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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HALE BROS. INVESTMENT
COMPANY, LLC,

Plaintiff,

v.

STUDENTSFIRST INSTITUTE;
STUDENTSFIRST; and 50CAN,
INC.,

Defendants.

No. 2:16-cv-02284-JAM-EFB

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTIONS TO DISMISS**

16 This action is centered around a landlord-tenant dispute
17 that is described in a Complaint which reads like an illicit love
18 affair: Plaintiff Hale Bros. believing its relationship with
19 Defendant StudentsFirst foolproof allegedly discovers
20 StudentsFirst in bed with another. Feeling betrayed, Hale Bros.
21 initiated this litigation, and in response StudentsFirst and
22 50CAN ask this Court to dismiss the Complaint and end this broken
23 association once and for all. No other line is more apropos than
24 the Captain's from Cool Hand Luke: "What we've got here is
25 failure to communicate." Id. (Warner Bros. 1967).¹

26
27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for December 13, 2016. In deciding this motion, the
Court takes as true all well-pleaded facts in the complaint.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 StudentsFirst and StudentsFirst Institute ("StudentsFirst")
3 leased office space from Hale Bros. Investment Company, LLC
4 ("Plaintiff" or "Hale Bros."). First Am. Compl. ("FAC"), ECF No.
5 8, ¶ 8. In October 2011, StudentsFirst agreed to pay monthly
6 rent to use the second floor of the Hale Building for sixty-seven
7 months. See id. See also Office Lease, attached to the FAC as
8 Exh. A (the "Lease"). StudentsFirst also leased twelve parking
9 spots connected to that building. See FAC ¶ 9. See also Parking
10 Agreement, attached to the FAC as Exh. B. In March 2012,
11 StudentsFirst moved in and began paying rent seven months later.
12 See FAC ¶ 10. The Lease was to remain in effect through October
13 2017. FAC ¶ 28.

14 In the event StudentsFirst failed to perform its contractual
15 obligations, Plaintiff acquired a security interest. The Lease
16 secured Plaintiff's interest in various furniture, fixtures, and
17 equipment from the office (the "Collateral"). See id. ¶ 15. A
18 Letter of Credit also secured Plaintiff's interest for
19 \$1,000,000.00, which reduced to \$500,000.00 in March 2016. See
20 id.

21 Three-and-a-half years passed before Plaintiff and
22 StudentsFirst's relationship soured. It started with a meeting
23 in April 2016 (the "Meeting"). See id. ¶ 11. StudentsFirst told
24 Plaintiff that, by September 2016, it would cease business
25 operations, transfer all assets to a third party, vacate the
26 office, and dissolve. See id. In other words, StudentsFirst
27 told Plaintiff that it would breach the Lease. StudentsFirst
28 also gave Plaintiff a balance sheet that showed rent payments

1 stopping in July 2016 and capital contributions—valued at
2 \$1,200,000.00—to 50CAN, Inc. (“50CAN”) in April and June 2016.
3 See id. ¶¶ 12-13. See also Cash Projections, attached to the FAC
4 as Exh. C. StudentsFirst also concealed from Plaintiff their
5 intent to transfer their assets to 50CAN and merge their company
6 with 50CAN. ¶ 16. This merger took place in or around March
7 2016 at which time 50CAN assumed all obligations and liabilities
8 of StudentsFirst under the Lease. ¶ 23. For the next two
9 months, Plaintiff asked StudentsFirst to clarify its position,
10 but to no avail. See FAC ¶ 14. After paying rent for the last
11 time in June 2016, see id., StudentsFirst vacated and abandoned
12 this leased office space removing several assets prior to
13 departure. See id. ¶ 15.

14 Plaintiff has sued StudentsFirst and 50CAN (collectively,
15 “Defendants”) for breach of contract, fraudulent transfer, fraud,
16 civil conspiracy, common counts, and for violating California
17 Business & Professions Code § 17200. Id. at 1. Plaintiff also
18 requests declaratory relief. Id. Defendants move separately to
19 dismiss these claims. ECF No. 9-1 (“50CAN’s MTD”); ECF No. 10-1
20 (“SF’s MTD”). Plaintiff opposes both motions to dismiss. See
21 ECF No. 14 (“Opp’n to 50CAN’s MTD”); ECF No. 15 (“Opp’n to SF’s
22 MTD”).

23 II. OPINION

24 A. First Claim: Breach of Contract

25 To state a claim for breach of contract under California
26 law, a plaintiff must allege (1) the existence of a contract;
27 (2) plaintiff’s performance of its obligations under the
28 contract or an excuse for nonperformance; (3) defendant’s

1 breach; and (4) resulting damage to plaintiff. See Arch Ins.
2 Co. v. Sierra Equip. Rental, Inc., No. 2:12-cv-00617, 2016 WL
3 4000932, at *3 (E.D. Cal. July 25, 2016) (internal citation
4 omitted).

5 1. StudentsFirst

6 StudentsFirst concedes that Plaintiff has properly pled a
7 breach of contract claim against it, so Plaintiff's claim
8 survives. See SF's MTD at 2 ("What will remain is a
9 straightforward breach of contract dispute between Plaintiff and
10 StudentsFirst.").

11 2. 50CAN

12 Plaintiff premises its breach of contract claim on the
13 Lease, the Parking Agreement, and the implied covenant of good
14 faith and fair dealing. FAC ¶¶ 32-40. Specifically, Plaintiff
15 argues that StudentsFirst's failure to pay rent from July 2016
16 through the remaining lease term, failure to execute an Estoppel
17 Certificate, abandonment, and merger with 50CAN makes 50CAN
18 liable for breaching the Lease. Id. ¶¶ 32-34. Plaintiff also
19 asserts that StudentsFirst's failure to pay rent from July 2016
20 through the remaining lease term makes 50CAN liable for
21 breaching the Parking Agreement. Id. ¶ 35. And, finally,
22 Plaintiff claims that 50CAN breached the implied covenant of
23 good faith and fair dealing for several reasons, including when
24 StudentsFirst ceased business operations, merged with 50CAN,
25 concealed its intent to breach the Lease until after the Letter
26 of Credit decreased in value, vacated the premises, removed
27 Collateral, and stopped paying rent. See id. ¶ 40 (emphasis
28 added).

1 Whether Plaintiff can bring this claim against 50CAN turns
2 on whether Plaintiff and 50CAN formed a contract. 50CAN
3 contends that they did not because, under the Lease, an
4 assignment occurs only if Plaintiff approves it. See 50CAN's
5 MTD at 5; Reply, ECF No. 16, at 1-2 ("50CAN's Reply"). But
6 Plaintiff maintains that they formed a contract because 50CAN
7 assumed StudentsFirst's obligations and liabilities under the
8 Lease via the merger. See Opp'n to 50CAN's MTD at 5.

9 The Court agrees with Plaintiff. 50CAN's argument
10 contradicts the Lease's plain language. The Lease states that
11 an unapproved assignment constitutes a default—it says nothing
12 about termination. Exh. A § 10.1(a) ("Without the prior written
13 consent of [Plaintiff]...[StudentsFirst] may not...assign...or
14 otherwise transfer...this Lease by operation of law or otherwise
15 or permit the use of...the Premises...by anyone other than
16 [StudentsFirst]"). The Lease also includes a successor-
17 liability rule:

18 Even if [StudentsFirst] is in Default and/or has
19 abandoned the Premises, this Lease shall continue in
20 effect for so long as [Plaintiff] does not terminate
21 [StudentFirst's] right to possession...and
22 [Plaintiff] may enforce all its rights and remedies
23 under this Lease, including the right to recover Rent
24 as it becomes due under this Lease. In such event,
25 [Plaintiff] shall have all of the rights and remedies
26 of a landlord under California Civil Code Section
27 1951.4 (lessor may continue Lease in effect after
28 Tenant's Default and abandonment and recover Rent as
it becomes due, if Tenant has the right to sublet or
assign, subject only to reasonable limitations) or
any successor statute.

26 Id. § 11.2(c). In other words, a breach does not automatically
27 terminate the Lease.

28 Since StudentsFirst's alleged breach does not terminate the

1 Lease, 50CAN assumed StudentsFirst's obligations and liabilities
2 via the merger. California law provides that the surviving
3 corporation inherits the absorbed corporation's liabilities.
4 See CAL. CORP. CODE § 1107(a)(West 2016). See also Maudlin v. Pac.
5 Decision Sci. Corp., 137 Cal. App. 4th 1001, 1016 (2006). By
6 including "California Civil Code Section 1951.4...or any
7 successor statute" in the Lease, Plaintiff and StudentsFirst
8 agreed that similar successor-liability rules applied. Exh. A,
9 § 11.2(c)(emphasis added). So, the Court "give[s] effect to the
10 mutual intention of the parties." CAL. CIV. CODE § 1636 (West
11 2016).

12 In sum, Plaintiff has stated a claim against 50CAN under an
13 assumption theory. Plaintiff alleges that the merger breached
14 the Lease and breached the implied covenant of good faith and
15 fair dealing. See FAC ¶¶ 26-34, 36-43. And Plaintiff maintains
16 that 50CAN "absorbed [StudentsFirst's] companies and assumed all
17 obligations and liabilities thereof, including, but not limited
18 to, [StudentsFirst's] obligations under the Lease." Id. ¶ 29.
19 Because a default does not automatically terminate the Lease and
20 because the Lease mandates a successor-liability rule, Plaintiff
21 has sufficiently pled a breach of contract claim against 50CAN.
22 The Court denies 50CAN's motion to dismiss this claim.

23 B. Second Claim: Fraudulent Transfer

24 A fraudulent conveyance involves a debtor transferring
25 property to a third party with the intent to prevent a creditor
26 from reaching that interest to satisfy the creditor's claim.
27 See Filip v. Bucurenciu, 129 Cal. App. 4th 825, 829 (2005)
28 (internal citation and quotation marks omitted). California's

1 Uniform Fraudulent Transfer Act ("UFTA") allows a defrauded
2 creditor to retrieve property the creditor would otherwise be
3 able to use to pay the debt. See CAL. CIV. CODE § 3439.04 (West
4 2016). See also Mehrtash v. Mehrtash, 93 Cal. App. 4th 75, 80
5 (2001). Under the UFTA, a fraudulent transfer may be "actual"
6 or "constructive." See CAL. CIV. CODE § 3439.04(a). Hales Bros.
7 alleges an actual fraudulent transfer claim. FAC ¶ 50. To
8 state a claim under that theory, a plaintiff must plead that the
9 defendant made a transfer with "actual intent to hinder, delay,
10 or defraud any creditor of the debtor." CAL. CIV. CODE
11 § 3439.01(i).

12 When pleading these elements, the plaintiff must meet the
13 heightened standards mandated by Fed. R. Civ. P. 9(b). Opperman
14 v. Path, Inc., 87 F. Supp. 3d 1018, 1066 (N.D. Cal. 2014). This
15 rule states that "[i]n alleging fraud or mistake, a party must
16 state with particularity the circumstances constituting the
17 fraud or mistake." FED. R. CIV. P. 9(b). In other words, the
18 plaintiff must state the "who, what, where, when, and how" and
19 must explain why the statement or omission was false or
20 misleading. See Cooper v. Pickett, 137 F.3d 616, 625, 627 (9th
21 Cir. 1997)(internal citations omitted). But these heightened
22 pleading requirements apply only to allegations made against the
23 transferor—not the transferee. In re Beverly, 374 B.R. 221, 235
24 (B.A.P. 9th Cir. 2007) (noting that the focus is on the
25 transferor's intent).

26 The allegations supporting this claim apply to both
27 Defendants. Plaintiff states that "[StudentsFirst] transferred
28 [its] assets to 50CAN with actual intent to hinder, delay,

1 and/or defraud Plaintiff in its collection of the monies
2 owed....” FAC ¶ 50. Then Plaintiff notes that “50CAN knowingly
3 and willingly received [StudentsFirst’s] funds and assets with
4 knowledge that [StudentsFirst] actually intended to hinder,
5 delay and/or defraud Plaintiff by unlawfully preventing
6 Plaintiff from recovering such funds and/or assets,” reasoning
7 that 50CAN had to know this, especially given the due diligence
8 preceding the merger. Id. ¶ 51.

9 1. StudentsFirst

10 StudentsFirst makes two arguments explaining why Plaintiff
11 has not stated a fraudulent transfer claim against it, but one
12 is not well taken. StudentsFirst contends that Plaintiff’s
13 constructive sham theory fails because Plaintiff did not allege
14 that StudentsFirst did not get a reasonably equivalent value.
15 SF’s MTD at 9. But Plaintiff has not raised a constructive sham
16 theory. See FAC ¶¶ 50-51. So, the Court focuses only on
17 whether Plaintiff has stated a claim under an “actual intent”
18 theory.

19 Because StudentsFirst is the transferor, Plaintiff must
20 plead its fraudulent transfer claim under Rule 9(b). See
21 Opperman, 87 F. Supp. 3d at 1066. Plaintiff alleges that
22 StudentsFirst transferred its assets to 50CAN with “actual
23 intent to hinder, delay, and/or defraud Plaintiff in its
24 collection of the monies owed due to [StudentsFirst’s]
25 abandonment of the Premises, failure to pay Rents, and various
26 breaches of the Lease.” FAC ¶ 50. Plaintiff adds that
27 StudentsFirst “unlawfully endeavored to place available funds
28 and assets outside Plaintiff’s reach....” Id. ¶ 52.

1 Plaintiff explains that "StudentsFirst" (the "who")
2 transferred its "assets"—including the \$1,200,000.00 in capital
3 contributions to 50CAN in April and June 2016 (the "what" and
4 "when")—and "purposefully concealed [its] intent to abandon the
5 Premises and cease adhering to [its] obligations under the
6 Lease...until after the Letter of Credit was reduced...in an
7 effort to defraud Plaintiff, its creditor, and prevent Plaintiff
8 from adequately mitigating the damages caused by Defendants"
9 (the "how" and "why"). Id. ¶¶ 50-52.

10 Plaintiff has specified the requisite "who, what, where,
11 when, and how," stating enough facts for StudentsFirst to
12 prepare an adequate answer. See Cooper, 137 F.3d at 627
13 (holding that complaint satisfied Rule 9(b)'s particularity
14 requirement because, given that it "points to specific quarters,
15 specific customers and provided dollar figures for each
16 quarter," defendants could prepare an adequate answer).
17 Plaintiff also states that StudentsFirst put its "funds and
18 assets" beyond Plaintiff's reach, a crucial allegation. See
19 Opperman, 87 F. Supp. 3d at 1066 (dismissing UFTA claim because
20 complaint did not mention that the transfer at issue put
21 property beyond plaintiffs' reach).

22 In sum, Plaintiff has satisfied Rule 9(b)'s particularity
23 requirement. To require more would "make Rule 9(b) carry more
24 weight than it was meant to bear." See Cooper, 137 F.3d at 627
25 (internal citation omitted). If Plaintiff cannot later offer
26 sufficient evidence, then it "will not prevail [on this claim]
27 at summary judgment or trial," but courts "do not test the
28 evidence at this stage." Id. (internal citation and quotation

1 marks omitted). The Court denies StudentsFirst's request to
2 dismiss Plaintiff's fraudulent transfer claim.

3
4 2. 50CAN

5 50CAN makes the same arguments as StudentsFirst. See
6 50CAN's MTD at 6; 50CAN's Reply at 2. Because 50CAN is the
7 transferee, Plaintiff need not plead under Rule 9(b). See
8 Beverly, 374 B.R. at 235. Given that procedural distinction,
9 because Plaintiff has already stated a claim against
10 StudentsFirst under Rule 9(b), it necessarily follows that
11 Plaintiff has also stated a claim under the more relaxed Rule 8
12 plausibility standard. Applying the same reasoning used to
13 conclude that Plaintiff stated a fraudulent transfer claim
14 against StudentsFirst, see supra Part II.B.1, the Court finds
15 that Plaintiff has stated one against 50CAN, and denies 50CAN's
16 request to dismiss it.

17 C. Third Claim: Fraud

18 To state a claim for fraud, a plaintiff must allege the
19 following under Rule 9(b)'s heightened pleading standard: (1) a
20 misrepresentation (i.e., false representation, concealment, or
21 nondisclosure), (2) knowledge of falsity, (3) intent to defraud,
22 (4) justifiable reliance, and (5) resulting damage. See Los
23 Angeles Mem'l Coliseum Comm'n v. Insomniac, Inc., 233 Cal. App.
24 4th 803, 831 (2015)(internal citations and quotation marks
25 omitted). A plaintiff may bring this claim under an affirmative
26 misrepresentation theory or a concealment theory. Because Hale
27 Bros. brings its fraud claim under a concealment theory, see FAC
28 ¶¶ 54-61, the Court focuses only on whether Plaintiff has stated

1 a claim under that theory.

2 To successfully state a fraud claim under a concealment
3 theory, the plaintiff must show that the defendant had a legal
4 duty to disclose facts. See Hoffman v. 162 N. Wolfe LLC, 228
5 Cal. App. 4th 1178, 1193 (2014). A plaintiff makes that showing
6 by claiming either: (1) the defendant had a fiduciary
7 relationship with the plaintiff; (2) the defendant exclusively
8 knew material facts not known to the plaintiff; (3) the
9 defendant concealed a material fact from plaintiff; or (4) the
10 defendant made partial representations, while also suppressing
11 some material facts. See Insomniac, 233 Cal. App. 4th at 831
12 (internal citations and quotation marks omitted). In short, an
13 affirmative duty to disclose concealed facts arises only from a
14 fiduciary or fiduciary-like relationship. Id. at 832.

15 But, even if the plaintiff establishes an affirmative duty
16 to disclose, plaintiff must still overcome the economic loss
17 rule. In California, a plaintiff cannot recover in tort for
18 breach of duties that merely restate contractual obligations.
19 See BNSF Ry. Co. v. San Joaquin Valley R.R. Co., No. 1:08-cv-
20 01086, 2011 WL 3328398, at *5 (E.D. Cal. Aug. 2, 2011)(internal
21 citations and quotation marks omitted). In other words, when a
22 plaintiff links its fraud claim to a party's alleged failure to
23 comply with a contractual duty, the proper claim is breach of
24 contract—not fraud. See id. (internal citation and quotation
25 marks omitted). This rule prevents contract and tort law from
26 “dissolving” into each other, maintaining the crucial
27 “distinction between commercial transactions in which economic
28 expectations are protected by commercial and contract law, and

1 transactions with individual consumers who are injured in a
2 manner traditionally addressed through tort law." See id. at *6
3 (internal citation omitted).

4 But, as with most rules, there is one exception.
5 California courts allow tort damages in contract cases where
6 tort liability is either (1) completely independent of the
7 contract; (2) arises from intentional conduct intended to harm—
8 i.e., a breach of duty causing physical injury; (3) insurance
9 contract suits involving a breach of the covenant of good faith
10 and fair dealing; (4) wrongful discharge in violation of
11 fundamental public policy; or (5) fraudulent inducement. See
12 id. This exception, though, is "narrow in scope." See id. at
13 *9 (internal citation omitted).

14 1. 50CAN

15 Plaintiff does not bring a fraud claim against 50CAN. See
16 FAC at 12 ("Fraud against Defendants, StudentsFirst and
17 StudentsFirst Institute.").

18 2. StudentsFirst

19 Plaintiff incorporates all preceding allegations into its
20 fraud claim, including breach of contract. See FAC ¶ 54.
21 Plaintiff specifies that "[StudentsFirst] intended to deceive
22 Plaintiff by failing to disclose and/or concealing from
23 Plaintiff [its] intention to merge [its] business with 50CAN,
24 transfer [its] assets to 50CAN, abandon the Premises, cease
25 payment of Rent and remove secured Collateral from the Premises
26 so as to induce Plaintiff not to draw upon the Letter of Credit
27 until after it was reduced...." Id. ¶ 56. Emphasizing that it
28 "had no way of knowing that [StudentsFirst]" had these

1 intentions, id. ¶ 57, Plaintiff maintains that it “reasonably
2 and justifiably relied on [StudentsFirst’s] deceptions and/or
3 concealment because, at the time, [StudentsFirst was], and had
4 been, in compliance with the Lease.” Id. ¶¶ 57, 59.

5 StudentsFirst argues that Plaintiff has not stated a fraud
6 claim against it because (1) Plaintiff failed to meet Rule
7 9(b)’s particularity standard, (2) StudentsFirst had no
8 affirmative duty to disclose facts to Plaintiff, and (3) even if
9 StudentsFirst did have that duty, Plaintiff still has not stated
10 a claim because Plaintiff cannot convert a contract-based
11 grievance into a tort. See SF’s MTD at 5-8. Plaintiff
12 disagrees, contending that it has satisfied Rule 9(b) and that
13 StudentsFirst had a duty to disclose those facts because they
14 were material to Plaintiff. Opp’n to SF’s MTD at 4. And
15 Plaintiff notes that whether StudentsFirst’s omissions “also
16 constitute a breach of the Lease is incidental” to that duty.
17 Id.

18 The Court agrees with StudentsFirst, but only as to its
19 last contention. Beginning with StudentsFirst’s pleading
20 argument, because Plaintiff incorporated all preceding
21 allegations into this claim (including fraudulent transfer), the
22 Court concludes that Plaintiff has met Rule 9(b)’s particularity
23 requirement, applying the same reasoning used to conclude that
24 Plaintiff satisfied Rule 9(b) for its fraudulent transfer claim.
25 See supra Part II.B.1.

26 As for whether StudentsFirst had an affirmative duty to
27 disclose facts, the Court concludes that it did. StudentsFirst
28 made partial representations to Plaintiff at the April Meeting,

1 but also made critical omissions. StudentsFirst admitted its
2 intent to cease business operations, to transfer all assets to a
3 third party, to vacate the Premises, and to dissolve. See FAC
4 ¶ 11. But StudentsFirst said nothing about its intent to also
5 remove secured Collateral and to accomplish these things after
6 the Letter of Credit reduced in half. See id. ¶¶ 11, 56-57
7 (emphasis added). So, even though StudentsFirst and Plaintiff
8 did not have a fiduciary relationship, a duty to disclose still
9 arose because StudentsFirst revealed some facts at the April
10 Meeting, but omitted others, which produced misleading half-
11 truths. That partial disclosure triggered an affirmative duty
12 to disclose. See Warner Constr. Corp. v. City of Los Angeles, 2
13 Cal. 3d 285, at 294-94 (1970)(holding that affirmative duty
14 arose because "defendant [made] representations but [did] not
15 disclose facts which materially qualify the facts disclosed").

16 The problem for Plaintiff, though, involves the economic
17 loss rule. This is not an insurance suit, and Plaintiff does
18 not allege physical injury, wrongful discharge, or fraudulent
19 inducement. So, Plaintiff's fraud claim proceeds only if it
20 alleges a duty arising under tort law independent of a breach of
21 contract. See BNSF, 2011 WL 3328398 at *6.

22 Two California cases are particularly relevant here. In
23 Robinson Helicopter Co., Inc. v. Dana Corp., the court held that
24 the economic loss rule did not bar plaintiff's fraud claims
25 because a duty arose under tort law independent of the contract
26 breach. 34 Cal. 4th 979, 991 (2004). Specifically, the
27 defendant breached the contract by providing nonconforming
28 clutches, but committed an independent tort by issuing false

1 certificates of conformance. Id. at 990-91 ("By issuing false
2 certificates of conformance, [the defendant] unquestionably made
3 affirmative representations that Robinson justifiably relied on
4 to its detriment. But for [these] misrepresentations...Robinson
5 would not have...used the nonconforming
6 clutches....[a]ccordingly, [the defendant's] tortious conduct
7 was separate from the breach itself, which involved [the
8 defendant's] provision of the nonconforming clutches.").
9 Conversely, in BNSF, the court held that the economic loss rule
10 barred Plaintiff's fraud claim because the fraudulent
11 misrepresentations were an "inseparable component" of the breach
12 of contract to pay. Id. at *9.

13 Plaintiff contends that "StudentsFirst had a duty to
14 disclose [the] information because it was material to Plaintiff;
15 whether such information may also constitute a breach of the
16 Lease is incidental to said duty." Opp'n to SF's MTD at 4.

17 This argument lacks teeth. Forgetting that the exception
18 to the economic loss rule is "narrow in scope," Plaintiff cites
19 no case law to support its argument that a breach of contract
20 that is "incidental to said duty" falls within this narrow
21 exception. And Plaintiff's FAC pokes holes in its own argument.
22 For instance, Plaintiff cites StudentsFirst's omissions to
23 support this claim and its breach of contract claim. See id.
24 ¶¶ 40, 55-58 (emphasis added). To make the overlap between
25 these claims even clearer, Plaintiff incorporates into its fraud
26 claim the allegations constituting contract breach. Id. ¶ 54.
27 And, finally, all additional facts implicate the Lease. See id.
28 ¶¶ 55, 59 (StudentsFirst "had no intention of continuing to

1 perform its obligations under the Lease"; Plaintiff "justifiably
2 relied on" StudentsFirst's concealment because "at the time,
3 [StudentsFirst was], and had been, in compliance of the Lease")
4 (emphasis added). Simply put, StudentsFirst's omissions are
5 anything but "incidental" to StudentsFirst's duty to disclose
6 information. Plaintiff has not shown that StudentsFirst's
7 omissions were separate from the breach itself, making this case
8 more comparable to BNSF than Robinson Helicopter. Plaintiff
9 cannot recast its breach of contract claim as a tort claim.

10 Dismissal under Fed. R. Civ. P. 12(b)(6) with prejudice is
11 appropriate "only if it appears beyond doubt that the plaintiff
12 can prove no set of facts in support of his claim which would
13 entitle him to relief." Navarro v. Block, 250 F.3d 729, 732
14 (9th Cir. 2001) (citations and internal quotation marks
15 omitted). As discussed above, Plaintiff cannot plead facts
16 falling within the narrow exception required to state a fraud
17 claim under a concealment theory. The Court therefore dismisses
18 Plaintiff's fraud claim with prejudice.

19 D. Fourth Claim: Civil Conspiracy

20 A civil conspiracy arises when two or more people agree to
21 a common plan or design to commit a tortious act. See Kidron v.
22 Movie Acquisition Corp., 40 Cal. App. 4th 1571, 1582 (1995). To
23 state a claim, the plaintiff must allege "(1) the formation and
24 operation of a conspiracy, (2) wrongful conduct in furtherance
25 of the conspiracy, and (3) damages arising from the wrongful
26 conduct." Id. at 1581.

27 Although "California recognizes a cause of action against
28 noncontracting parties who interfere with the performance of a

1 contract," a party cannot be held liable in tort for conspiracy
2 to interfere with its own contract. See Applied Equip. corps.
3 v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 507-08, 513 (1994)
4 (original emphasis). "One contracting party owes no general
5 tort duty to another not to interfere with the performance of
6 the contract; its duty is simply to perform the contract
7 according to its terms." Id. at 514.

8 The allegations supporting this claim apply to both
9 Defendants. Plaintiff states that Defendants "knowingly and
10 willfully conspired and agreed amongst themselves to
11 intentionally" (1) allow the Letter of Credit to reduce in half
12 before telling Plaintiff about their intent to merge; (2)
13 conceal this intent; (3) cause Plaintiff to believe its secured
14 Collateral was intact; (4) remove that secured Collateral to
15 deprive Plaintiff of its secured interest; and (5) hinder,
16 delay, and/or defraud Plaintiff in collecting its claim against
17 Defendants for breaching the Lease. See FAC ¶ 64.

18 1. StudentsFirst

19 StudentsFirst argues that Plaintiff cannot bring this claim
20 because a tort claim for interference with a contract does not
21 lie against a party to that contract. See SF's MTD at 9. Yet
22 Plaintiff maintains that it has stated a claim because it
23 alleged a conspiracy to commit a tortious act—not a conspiracy
24 to breach a contract. See Opp'n to SF's MTD at 9. Plaintiff's
25 argument is contradicted by the FAC and is without merit.

26 Plaintiff incorporates all previous allegations of its FAC
27 into this civil conspiracy claim, including breach of contract.
28 See FAC ¶ 62. But, even if Plaintiff had not incorporated that

1 claim, Plaintiff's additional allegations derive from the same
2 facts that support contract breach. Indeed, Plaintiff states
3 that Defendants conspired with each other to conceal a breach of
4 contract, to conceal their intent to breach the contract, and to
5 conceal their intent to draw from the Letter of Credit, also in
6 breach of contract. See id. ¶¶ 63-66 (citing Letter of Credit,
7 merger, transfer of assets, abandonment, removal of Collateral,
8 and refusal to pay rent). Simply put, because the facts
9 supporting Plaintiff's civil conspiracy claim are an inseparable
10 component of its breach of contract claim, Plaintiff's argument
11 fails. See supra Part II.C.2. The Court finds that Plaintiff
12 cannot state a civil conspiracy claim against StudentsFirst and
13 grants StudentsFirst's request to dismiss this claim with
14 prejudice.

15 2. 50CAN

16 Plaintiff does not dispute that conspiracy to breach a
17 contract is not a legally cognizable claim and it has conceded
18 that it has not alleged such a conspiracy. Rather, Plaintiff
19 contends it has adequately alleged the existence of conspiracy
20 to commit a civil tort by 50CAN. Opp'n to 50CAN MTD at 7-8.

21 No matter how much Plaintiff wants this Court to believe
22 that it has alleged a conspiracy claim to commit a tort,
23 stripped to its core, the conspiracy claim derives from
24 Plaintiff's breach of contract claim. See supra Part II.C.2.
25 None of the allegations supporting this claim give rise to a
26 claim of civil conspiracy. Given that the Court has dismissed
27 Plaintiff's fraud claim against StudentsFirst there is no basis
28 for this claim against 50CAN. The Court grants 50CAN's request

1 to dismiss this claim with prejudice.

2 E. Fifth Claim: Common Counts

3 The common count is a general pleading seeking recovery of
4 money without specifying the nature of the claim. See Title
5 Ins. Co. of Minnesota v. State Bd. of Equalization, 4 Cal. 4th
6 715, 731 (1992)(internal citations and quotation marks omitted).
7 It is not a specific cause of action, but rather "a simplified
8 form of pleading normally used to aver the existence of various
9 forms of monetary indebtedness." McBride v. Boughton, 123 Cal.
10 App. 4th 379, 394 (2004)(internal citations omitted). To state
11 a claim, a plaintiff must allege "(1) a statement of
12 indebtedness in certain sum, (2) consideration, i.e., goods
13 sold, work done, etc., and (3) nonpayment. Farmers Ins. Exch.
14 v. Zerlin, 53 Cal. App. 4th 445, 460 (1997)(internal citation
15 omitted).

16 The allegations supporting this claim apply to both
17 Defendants. Once again, Plaintiff incorporates all previous
18 allegations into its common counts claim, including breach of
19 contract. See FAC ¶ 69. Plaintiff adds that "[w]ithin the last
20 year, [StudentsFirst], and by way of merger and assumption of
21 all liabilities and obligations, 50CAN, became indebted to
22 Plaintiff in an amount subject to identification, but in an
23 amount no less than \$877,090.88, as a result of [its] lease of
24 the Premises and the services provided by Plaintiff in
25 accordance therewith." Id. ¶ 70. Plaintiff seeks compensatory
26 damages, interest, costs of suit, and any other relief the Court
27 deems proper. See id. ¶ 72.

28 ///

1 1. StudentsFirst

2 StudentsFirst argues that Plaintiff has not stated a common
3 counts claim because Plaintiff improperly restyles it as a
4 breach of contract claim. SF's MTD at 9. StudentsFirst adds
5 that Plaintiff has neither alleged a debt of a sum certain nor
6 identified what consideration Plaintiff gave to StudentsFirst
7 besides the Lease. Id. at 10. But Plaintiff challenges these
8 arguments, maintaining that it has alleged indebtedness in a
9 certain sum. Opp'n to SF's MTD at 12 ("no less than
10 \$877,090.88"). Plaintiff also states that its services, as
11 required under the Lease, satisfy the indebtedness element. Id.
12 at 12-13. And, finally, Plaintiff notes that StudentsFirst
13 never sought to dismiss the breach of contract claim, so the
14 common count claim "must survive." Id. at 13.

15 The Court agrees with StudentsFirst that this claim cannot
16 survive but for slightly different reasons. "[W]hen the common
17 count is based on an express contract, the element of
18 indebtedness is not satisfied where the plaintiff seeks damages
19 for breach...." Mike Nelson Co. v. Hathaway, No. F 05-0208,
20 2005 WL 2179310, at *4-5 (E.D. Cal. Sept. 8, 2005). Here,
21 Plaintiff centers its common counts claim on express contracts—
22 the Lease and the Parking Agreement—and Plaintiff seeks
23 compensatory damages. See FAC ¶¶ 69-72. Also, reading the
24 breach of contract allegations and the common count allegations
25 together, the common count allegations in fact seek damages for
26 breach. See Hathaway, 2005 WL 2179310 at *5. Indeed, once
27 again, Plaintiff incorporates into its common counts claim the
28 allegations supporting contract breach. See FAC ¶ 69.

1 And, finally, that StudentsFirst did not move to dismiss
2 the breach of contract does not help Plaintiff's argument.
3 Because Plaintiff's common counts claim is duplicative of its
4 surviving breach of contract claim, the common counts claim
5 fails as a matter of law. See Hathaway, 2005 WL 2179310 at *4-
6 5. The Court grants StudentsFirst's request to dismiss
7 Plaintiff's common counts claim with prejudice.

8 2. 50CAN

9 Having previously held that Plaintiff has stated a breach
10 of contract claim against 50CAN, see supra Part II.A.2, the
11 Court concludes that the same reasons barring Plaintiff's common
12 counts claim against StudentsFirst apply here. See supra Part
13 II.E.1. Plaintiff cannot state a common counts claim against
14 50CAN, so the Court dismisses it with prejudice.

15 F. Sixth Claim: Declaratory Relief

16 The Declaratory Judgment Act allows a district court to
17 "declare the rights and other legal relations of any party
18 seeking such declaration, whether or not further relief is or
19 could be sought," but only "[i]n a case of actual controversy."
20 28 U.S.C. § 2201(a). This remedy is a form of relief—not an
21 independent claim. See Lane v. Vitek Real Estate Indus. Grp.,
22 713 F. Supp. 2d 1092, 1104 (E.D. Cal. 2010). Designed to
23 resolve uncertainties or disputes that could result in future
24 litigation, declaratory relief operates prospectively and should
25 not redress past wrongs. See United States v. Washington, 759
26 F.2d 1353, 1356-57 (9th Cir. 1985) (en banc).

27 Specifically, declaratory relief is appropriate when the
28 judgment will (1) "serve a useful purpose in clarifying and

1 settling the legal relations in issue"; and (2) "when it will
2 terminate and afford relief from the uncertainty, insecurity,
3 and controversy giving rise to the proceeding." McGraw-Edison
4 Co. v. Preformed Line Prods. Co., 362 F.2d 339, 342 (9th Cir.
5 1966). Stated differently, this remedy enables parties to shape
6 their conduct to avoid a breach. StreamCast Networks Inc. v.
7 Ibis LLC, No. CV 05-04239, 2006 WL 5720345, at *3 (C.D. Cal. May
8 2, 2006). Courts should grant declaratory relief to declare
9 rights rather than to execute them. See id. (internal citations
10 and quotation marks omitted).

11 The allegations supporting this claim apply to both
12 Defendants. Plaintiff incorporates all previous allegations
13 into its request for declaratory relief. See FAC ¶ 73.
14 Plaintiff explains that "[a] dispute has arisen and now exists
15 between the parties to this action as to their rights,
16 responsibilities, and obligations under the Lease." Id. ¶ 74.
17 Plaintiff states that "it has performed all obligations required
18 of it under the Lease," but that Defendants argue that "they are
19 excused from any further performance of the Lease." Id. So,
20 Plaintiff "seeks a judicial determination" as to the parties'
21 rights and obligations. Id.

22 1. StudentsFirst

23 StudentsFirst contends that declaratory relief is
24 inappropriate because Plaintiff centers its FAC on
25 StudentsFirst's alleged breach of contract—a past act. See SF's
26 MTD at 11 (emphasis added). Yet Plaintiff argues that the case
27 is ripe for judicial determination because Plaintiff "reasonably
28 expects" that StudentsFirst will raise an affirmative defense

1 that it is excused from performing under the Lease. Opp'n to
2 SF's MTD at 14.

3 StudentsFirst has the stronger argument. An adequate
4 remedy already exists under Plaintiff's breach of contract
5 claim, making declaratory relief duplicative and unnecessary
6 here. See Ellena v. Standard Ins. Co., No. 12-5401 SC, 2013 WL
7 3200614, at *3 (N.D. Cal. June 24, 2013) (concluding declaratory
8 relief claim duplicative of breach of contract claim because
9 deciding legality of Policy's language already at issue in
10 breach of contract claim); Valle v. JP Morgan Chase Bank, N.A.,
11 No. 11-cv-2453, 2012 WL 1205635, at *10 (S.D. Cal. Apr. 11,
12 2012)(holding that claim for declaratory relief fails because
13 based on same allegations supporting another cause of action).
14 The Court grants StudentsFirst's request to dismiss with
15 prejudice Plaintiff's claim for declaratory relief.

16 2. 50CAN

17 Having previously held that Plaintiff has stated a breach
18 of contract claim against 50CAN, see supra Part II.A.2, the
19 Court also grants 50CAN's request to dismiss with prejudice
20 Plaintiff's claim for declaratory relief for the same reasons
21 the claim fails against StudentsFirst. See supra Part II.F.1.

22 G. Seventh Claim: California Business & Professions Code
23 Section 17200

24 California law prohibits "unfair competition," which
25 includes "any unlawful, unfair or fraudulent business act or
26 practice." CAL. BUS. & PROF. CODE § 17200 (West 2016) ("UCL"). The
27 statute's scope is broad, and it governs anti-competitive
28 business practices as well as injuries to consumers. See Cel-

1 Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th
2 163, 180 (1999)(internal citations and quotation marks omitted).
3 A court may deem a practice unfair even if it is not illegal.
4 See id.

5 Enacted to protect both consumers and competitors by
6 promoting fair competition in commercial markets for goods and
7 services, the UCL is a meaningful consumer protection tool. See
8 Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1152
9 (2003). It "provides an equitable means through which both
10 public prosecutors and private individuals can bring suit to
11 unfair business practices and restore money or property to
12 victims of these practices." Id. at 1150. To state a claim, a
13 plaintiff "need only show that members of the public are likely
14 to be deceived." Linear Tech. Corp. v. Applied Materials, Inc.,
15 152 Cal. App. 4th 115, 133 (2007)(internal citations and
16 quotation marks omitted).

17 But corporate plaintiffs face an uphill battle. When a UCL
18 claim is based on a contract that does not involve the public or
19 individual consumers, a corporate plaintiff cannot use the
20 statute for the relief it seeks. See id. at 135.

21 The allegations supporting this claim apply to both
22 Defendants. After incorporating all previous allegations in this
23 claim (including those constituting contract breach), Plaintiff
24 states that "Defendants have engaged in 'unlawful,' 'unfair,'
25 and/or 'fraudulent' business acts or practices in an effort to
26 defraud their creditors, including, without limitation,
27 Plaintiff." FAC ¶ 78. Plaintiff specifies that Defendants have
28 "deceived Plaintiff, removed property and transferred substantial

1 assets in an effort to avoid and evade payments to Plaintiff,
2 and/or hinder or delay Plaintiff's ability to collect those sums
3 due and owing to it." Id.

4 1. StudentsFirst

5 Characterizing the Lease as a breach of a commercial
6 contract with no adverse effects on consumer welfare,
7 StudentsFirst argues the UCL does not apply here. See SF's MTD
8 at 9. Plaintiff disagrees, contending that its UCL claim is
9 based on its fraud, fraudulent transfer, and civil conspiracy
10 claims—not its breach of contract claim. Opp'n to SF's MTD at
11 12. In response, StudentsFirst reiterates that, even if
12 Plaintiff's tort claims survive, Plaintiff still has not alleged
13 that this private dispute among corporate actors raises issues
14 that fall within the UCL's reach. Reply, ECF No. 17, at 4 ("SF's
15 Reply").

16 The Court agrees with StudentsFirst. Notwithstanding
17 Plaintiff's argument that its UCL claim is not based on the
18 Lease, at its core, this case involves a dispute about the
19 economic relationship between commercial parties. Plaintiff's
20 incorporating here allegations supporting its breach of contract
21 claim augments this conclusion. See FAC ¶ 77. See also Dollar
22 Tree Stores Inc. v. Toyama Partners LLC, 875 F. Supp. 2d 1058,
23 1083 (N.D. Cal. 2012) (holding that plaintiff failed to state a
24 UCL claim because plaintiff alleged that that claim was based on
25 its breach of contract claim). Additionally, the Lease defined
26 only Plaintiff and StudentsFirst's relationship—it did not
27 implicate potential other creditors or the general public. See
28 generally Exh. A. This too shows that Plaintiff cannot state a

1 UCL claim. See In re ConocoPhillips, No. 09-cv-02040, 2011 WL
2 1399783, at *3 (N.D. Cal. Apr. 13, 2011)(holding plaintiff cannot
3 assert UCL claim because parties' relationship defined by their
4 contractual arrangement and did not involve the general public or
5 individual consumers who were also parties to the contract).

6 In sum, the Court finds that Plaintiff cannot state a UCL
7 claim against StudentsFirst because § 17200 does not protect
8 commercial disputes between contracting parties that do not
9 involve the general public or individual consumers. The Court
10 grants StudentsFirst's request to dismiss this claim with
11 prejudice.

12 2. 50CAN

13 The Court also finds that Plaintiff fails to state a UCL
14 claim against 50CAN for the same reasons Plaintiff fails to state
15 this claim against StudentsFirst. See supra Part II.G.1. The
16 Court grants 50CAN's request to dismiss the UCL claim with
17 prejudice.

18
19 III. ORDER

20 For the reasons set forth above, the Court GRANTS in part
21 and DENIES in part Defendants' Motions to Dismiss as follows:

22 1. Defendant 50CAN's motion to dismiss the breach of
23 contract claim is DENIED;

24 2. Defendants' motions to dismiss the fraudulent transfer
25 claim are DENIED;

26 3. Defendants StudentsFirst's motion to dismiss the fraud
27 claim is GRANTED WITH PREJUDICE;

28 4. Defendants' motions to dismiss the civil conspiracy

1 claim are GRANTED WITH PREJUDICE;

2 5. Defendants' motions to dismiss the common counts claim
3 are GRANTED WITH PREJUDICE;

4 6. Defendants' motions to dismiss the claim for
5 declaratory relief are GRANTED WITH PREJUDICE; and

6 7. Defendants' motions to dismiss the UCL claim are
7 GRANTED WITH PREJUDICE.

8 IT IS SO ORDERED.

9 Dated: February 13, 2017

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11 
12 JOHN A. MENDEZ,
13 UNITED STATES DISTRICT JUDGE
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