth Circuit has made clear that:

> [I]t matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence. If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity.

Trident, 847 F.2d at 569; *see also First Nat. Mortg. Co. v. Fed. Realty Inv. Tr.*, 631 F.3d 1058, 1066-67 (9th Cir. 2011) ("[I]t is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face."). Thus, where competing interpretations of a contract are presented, "parties should be afforded the opportunity to obtain extrinsic evidence through discovery." *In re Yahoo! Litig.*, 251 F.R.D. 459, 471 n.8 (C.D. Cal. 2008); *see Applied Elastomerics, Inc. v. Z-Man Fishing Prods., Inc.*, No. C 06-2469 CW, 2007 WL 1593212, at *3-4 (N.D. Cal. June 1, 2007) (finding that, in light of the plaintiff's claim that the contract was ambiguous, "the case must proceed beyond the pleadings so that the court may consider the evidence" bearing on whether the contract was reasonably susceptible to a different interpretation).

This is the exact situation presented by Balboa's Motion: Balboa argues that the terms of the Master Lease entitle it to collect pro-rated rent for an extra quarter that was not disclosed in the Lease Schedules, or the executed Notices of Assignment, or in the Parties' direct negotiations leading to the entry into the

agreements. Mem. at 12. ShopKo, on the other hand, has pleaded the exact opposite, vigorously disputes Balboa's position, and has expressly pleaded a contrary interpretation that is even supported by the extrinsic evidence that Balboa submitted in its motion to dismiss. *E.g.*, Compl. ¶ 51 ("Any position by Balboa that the extra quarterly payments withdrawn from ShopKo's bank account were permissible under the pro-rated rent provision in each lease is without merit, and such an alleged interpretation is both unwarranted and a breach of this contract."). In sum, ShopKo's allegations make clear that the Parties' intent was to enter into capital lease agreements whereby ShopKo would make a defined number of quarterly payments, as agreed in the relevant Lease Schedules, followed by a nominal payment of $1 to complete the purchase of the capital equipment. *Id.* ¶ 9.

This understanding is supported by the contemporaneous writings exchanged between the Parties. The Master Lease Agreement states "The rent payable with respect to any Schedule(s) ***shall be the amount shown on such Schedule[](s)***." *See id.*, Ex. A, p. 27, ¶ 3 (emphasis added). Only after this definitive requirement that the rent be stated in the applicable Lease Schedule, does the agreement go on to describe a purported optional payment structure for pro-rata rent. *Id.* However, per the first sentence of this clause, pro-rata rent is only payable if it is set forth in the applicable Lease Schedule. *Id.* Here, the Lease Schedules make no reference to pro-rata rent. *See id.* ¶¶ 9, 10, 16; Exs. A-M.

As alleged, the payment structure set forth in the Lease Schedules was reinforced by the Notices of Assignment, which, for the 11 leases that were assigned by Balboa, were executed within one day of the corresponding Lease Schedule being executed. *See id.* ¶ 12; Exs. A-M; Chiongson Aff., Ex. A, ECF No. 19-3.[6] As alleged, these documents clearly present ShopKo's payment obligations

[6] ShopKo has since learned that the Notice of Assignment presented to it for Lease No. 211267-001, was never executed by Balboa. Thus, the rights to this lease apparently remain with Balboa.

under each Lease Schedule, on which ShopKo relied. Compl. ¶¶ 13-14, 17. The Notices state that "all rental payments" shall be paid directly to the assignee and then go on to state the exact rental payments due. These Notices generally follow the same structure. As an example, Lease No. 171984-000 states: "The following payments due to Lessor under the Lease shall be paid to the [assignee] . . . : Eleven (11) consecutive quarterly payments of $129,565.78 and 1 final quarterly payment of $86,377.19." *Id.*, Ex. A, p. 24. Consistent with the Lease Schedules and the Parties' understanding of their agreements, pro-rata rent is never disclosed and was never agreed to by the Parties.

Thus, because a factual dispute clearly exists, ShopKo's claims cannot be dismissed at the pleading stage, before it has the opportunity for discovery.

3. Balboa's Reference to Extrinsic Documents Cannot Supplant ShopKo's Well-Pleaded Allegations

Balboa impermissibly references three types of documents in its Motion – (i) "Hold Harmless" letters; (ii) alleged "invoices" sent to ShopKo; and (iii) "Welcome" letters – and asks the Court to accept these documents as undisputed fact. These documents do not defeat ShopKo's well-pleaded claims for two reasons: first, with respect to the Hold Harmless letters and the alleged "invoices," these documents cannot be incorporated by reference into ShopKo's Complaint; and, second, at most, these documents offer competing versions of various disputed material facts that require development through discovery.

a. The Court Cannot Consider Documents That Are Not Referenced in the Complaint

Generally, a court may not consider material beyond the pleadings when ruling on a motion to dismiss under Rule 12(b)(6). *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 998 (9th Cir. 2011). The Court, however, can consider documents attached to the Complaint. *Id.* at 999. It can also consider "unattached evidence on which the complaint 'necessarily relies' if: (1) the

complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Id*. With respect to the first element, "the incorporation-by-reference doctrine requires that the Complaint refer to specific documents, ***not their absence***. . . . [E]ven passing references [in the Complaint] to 'correspondence' with Defendants would not be enough." *Hernandez v. Specialized Loan Servicing, LLC*, No. CV 14-9404-GW (JEMx), 2015 WL 350223, at *3 (C.D. Cal. Jan. 22, 2015) (emphasis added) (holding Defendants cannot "'incorporate' documents unmentioned in the Complaint in order to contradict [Plaintiff's] allegations with their own evidence"). With respect to the second element, classic examples of documents that are central to a claim include a claim about insurance coverage that is based on the contents of a coverage plan or when a claim for stock fraud is based on the contents of an SEC filing. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Here, the "Hold Harmless" letters and the alleged "invoices" cannot be considered on a motion to dismiss. First, neither of these document categories is specifically referred to in the Complaint. Balboa cannot point to a single allegation that references a "Hold Harmless" letter or an invoice. Instead, Balboa argues that ShopKo's allegations of Balboa's deceitful tactics "opens the door to any correspondence" that might prove otherwise. Mem. at 5 n.4. This is not the rule: Balboa cannot point to the absence of a document that was never referenced in the Complaint. *See Hernandez*, 2015 WL 350223, at *3. Critically, Balboa's "rule," which would allow the introduction of any document that a defendant argues directly contradicts a well-pleaded allegation, would effectively transform every motion to dismiss into a summary judgment motion and corresponding argument on the factual merits before any factual discovery has occurred. This goes far beyond the requirements of notice pleading and the purpose of a motion to dismiss.

Second, these documents are not central to ShopKo's claims because they were created by Balboa and delivered to ShopKo **after** Balboa's misrepresentations

were made. ShopKo's claims are based on the obligations and misrepresentations in the Lease Schedules and Notices of Assignment, not on documents that Balboa created after the core fraudulent conduct had already occurred. Accordingly, the Court should not consider the Hold Harmless letters or the alleged "invoices" when deciding this Motion.

b. Balboa's Extrinsic Evidence Highlights Disputed Issues of Fact That Warrant Discovery

Even in the limited situations where a Court can consider "the *existence*" of documents outside the complaint it may not "draw inferences or take notice of facts that might reasonably be disputed." *Corinthian Colls.*, 655 F.3d at 999. For example, in *Lee v. City of Los Angeles*, a case cited by Balboa (Mem. at 8), the Ninth Circuit reversed the district court's order granting defendant's motion to dismiss because "the district court's decision to dismiss plaintiffs' federal claims was rooted in defendants' factual assertions." 250 F.3d 668, 688 (9th Cir. 2001). The Ninth Circuit explained that the district court impermissibly "assumed the existence of facts that favor defendants based on evidence outside plaintiffs' pleadings, took judicial notice of the truth of disputed factual matters, and did not construe plaintiffs' allegations in the light most favorable to plaintiffs." *Id.*

As such, the Welcome Letters, the Hold Harmless letters, and alleged "invoices" do not supplant ShopKo's well-pleaded allegations. If anything, the documents only raise questions that need to be addressed through discovery.

The Welcome Letters, for example, were sent to ShopKo by Balboa **after** the corresponding Lease Schedule was executed – i.e., after Balboa perpetrated its fraud and the Parties reached agreement on payment terms based on rental amounts listed in the Lease Schedules. Gibson Aff. ¶ 15. Moreover, these generic form letters do not specifically inform ShopKo that it must pay interim rent, nor does it disclose that Balboa intended to try to secure for itself a discretionary and unilateral right to charge ShopKo pro-rata or interim rent (depending on which of Balboa's documents one reviews) for up to 89/90th of a quarterly payment period in addition

to the agreed quarterly payments set forth in the Lease Schedules. As alleged, the Leasing Schedules did not disclose the extra quarterly payment Balboa intended to withdraw, and thus ShopKo had no reason to suspect that mention of interim rent in a form letter delivered **after** the agreements were reached between the Parties affected the quarterly payments negotiated and to which the Parties agreed.

The Hold Harmless letters raise similar fact questions requiring discovery. As an initial matter, none of the Hold Harmless letters are relevant because Balboa never, in fact, paid an equipment supplier before the equipment was actually delivered. Gibson Aff. ¶ 16. Thus, its terms are inapplicable here.

In any event, the interim terms described in the Hold Harmless letters **substantially differ** from the optional pro-rata language in the Master Lease.[7] Contrary to Balboa's assertion that the Master Lease authorized it to manipulate the Commencement Date of the capital leases so that it could collect an extra three-months of "rent" (Mem. at 12), the Hold Harmless letters, at most, speak to interim rent through the end of the month in which the capital equipment was delivered. *See* Chiongson Aff., Ex. A, p. 7-15 ("Interim rent shall continue to accrue from the date of such Delivery and Acceptance Certificate through the first day of the following month."). As an example, for Lease No. 171984-011, the Lease Schedule was executed on November 20, 2013 and the Delivery and Acceptance Certificate was signed on November 21, 2013. Gibson Aff., Ex. A. If the Hold Harmless letters were deemed to control the Parties' agreement concerning pro-rata or interim rent, then for this particular lease, rent would have ended by November 30, 2013.

[7] Indeed, Balboa's internal inconsistencies in how it refers to elective proportional payment provisions furthered its deceptive scheme because the language in documents subsequent to the Master Lease never referred back to the optional provision of the Master Lease on the same terms. The Master Lease references an ambiguous "prorata portion of the rental charges"; the "invoices" reference "Prorated Rnt," but do not indicate whether the rent is for an "interim" period versus a quarterly payment; while the Hold Harmless letters reference an entirely different "interim rent" scheme.

This equates to a total of approximately 10 days of interim rent, not the 89 days that Balboa fraudulently withdrew from ShopKo's bank accounts. Thus, the Hold Harmless letters **actually highlight Balboa's fraud**, as reflected in the conflicting provisions in various of Balboa's documents, extrinsic and otherwise.

Finally, the alleged "invoices" are unavailing. Indeed, they are not true "invoices" as the term is typically used in business because they were not provided to ShopKo by Balboa for review and approval prior to ShopKo making a scheduled quarterly payment. Gibson Aff. ¶ 18. This is evident by the fact that the date listed on the alleged "invoice" is generally the same date that Balboa made its fraudulent withdrawal, meaning that the "invoices" could not have provided notice to ShopKo before the fraudulent, unauthorized withdrawals occurred. Instead, the "invoices" were viewed by ShopKo as confirmations of the scheduled quarterly payments to be withdrawn by Balboa under the agreed Lease Schedules. *Id.* ¶ 19.

In sum, Balboa's core – indeed, its only – argument which it repeats throughout its Motion, is that it contests the facts and contract interpretation that ShopKo has alleged, with extensive detail, in the Complaint. To support its argument, Balboa has cobbled together extrinsic documents that, viewed only in retrospect, it argues disclosed to ShopKo that Balboa intended to withdraw an extra quarterly payment, massively increasing the cost of the capital equipment to be obtained by ShopKo under each capital lease, and massively increasing the implied interest rate associated with each such acquisition. While ShopKo sees no legal or factual merit in this argument, at minimum, it is certainly not an argument at the pleading stage, and Balboa's Motion to Dismiss must be denied.

4. ShopKo Has Stated a Claim for Tortious Fraud and Intentional Deceit

Balboa argues that ShopKo did not adequately plead three of the five elements for such a claim: (i) a misrepresentation, (iv) justifiable reliance, and (v) damages. Mem. at 16. Balboa's arguments rely on the same theory debunked

above, and its factual challenges cannot defeat ShopKo's well-pleaded allegations.

First, ShopKo has specifically pleaded misrepresentations by identifying the Lease Schedules and Notices of Assignment, which contain material omissions. Compl., Exs. A-M. ShopKo has alleged that these documents are fraudulent because Balboa deceitfully omitted reference to its intention to withdraw an extra, unauthorized quarterly payment from ShopKo's bank accounts. *Id.* ¶¶ 27, 8-11, 14. Second, ShopKo has pleaded justifiable reliance by alleging it relied on the representations in the Lease Schedules and Notices of Assignment that the payments listed were accurate and did not deceitfully omit an extra quarterly payment. *Id.* ¶ 30. It also alleges that it would not have entered into the leases if it had known about the extra quarterly payment. *Id.* More specifically, the extra, unauthorized quarterly payment increased the effective purchase price of the equipment beyond any reasonable value that ShopKo would have paid for the equipment if it had known of Balboa's deception. *See id.* ¶¶ 10, 28, 30, 133. Third, ShopKo has alleged damages, in that but for Balboa's material misrepresentations and omissions, ShopKo would not have had the unauthorized amount of $781,401.46 withdrawn from its bank accounts. *Id.* ¶ 32. It has also alleged the specific damages amounts pertaining to each individual Lease Schedule. *Id.* ¶ 24.

Thus, ShopKo has stated a claim for Tortious Fraud and Intentional Deceit.

5. ShopKo Has Stated a Claim for Actual Fraud

Balboa argues that ShopKo has not pleaded a claim for actual fraud because (i) it has not alleged that Balboa concealed its intent to withdraw an extra quarterly payment, (ii) it has not alleged a duty to disclose, (iii) it has not justifiably relied on the omission (i.e., if ShopKo was aware it would have acted differently), and (iv) it has not alleged damages. Mem. at 17-20. ShopKo has alleged all of these elements. Balboa's only argument to the contrary is that it disputes the facts as alleged in ShopKo's Complaint, which is irrelevant on a motion to dismiss.

First, ShopKo specifically alleges the Schedules and Notices of Assignment

contain material misrepresentations because they do not reference the extra, unauthorized quarterly payments that Balboa intended to take from ShopKo and it also alleges that "Balboa intentionally concealed these payments from ShopKo before the leases were executed." Compl. ¶ 34. Thus, ShopKo has more than adequately alleged that Balboa concealed a material fact, i.e., Balboa's undisclosed intent to take an unauthorized quarterly payment. *Id*. ¶ 24.

Second, ShopKo has adequately alleged a duty to disclose. California recognizes four circumstances where a duty to disclose exists:

> (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not 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 fact.

Baggett, 582 F. Supp. 2d at 1267-68.

ShopKo, has alleged three of the four circumstances, any of which create a duty to disclose. First, ShopKo has alleged that Balboa had exclusive knowledge of its intent to take an extra quarterly payment not listed on the Lease Schedules or Notices of Assignment. Here, because Balboa did not disclose its intent, ShopKo had no way of knowing that the total lease price and terms listed on the Lease Schedules were inaccurate. Compl. ¶ 27. ShopKo also alleges that Balboa actively concealed its intent to take an extra quarterly payment. This is evidenced by the omission in the Lease Schedules themselves and the subsequently issued Notices of Assignment, which set forth the payment terms, but do not make reference to the extra quarterly payment. *Id*. ¶¶ 27, 14-17. ShopKo further alleges that Balboa intentionally timed its unauthorized withdrawals to coincide with the timing of when the actual first quarterly payment was due so that Balboa's fraudulent scheme could go undetected for years – which it in fact did. *Id*. ¶ 22. This, again, demonstrates active concealment. For the same reasons, ShopKo alleges that Balboa made partial representations, but omitted and suppressed other material facts because Balboa omitted from the Lease Schedules and the Notices of

Assignment its intent to take an extra quarterly payment.

Third, ShopKo has alleged justifiable reliance and damages. ShopKo's allegations make clear that "ShopKo relied on Balboa's representation as to the total cost of each lease, the payment terms, and the payment schedules," in addition to relying on similar representations in the Notices of Assignment. *Id.* ¶ 37. ShopKo also alleges that "[h]ad ShopKo known that the terms presented by Balboa in each lease and the letters were not accurate and that each lease required an additional payment in the approximate amount of 89/90th of a quarterly payment, ShopKo would not have entered into any of the leases." *Id.* This is because the additional, unauthorized payment increased the effective purchase price for the equipment beyond its reasonable value. *Id.*; *see also* ¶¶ 9-10, 133. The result being that ShopKo suffered damages from the unauthorized withdrawals in an amount in excess of $781,401.46. *Id.* ¶ 39. ShopKo, thus, has stated a claim for Actual Fraud.

6. ShopKo Has Stated a Claim for Negligent Misrepresentation

Balboa claims that ShopKo failed to state a claim for Negligent Misrepresentation because it has not alleged (i) a misrepresentation, (ii) justifiable reliance, or (iii) damages. Mem. at 20. As above, Balboa's argument fails.

ShopKo alleged that that (i) the Lease Schedules and Notices of Assignment contained misrepresentations via material omissions concerning Balboa's intent to withdrawal an extra, unauthorized quarterly payment (Compl. ¶¶ 41-42); (ii) ShopKo relied on these documents as written and would not have entered in the Lease Schedules if it knew Balboa intended to withdraw an extra, unauthorized payment (*id.* ¶ 44); and (iii) ShopKo suffered damages, at a minimum, equal to the unauthorized withdrawals resulting from Balboa's misrepresentations (*id.* ¶ 46).

7. ShopKo Has Stated Claims for Breach of the Lease Schedules

Balboa's only argument in support of its motion to dismiss ShopKo's 13 breach of contract claims is Balboa's disputed factual counter-interpretation of the Parties' agreements; namely, Balboa's factual argument that the Master Lease

authorized Balboa's withdrawal of an extra quarterly payment, even though it was never disclosed in the Lease Schedules or Notices of Assignment, and despite that such counter-interpretation is directly at odds with the Parties' express contract negotiations. Mem. at 21.

For the reasons stated above, Balboa's disputed statements of fact are not reason to dismiss well-pleaded claims. *See Ronpak*, 2015 WL 179560, at *5; *Zander*, 2014 WL 794212, at *2. ShopKo clearly alleges the elements of a breach of contract action: (i) the Parties' entered into 13 written capital lease agreements based on payment terms set forth in the Leasing Schedules; (ii) ShopKo performed its obligations by making each and every payment owed; (iii) Balboa breached each Lease Schedule by withdrawing an extra quarterly payment; and (iv) ShopKo has suffered damages in the amount of the unauthorized withdrawal. Compl. ¶¶ 47-124.

ShopKo also specifically alleges that Balboa's counter-interpretation that the extra quarterly payments were permissible is without merit. *E.g.*, *id*. ¶ 51. This is because Balboa's counter-interpretation contradicts the Parties' understanding of the Lease Schedules and the Notices of Assignment. As explained above, the Master Lease unequivocally states that "The rent payable with respect to any Schedule(s) shall be the amount shown on such Schedule[](s)." Compl., Ex. A, p. 27, ¶ 3. None of the Lease Schedules explicitly make reference to or disclose that Balboa is entitled to withdraw an extra quarterly payment that was never contemplated by the Parties. Compl. ¶¶ 9-10, 16, 18; Exs. A-M. The Notices of Assignment reinforce this understanding as they too are silent as to an extra quarterly payment. Accordingly, because Balboa merely attempts to discredit "the accuracy, rather than the adequacy" of ShopKo's allegations, its motion to dismiss must be denied.[8]

[8] Even if the Court were to accept that Balboa's counter-position has merit, dismissal is still improper because, pursuant to *Pacific Gas* and Ninth Circuit precedent following California law, ShopKo is entitled to present extrinsic evidence

8. ShopKo Has Stated a Claim for a Breach of the Implied Covenant of Good Faith and Fair Dealing

Balboa argues that ShopKo has failed to state a claim for breach of the implied covenant of good faith and fair dealing because (i) it "fails to allege that it did all of the significant things the Master Lease and Schedules required" because it "sued to have the prorated rental payments returned"; (ii) ShopKo fails to allege that Balboa "'unfairly interfer[ed] with' ShopKo's 'right to receive the benefits of the contract'"; and (iii) ShopKo "fails to allege damages." Mem. at 21-22.

Once again, however, Balboa's arguments are premised on challenging the factual merits of ShopKo's allegations, as opposed to challenging their legal adequacy. First, Balboa argues that ShopKo did not perform on the contract because it chose to sue instead of disavowing the contracts. This argument is contradictory. ShopKo's choice to sue specifically avoids non-performance. Regardless, for each Lease Schedule at issue, ShopKo has specifically alleged that "ShopKo has performed its obligations under this contract, and has made each and every payment due under the lease schedule." Compl. ¶ 49; Counts IV-XVI. Second, ShopKo clearly alleges that Balboa interfered with its rights to receive the benefits of the contract when Balboa took unauthorized withdrawals from ShopKo's bank accounts.[9] *Id.* ¶ 128. Third, Shopko alleges damages in the amount of the unauthorized withdrawals. *Id.* ¶ 130. Accordingly, ShopKo has adequately

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to support its interpretation of the Parties' agreements. *See supra* § B.2. Hence, the breach of contract claims cannot be dismissed at the pleading stage.

[9] Courts have recognized 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." *Reiydelle v. J.P. Morgan Chase Bank, N.A.*, No. 12-cv-06543-JCS, 2014 WL 312348, at *13 (N.D. Cal. Jan. 28, 2014). Here, ShopKo has alleged such discretion, in that Balboa was authorized to withdraw funds directly from ShopKo's bank account without ShopKo's specific approval for each withdrawal. Compl. ¶ 11.

alleged a claim for breach of the implied covenant of good faith and fair dealing.

9. Shopko Has Stated a Claim for Violation of California's Unfair Competition Law

The UCL proscribes "any lawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Balboa asserts that ShopKo has failed to allege that Balboa's business acts and/or practices were (i) unlawful; (ii) unfair; or (iii) fraudulent. Mem. at 22-24. To the contrary, ShopKo has alleged all three prongs, any of which is an independent basis to state a claim under the UCL. Mem. at 22-23 (citing *Langan v. United Servs. Auto. Ass'n*, 69 F. Supp. 3d 965, 983-85 (N.D. Cal. 2014)).

First, "[a]n unlawful business activity includes anything that can properly be called a business practice and that at the same time is forbidden by law." *Ronpak*, 2015 WL 179560, at *3. Thus, ShopKo has alleged an actionable UCL claim by alleging that "1) the defendant's actions constitute business acts or practices and 2) the same acts or practices form the basis for another claim for relief." *Id.*; *see also Celebrity Chefs Tour, LLC v. Macy's, Inc.*, 16 F. Supp. 3d 1141, 1155 (S.D. Cal. 2014). In *Ronpak*, for example, the court held that Plaintiff adequately alleged a UCL claim where it also properly pled a theory of fraudulent inducement. *Id.* at *3. Here, Balboa does not challenge that the act of negotiating and entering into capital leasing contracts is a business practice, thus the first element is demonstrably met. Additionally, as discussed above, ShopKo has adequately alleged claims for a variety of tortious and fraudulent conduct. Thus, ShopKo has stated a claim under the first prong, an "unlawful" business practice.

Second, ShopKo has stated a claim under the second prong, an "unfair" business practice. As Balboa recognizes, there are several standards that have been employed to determine whether a business practice is "unfair," including where a business practice "violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its

benefits." *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2006). Because such an analysis requires the fact finder to "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . the determination whether [a business practice] is unfair is one of fact which requires a review of the evidence from both parties. ***It thus cannot usually be made on a demurrer***." *Id.* (emphasis added).

ShopKo has adequately pleaded unfairness in the form of immoral, unethical and unscrupulous behavior by alleging that Balboa misrepresented the terms of the Lease Schedules, which allowed Balboa to gain "an unfair advantage in the marketplace by disguising the true costs of its financial products and misleading customers, including ShopKo." Compl. ¶ 133.

ShopKo, likewise, alleges a claim under the third prong for a UCL claim, "fraudulent" business practices. "A fraudulent business practice is one which is likely to deceive the public." *McKell*, 142 Cal. App. 4th at 1471. Such a claim under the UCL is less stringent than the requirements to plead common law fraud. *See Garcia v. Sony Comput. Entm't Am., LLC*, 859 F. Supp. 2d 1056, 1062 (N.D. Cal. 2012) ("Unlike ordinary fraud, which requires plaintiff to plead a deception that is actually false, known to be false by the perpetrator, and reasonably relied upon by the victim, thereby incurring damages, none of these elements is required to state a claim for equitable relief under the UCL.").

Once again, Balboa's retort focuses on challenging the facts underlying ShopKo's allegations, instead of pointing to legal inadequacies. Specifically, Balboa asserts that ShopKo failed to allege (i) a duty to disclose and (ii) that the public could be misled by Balboa's conduct because it claims the extra payment was part of the Master Lease. Mem. at 25. For the same reasons that its fraud claims survive, ShopKo has alleged a duty to disclose because it has alleged both that Balboa omitted material facts and actively concealed those same facts when it did not disclose its intent to take an extra quarterly payment in the Lease Schedules

and the Notices of Assignment. Further, ShopKo alleges Balboa's practices mislead its customers "by disguising the true costs of its financial products." Compl. ¶ 133. Indeed, as alleged, it is reasonable to conclude that Balboa's fraudulent omission of its intent to take an extra quarterly payment, beyond what was set out in the specific Lease Schedules and Notices of Assignment, would mislead Balboa's consumers and induce them to purchase financial products from Balboa on incomplete terms, as it did ShopKo.[10]

10. ShopKo Has Standing to Assert Claims for Leases Executed By Its Wholly-Owned Subsidiary SVS Trucking

Balboa argues that ShopKo has not alleged standing to bring claims related to Schedule Nos. 211267-000 and -001 because the Schedules were signed by a representative of ShopKo's wholly-owned subsidiary SVS Trucking LLC. Mem. at 10. However, Balboa's bald assertions ignore the well-pleaded allegations, which establish that **ShopKo itself** has suffered an injury-in-fact, by way of the fraudulent and unauthorized withdrawals taken by Balboa from **ShopKo's bank accounts**.

As Balboa notes, to plead standing, ShopKo must allege (i) that it has "suffered an injury in fact" and (ii) a causal connection between the injury and the conduct complained of. Mem. at 10. ShopKo has pleaded both of these elements.

Specifically, though the Schedule was signed by SVS Trucking, ShopKo alleges that Balboa fraudulently withdrew funds from ShopKo's bank account. *See* Compl. ¶¶ 116 ("On April 17, 2015, Balboa breached this contract by withdrawing a "13th" payment of $54,853.79 from ***ShopKo's bank account***.") (emphasis added); 122 (similar allegation for Lease No. 211267-001); 39 ("Balboa's fraudulent scheme has resulted in ShopKo suffering damages in an amount in excess of

[10] Balboa's standing argument is inapposite. Mem. at 25. The standing requirement only applies where the plaintiff is proceeding "with a putative class action for 'fraudulent' conduct under the UCL." *Garcia*, 859 F. Supp. 2d at 1062. ShopKo is only seeking redress of its individual harm. Regardless, it has adequately alleged the loss of money and actual reliance. *E.g.*, Compl. ¶¶ 133. 135.

$781,401.46, which is the total amount of money that Balboa improperly withdrew from ShopKo under the 13 leases."); *Id*. ¶¶ 32, 46 (similar). Because the unauthorized withdrawals were made from ShopKo's bank accounts, ShopKo has suffered an actual injury, *i.e.* the loss of money. The allegations also make clear that this injury was caused by Balboa's fraudulent conduct, without which the withdrawals would have never been made. Accordingly, ShopKo has standing to sue for its injuries caused by Balboa as they pertain to all 13 leases, including the two executed by its wholly-owned subsidiary SVS Trucking.

Alternatively, if the Court finds that ShopKo does not have standing to redress its injuries related to Lease Nos. 211267-000 and -001, ShopKo can correct this technicality by joining SVS Trucking in this Action pursuant to Rule 17(a). Rule 17(a) provides that:

> The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

Fed. R. Civ. P. 17(a)(3).

Here, should the Court require, SVS Trucking intends to join this Action to assert claims that have injured both ShopKo and SVS Trucking. If necessary, ShopKo respectfully submits that the most efficient course for correcting this technicality is with an omnibus amended pleading, after the Court has ruled on Balboa's motion to dismiss. With leave from the Court, such an amended pleading will allow ShopKo to address the standing and jurisdictional clarifications discussed in this Opposition, in addition to any other issues that may arise from the Court's decision on Balboa's Motion to Dismiss.

CONCLUSION

For the foregoing reasons, ShopKo respectfully submits that Balboa's Motion to Dismiss should be denied in its entirety.

Dated: April 22, 2016

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