

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOLLAR TREE STORES INC.,

No. C 10-325 SI

Plaintiff,

**ORDER GRANTING COMERICA'S
MOTION TO DISMISS THE AMENDED
COMPLAINT**

v.

TOYAMA PARTNERS, LLC and COMERICA
BANK,

Defendants.

Now before the Court is Comerica Bank's motion to dismiss the amended complaint. For the reasons set forth below, the Court GRANTS the motion.

BACKGROUND

From approximately August 25, 2003 through September 15, 2008, plaintiff Dollar Tree Stores, Inc. ("Dollar Tree"), operated a Dollar Tree Store in the Mowry Crossing Shopping Center in Newark, California. Plaintiff ceased operations due to a construction renovation project that began in 2008; construction remains incomplete and Dollar Tree is unable to resume operations at the Mowry Crossing location. Plaintiff alleges contract and tort claims against both the landlord, Toyama Partners, LLC ("Toyama"), and the construction lender Comerica Bank ("Comerica").

The following facts are drawn from plaintiff's amended complaint, as well as copies of the contracts attached to the complaint.¹ By a lease dated June 9, 2003 (the "Original Lease"),

¹ Although generally "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion," it may consider documents properly submitted with the complaint and any documents not attached to the complaint if their authenticity is undisputed and the complaint

1 Pacific/DSL No. 2, Toyama’s predecessor-in-interest, leased space in the shopping center to Dollar
2 Tree. The Original Lease provides that the Dollar Tree store was 17,625 square feet and the dimensions
3 were “approximately 110 linear feet of frontage by 160 lineal feet of depth.” FAC ¶ 48, Original Lease
4 ¶ 1(b) (FAC Ex. 1). The commencement date of the Original Lease was August 24, 2003. FAC ¶ 49.
5 The Original Lease had an initial term of 5 years, and Dollar Tree had the right to extend the term of
6 the Original Lease for three additional 5 year terms, for total possible term of 20 years. *Id.* ¶¶ 49-50.
7 Paragraph T of the Original Lease contains a covenant of quiet enjoyment, and Paragraph G of the
8 Original Lease provides that Dollar Tree has the right to use common areas located in the shopping
9 center. *Id.* ¶¶ 51-52. Dollar Tree alleges that the retail variety store it operated under the Original Lease
10 was highly profitable, with annual sales approaching \$3 million a year. *Id.* ¶ 55.

11 According to the FAC, from 2005 through the first several months of 2007, Toyama engaged
12 in unsuccessful negotiations with Dollar Tree to either terminate Dollar Tree’s lease or relocate its store
13 in connection with a plan to totally reconstruct the shopping center. *Id.* ¶ 2. The FAC alleges that
14 although Toyama never reached an agreement with Dollar Tree in 2007, Toyama and its lender,
15 Comerica, “forged ahead” with the reconstruction project. *Id.* ¶ 3. The \$39 million reconstruction
16 project was financed by Comerica through a Building and Loan Agreement (“BLA”) dated August 21,
17 2007. *Id.* ¶ 7. In the BLA, Toyama represented and warranted to Comerica that “[t]he consummation
18 of the transaction hereby contemplated and performance of this Agreement and the other Loan
19 Documents . . . will not result in any breach of, or constitute a default under any . . . lease . . . or other
20 instrument to which the Borrower . . . is a party.” BLA § 7.9 (FAC Ex. 13). Toyama further represented
21 and warranted that “[t]he Major Leases . . . are in full force and effect . . . and all conditions to the
22 effectiveness or continuing effectiveness therefore required to be satisfied as of the date hereof have
23 been satisfied.” The Original Lease is a “Major Lease” under the BLA. BLA §§ 1.28, 7.15.

24 _____
25 necessarily relies on them. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (internal
26 quotation marks and citation omitted). Because neither party has questioned the authenticity of the
27 exhibits submitted with the motion, opposition and reply briefs (the BLA, SNDA, Original Lease,
28 Amended Lease) and the complaint relies on these documents, the Court may consider their contents
in deciding this matter.

1 possession of the Original Premises. *Id.* ¶ 118. As part of settlement negotiations stemming from this
2 dispute, on July 18, 2008, Toyama and Dollar entered into an Amended and Restated Lease wherein
3 Dollar agreed to vacate the premises within 60 days, after which time Toyama would provide a
4 replacement premises in the newly constructed center. *Id.* ¶ 123, Ex. 18 (the “Amended and Restated
5 Lease”). The Amended Lease provides that “[a]s of the date hereof, Landlord acknowledges that to its
6 knowledge Tenant is not in default under the Existing Lease and Tenant acknowledges that Landlord
7 is not in default under the Existing Lease.” Amended and Restated Lease § W. The Amended and
8 Restated Lease also provides that Toyama agrees to build new premises for Dollar Tree in the shopping
9 center (“Replacement Premises”); Dollar Tree agrees to vacate the Original Premises within 60 days
10 of the effective date of the New Lease; and Toyama agrees to pay a closing fee of \$500,000 to Dollar
11 Tree. FAC ¶ 131. “Comerica approved funding for the \$500,000 closing fee as part of the BLA loan,
12 [and] Comerica financed the \$500,000 placed into escrow under the Amended and Restated Lease.”
13 *Id.* ¶¶ 132-33. Dollar Tree vacated the Original Premises on September 15, 2008. *Id.* ¶ 139.

14 Mervyn’s LLC, was a major lessee in the Mowry Center with a twenty-year lease term; the
15 parties anticipated Mervyn’s would continue leasing in the newly renovated center. Under the Building
16 and Loan Agreement, both Dollar Tree and Mervyn’s were considered to be major leases, and the BLA
17 expressly stated that “if Mervyn’s exercises its right to terminate its lease with [Toyama]” it would
18 constitute an event of default under the loan. BLA, Exs. D, E ¶ 5. On July 29, 2008, Mervyn’s filed
19 for bankruptcy. The Mervyn’s bankruptcy constituted an event of default under Mervyn’s lease with
20 Toyama and under the BLA. FAC ¶¶ 138, 140, 144, Ex. 12 § 15.1(c) (Mervyn’s Lease); BLA §§ 1.28,
21 7.15, 9.7, 10.1. In October 2008, Mervyn’s announced its intent to liquidate and to terminate its lease
22 with Toyama. *See* Comerica’s Request for Judicial Notice, Ex. 1 (Order Approving Agency Agreement,
23 Store Closing Sales, and Related Relief, dated Oct. 30, 2008, *In re Mervyn’s Holdings, LLC et al.*,
24 United States Bankruptcy Court, District of Delaware, Case No. 08-11586 (KG)); *see also* Compl. ¶¶
25 37-38.

26 The FAC alleges that “[i]n November 2008, without notice to Dollar Tree and prior to the
27
28

1 Mervyn’s lease actually being terminated, Comerica ceased funding the reconstruction of the Shopping
2 Center. The Mervyn’s lease was terminated by the bankruptcy court’s order issued on December 23,
3 2008.” FAC ¶ 34. “In November 2008, Comerica explained to Toyama that it was ceasing to fund the
4 loan because Mervyn’s filed for bankruptcy, and the bankruptcy consisted an event of default under
5 Mervyn’s lease. Although this alleged event of default existed in July 2008, Comerica failed to advise
6 Dollar Tree of this material fact before Dollar Tree vacated the leased premises in September 2008.”
7 *Id.* ¶ 35. The shopping center remains incomplete and Toyama has not provided Dollar with a
8 replacement store. *Id.* ¶ 36.

9 In an order filed April 26, 2010, the Court granted Comerica’s motion to dismiss all of the claims
10 alleged against it in the original complaint.² Those claims were: (1) tortious interference with the
11 original lease and amended and restated lease; (2) tortious interference with prospective economic
12 advantage; (3) breach of the Subordination, Non-Disturbance and Attornment Agreement (SNDA); (4)
13 breach of implied covenant of good faith and fair dealing in the SNDA; (5) lender liability/negligence;
14 and (6) unfair competition. On May 10, 2010, Dollar Tree filed an amended complaint alleging four
15 claims against Comerica: (1) breach of the SNDA; (2) breach of implied covenant of good faith and fair
16 dealing in the SNDA; (3) tortious interference with the Original Lease; and (4) unfair competition.
17 Comerica has moved to dismiss these claims for failure to state a claim.

18 19 LEGAL STANDARD

20 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it
21 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss,
22 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
23 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff
24 to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.”
25 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading

26
27 ² Toyama answered the original complaint.

1 of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative
2 level.” *Twombly*, 550 U.S. at 544, 555.

3 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court
4 must assume that the plaintiff’s allegations are true and must draw all reasonable inferences in the
5 plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the
6 court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions
7 of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).
8 Moreover, even in the face of factual allegations that appear unlikely, “so long as the plaintiff alleges
9 facts to support a theory that is not facially implausible, the court’s skepticism is best reserved for later
10 stages of the proceedings when the plaintiff’s case can be rejected on evidentiary grounds.” *Id.* at 1057.

11 If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The
12 Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request
13 to amend the pleading was made, unless it determines that the pleading could not possibly be cured by
14 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal
15 quotation marks omitted).

17 DISCUSSION

18 I. Breach of the SNDA

19 Dollar Tree alleges that Comerica breached the SNDA “by disturbing, diminishing and
20 interfering with Dollar Tree’s possession and occupancy” of the Original Premises and the Replacement
21 Premises. The FAC cites paragraph 3 of the SNDA, which provides:

22 Tenant Not to be Disturbed: So long as Tenant is not in default (beyond any period under
23 the Lease given to Tenant to cure such default) in the payment of rent to be paid under
24 the Lease or in the performance of any of the terms, covenants or conditions of the Lease
25 on Tenant’s part to be performed, Tenant’s possession of the Premises under all of the
26 terms, covenants and conditions of the Lease and any extensions or renewals thereof
27 which may be affected in accordance with any renewal rights therefore in the Lease,
28 shall not be diminished or interfered with by Lender, and Tenant’s occupancy of the
Premises under all of the terms, covenants and conditions of the Lease shall not be
disturbed by Lender during the terms of the Lease or any such extensions or renewals
thereof.

1 The FAC alleges that “based upon, *inter alia*, Toyama’s email communication to Comerica,
2 Comerica’s knowledge and/or possession of the site plans for redevelopment of the Shopping Center,
3 and the contents of the Building Loan Disbursement Plan contained in Exhibit B to the BLA, Comerica
4 was fully aware, or at the very least was substantially certain, that when Comerica executed both the
5 SNDA (which contained terms by which Comerica expressly committed not to disturb Dollar Tree’s
6 tenancy) and BLA and subsequently disbursed funds for the construction of Mervyn’s foundation and
7 related site work and the reconstruction of the Shopping Center, that Toyama would materially interfere
8 with and disturb (i) Dollar Tree’s occupancy and possession of its store by requiring Dollar Tree to
9 vacate its leased premises and either relocate to the then-proposed inferiorly located ‘Major 3’ space,
10 relocate to some other space in the reconstructed Shopping Center, or close its store at the Shopping
11 Center, (ii) Dollar Tree’s right to operate a 17,635 square foot store with 110 linear feet of frontage by
12 160 lineal feet of depth, and (iii) Dollar Tree’s right to have unfettered access to all common areas,
13 including the parking lots, delivery routes, and site lines to its premises from Mowry Avenue.” FAC
14 ¶ 168. The FAC also alleges that Comerica knew that ceasing to loan money to Toyama under the BLA
15 would halt Toyama’s substantial redevelopment construction activities and materially interfere with
16 Dollar Tree’s right to possess the Replacement Premises under the Amended and Restated Lease by
17 June 15, 2009. *Id.* ¶ 170.

18 Comerica contends that Dollar Tree cannot state a claim for breach of the SNDA with respect
19 to either the Original Lease and its Original Premises, or the Amended and Restated Lease and the
20 Replacement Premises.

21
22 **A. Original Lease and Original Premises**

23 Comerica contends that Dollar Tree cannot state a claim for breach of the SNDA based upon
24 alleged interference with Dollar Tree’s rights under the Original Lease for a number of reasons. First,
25 Comerica argues that Dollar Tree’s allegations are belied by the terms of the BLA. Under Section 7.9
26 of the BLA, Toyama expressly warranted that the loan would “not result in any breach of, or constitute
27
28

1 a default under any . . . lease” to which Toyama was bound. In addition, all disbursements under the
2 BLA were conditioned upon Toyama being in compliance with its covenants, and Toyama agreed that
3 the representations made in Section 7 were true as of the date of the disbursement. BLA §§ 5.2.5,
4 5.2.11. Thus, Comerica argues, because the BLA expressly conditioned the loan on Toyama’s
5 commitment to ensure that there were no breaches of the leases with its tenants, it is not plausible that
6 Comerica knew that its act of funding the loan would result in a breach of the Original Lease.

7 Second, Comerica argues that the breaches alleged in the FAC were allegedly committed by
8 Toyama or third parties involved in the construction, and there are no allegations that Toyama or the
9 third parties were Comerica’s agents or under Comerica’s direction or control. Paragraph 112 of the
10 FAC alleges the acts which Dollar Tree claims breached the Original Lease and interfered with its
11 occupancy of the Original Premises:

- 12 112. In violation of the Original Lease and SNDA, Toyama, with Comerica’s
13 knowledge and consent, implemented the redevelopment of the Shopping Center,
14 by, *inter alia*, causing the following interference and disturbance to occur:
- 15 (a) Toyama placed a chain link fence across Dollar Tree’s storefront,
16 restricting access to the store, creating the appearance that Dollar Tree
17 was closed, and causing patrons to believe that the area around the store
18 was potentially hazardous. . . .
 - 19 (b) Toyama placed a construction trailer, heavy construction equipment, and
20 construction vehicles in front of Dollar Tree’s store, which impaired the
21 visibility of the store, unreasonably restricted customer parking and
22 general access to the premises, and created a general nuisance for Dollar
23 Tree and its customers. . . .
 - 24 (c) Toyama restricted significant areas of the common parking lot in front of
25 Dollar Tree’s store. These restrictions, along with the chain link fence
26 and other obstructions mentioned in subparagraph (b), forced customers
27 to walk considerable distances to and from their cars, and caused other
28 customers to stop shopping at Dollar Tree altogether.
 - (d) Toyama severely interfered with merchandise deliveries to Dollar Tree
by blocking the intended access to the delivery door and requiring
delivery drivers to back up to the door from a busy street. Dollar Tree
employees were required to direct traffic in both directions while the
driver backed the truck up to the door, and one of the more inexperienced
drivers was unable to gain access at all, requiring the deliveries to be re-
routed with a more experienced driver.

- 1 (e) Toyama removed Dollar Tree’s pylon sign at the Shopping Center and
2 otherwise interfered with Dollar Tree’s visibility at the Shopping Center.
3 Toyama’s removal of Dollar Tree’s pylon sign made Dollar Tree’s store
4 far less visible to passing motorists and created a false impression that
5 Dollar Tree was closed. Indeed, Dollar Tree was forced to erect banner
6 signs on the outside of the store stating that Dollar Tree was open during
7 the construction. This gave Dollar Tree an unprofessional appearance
8 and adversely impacted its brand image. . . .
- 9 (f) Toyama generally interfered with Dollar Tree’s right to quiet enjoyment
10 of the leased premises through, *inter alia*, construction noise, excavation
11 of parking lots, restricting access to common areas, and creating dust and
12 debris.

13 FAC ¶ 112 (a)-(f).

14 Comerica argues that Section 3 of the SNDA simply provides that Dollar Tree’s possession of
15 the Premises identified in Exhibit A to the Original Lease shall not be “diminished or interfered with
16 by Lender” and that Dollar Tree’s occupancy under the Original Lease shall not be disturbed by Lender.
17 Comerica contends that Dollar Tree has not and cannot allege that *Comerica* interfered with Dollar
18 Tree’s occupancy of the Original Premises because Comerica merely lent money and nothing more.
19 Comerica argues that nowhere in the SNDA does Comerica agree to become liable for the acts of
20 Toyama as landlord, or to act as a guarantor or surety of Toyama or any third party, and yet this is the
21 construction of the SNDA that Dollar Tree urges.

22 Finally, and perhaps most importantly, Comerica contends that Dollar Tree’s claim of breach
23 is belied by Dollar Tree’s express acknowledgment in the Amended and Restated Lease that “Landlord
24 is not in default under the Existing Lease.” Amended and Restated Lease § W. Comerica argues that
25 if Toyama was not in default under the Original Lease, Comerica, which acted solely as a lender, cannot
26 be found to have interfered with Dollar Tree’s rights under the Original Lease. Comerica notes that the
27 Original Lease contains a covenant of quiet enjoyment of the Premises, and Comerica argues that Dollar
28 Tree’s acknowledgment that Toyama was not in default under the Original Lease trumps its current

1 allegations that Comerica breached the SNDA by virtue of Toyama’s purported interference with Dollar
2 Tree’s occupancy and possession of the Original Premises.³

3 Dollar Tree argues, and the FAC alleges, that Comerica breached Paragraph 3 of the SNDA by
4 approving and financing the reconstruction, which directly resulted in all of the interferences alleged
5 in Paragraph 112 of the FAC. Dollar Tree argues that given the significant alterations planned for
6 Dollar Tree’s premises, including the removal of walls and the front facade, it was physically impossible
7 for Toyoma and Comerica to complete the work without displacing Dollar Tree and forcing Dollar Tree
8 to relocate. Dollar Tree argues that the fact that Dollar Tree would be forced to vacate is evident from
9 Toyoma’s March 7, 2007 email to Comerica stating “we are keeping Dollar Tree and relocating them
10 to a new building” and the BLA, which shows Dollar Tree being relocated in a new 15,000 square foot
11 store identified as “Major 3.” Dollar Tree argues that “[t]he only way that Toyoma would avoid
12 disturbing Dollar Tree’s lease would be to forego reconstruction of the Shopping Center in accordance
13 with the plans approved by Comerica.” Opp’n at 14 n.6. According to Dollar Tree, Comerica
14 immediately breached the SNDA by executing the BLA and disbursing funds because Comerica knew
15 that the renovation project contemplated moving Dollar Tree into a different premises.

16 The Court concludes that Dollar Tree has not stated a claim against Comerica for breach of the
17 SNDA based upon an interference with Dollar’s Tree’s Original Lease and Original Premises. As
18 detailed in Paragraph 112 of the FAC, all of the acts that Dollar Tree alleges interfered with its Original
19 Lease were committed by Toyoma or third parties in connection with the reconstruction. The only
20 alleged basis for holding Comerica liable for a breach of the SNDA is Comerica’s financing of the
21 renovation project. Dollar Tree alleges that Comerica can be held liable because “[w]here a bank has
22

23 ³ Comerica also argues that Dollar Tree voluntarily vacated the Original Premises, and thus
24 Dollar Tree cannot claim that Comerica breached the Original Lease by “forcing” it to vacate the
25 Original Premises. Comerica cites a number of paragraphs in the FAC alleging that Comerica “forced”
26 Dollar Tree to vacate the Original Premises. In response, Dollar Tree asserts that “Dollar Tree’s
27 decision to execute the Amended and Restated Lease has no relevance to whether the disturbances that
28 preceded that decision breached the [SNDA].” Opp’n at 10:4-5. However, to the extent that Dollar Tree
made admissions in the Amended and Restated Lease that contradict its claim that Comerica breached
the SNDA with respect to the Original Lease and the Original Premises, the admissions in the Amended
and Restated Lease control.

1 full knowledge that a shopping center is going to be reconfigured . . . and/or tenants are going to be
2 displaced, the interference described in [Paragraph 112] is consistent with the type of interference that
3 a bank would reasonably expect to occur when it is loaning money to a landlord to fund a \$39 million
4 reconstruction project. Given that such interference was substantially certain to occur in light of the
5 nature and scope of the project, Comerica was more interested in collecting its \$500,000 in origination
6 and other future fees than in honoring its unconditional obligation not to disturb Dollar Tree’s tenancy,
7 as contained in the negotiated SNDA.” FAC ¶ 113. However, as stated in the BLA, Comerica’s
8 execution of the BLA and agreement to lend Toyama money for the reconstruction project was expressly
9 conditioned upon Toyama’s representations and warranties that there would be no breach of any leases,
10 including Dollar Tree’s lease. Dollar Tree places great weight on the FAC’s allegations that Comerica
11 knew that Dollar Tree would be relocated, and thus, Dollar Tree argues, Comerica knew that funding
12 the renovation project would cause a breach of the Original Lease. However, in light of the express
13 warranties in the BLA that Toyama would *not* breach the Original Lease, it was not reasonably certain
14 to Comerica that merely lending money to finance the renovation project would cause a breach in Dollar
15 Tree’s Original Lease. To the contrary, the BLA required Toyama to reach agreement with Dollar Tree
16 so that Toyama would not be in default under the Original Lease. It was not reasonably certain that
17 Toyama would fail to reach an agreement with Dollar Tree so as to avoid a breach, and in view of the
18 promises made by Toyama in the BLA, it is not plausible that Comerica’s acts would result in a breach
19 of the Original Lease.⁴

20
21 ⁴ Dollar Tree filed a sur-reply with “phased plans” for Toyama’s reconstruction of the Shopping
22 Center. Dollar Tree asserts that these plans, which provide for the demolition of the old Dollar Tree
23 store in “phase 5,” are evidence that Comerica was fully aware, or at least it was substantially certain,
24 that when it executed contracts with Dollar Tree and Toyama and approved the funding of the
25 reconstruction, that such reconstruction would breach the SNDA between Comerica and Dollar Tree
26 and tortiously interfere with Dollar Tree’s right to quiet enjoyment. While Comerica objects to the
27 admissibility of these phase plans, Comerica also asserts that these documents do not provide support
28 for Dollar Tree’s allegations. Comerica argues that the plans show that Toyama contemplated
construction plans specifically intended not to interfere with Dollar Tree’s possession of the Original
Premises, and notes, *inter alia*, that phase 2 was to “install temporary services for Dollar Tree”; phase
3 contemplated no demolition of Dollar Tree’s Original Premises; and that phase 5 called first for
construction of Dollar Tree’s replacement premises, then for relocating Dollar Tree, and then for
demolition of the Original Premises.

The Court finds that even if these plans are considered in connection with the instant motion to

1 Further, in neither the SNDA nor the BLA did Comerica agree to become liable for the acts of
2 Toyama as landlord, or to act as a guarantor or a surety of Toyoma or any other third party. Indeed,
3 Section 5(b) of the SNDA expressly states that “[i]f Lender should succeed to the interest of Landlord
4 under the Lease, Lender shall not be (I), liable for any act or omission of any prior landlord”
5 SNDA § 5(b). As Comerica argues, Dollar Tree is essentially trying to hold Comerica liable for the
6 landlord’s alleged breaches of the lease, while under the SNDA Comerica could not be held liable for
7 Toyama’s acts, even if Comerica succeeded to Toyama’s interests as owner of the shopping center.

8 The Court also finds that Dollar Tree’s claim for breach of the SNDA with regard to the Original
9 Lease is inconsistent with and undermined by its express acknowledgment in the Amended and Restated
10 Lease that “[a]s of the date hereof . . . Tenant acknowledges that Landlord is not in default under the
11 Existing Lease.” Dollar Tree argues that this statement should be disregarded because it is a “standard
12 term in an amended lease” and, in any event, Toyama’s failure to construct the Replacement Premises
13 constitutes a subsequent breach and/or failure of consideration which would authorize Dollar Tree to
14 rescind the Amended and Restated Lease. However, as Dollar Tree acknowledged at the hearing, Dollar
15 Tree has not in fact rescinded, and has retained the \$500,000 closing fee funded by Comerica. More
16 importantly, Dollar Tree has affirmed the Amended and Restated Lease and sued for its breach, basing
17 its measure of damages against Comerica and Toyama on the Amended and Restated Lease’s liquidated
18 damages clause. *See* FAC ¶¶ 135, 154-55, 157, 160-62, 199, 201. “An action for rescission is based
19 on the disaffirmance of the contract and an action for damages for breach of contract is based on its
20 affirmance.” *Akin v. Certain Underwriters at Lloyd’s London*, 140 Cal. App. 4th 291, 296 (2006).

21 Dollar Tree also contends that because Comerica is not a party to the Amended and Restated
22 Lease, Comerica lacks standing to assert the alleged admission. However, the cases that Dollar Tree
23 cites for this proposition instead address when a third party is considered a third party beneficiary who
24 can enforce a contract. *See, e.g., Lorber Indus. of Cal. v. Los Angeles Printworks Corp.*, 803 F.2d 523

25 _____
26 dismiss, the plans do not alter the Court’s analysis. The fact that Comerica knew that Toyama planned
27 to eventually relocate Dollar Tree does not, given the express warranties in the BLA, provide a plausible
28 basis for a claim that Comerica interfered with Dollar Tree’s possession of the Original Premises in
breach of the SNDA, or that Comerica breached the SNDA.

1 (9th Cir. 1986). Here, the question is not whether Comerica is a third party beneficiary of the Amended
2 and Restated Lease, but whether Dollar Tree’s allegations are inconsistent with its admissions in a
3 contract that Dollar Tree seeks to enforce, and that Dollar Tree attached to its complaint. *See Steckman*
4 *v. Hart Brewing*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) (“[W]e are not required to accept as true
5 conclusory allegations which are contradicted by documents referred to in the complaint.”).

6 Finally, citing California Evidence Code § 1152(a), Dollar Tree contends that because the
7 statement was made in conjunction with resolving a dispute subject to the fulfillment of conditions, the
8 statement is inadmissible because it was made in compromise of a disputed claim. However, even
9 assuming that this Court is required to apply Section 1152(a),⁵ that section only provides that
10 “[e]vidence that a person has, in compromise or from humanitarian motives, furnished or offered or
11 promised to furnish money or any other thing, act, or service to another who has sustained or will sustain
12 or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or
13 statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or
14 damage or any part of it.” Cal. Evid. Code § 1152(a). Here, the statement by Dollar Tree is not made
15 during settlement negotiations, but is contained in a signed contract that Dollar Tree has attached to its
16 complaint, and pursuant to which Dollar Tree seeks contractual remedies.

17
18 **B. Amended and Restated Lease and Replacement Premises**

19 The FAC also alleges that Comerica breached the SNDA by failing to fund construction of the
20 Replacement Premises. Comerica contends that there is no duty under the SNDA to fund construction
21 of the Replacement Premises. First, Comerica argues that the sole obligations of Comerica with respect
22

23 ⁵ Pursuant to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity apply
24 state substantive law and federal procedural law. While “[m]ost evidentiary rules are procedural in
25 nature, and the Federal Rules of Evidence ordinarily govern in diversity cases . . . state evidence rules
26 that are intimately bound up with the state’s substantive decision making must be given full effect by
27 federal courts sitting in diversity.” *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th Cir. 2003)
(internal citations and quotations omitted). The parties assume without analysis that the Court would
28 apply California Evidence Code § 1152. In any event, Section 1152 is similar to Federal Rule of
Evidence 408, which states that evidence of an offer to compromise a claim is inadmissible to prove
liability.

1 to financing repair, construction, or rebuilding of the tenant’s premises are set forth in § 5(b) of the
2 SNDA, and that all such obligations are explicitly conditioned upon Comerica’s succeeding to the
3 interests of Toyama under the Original Lease. Comerica argues that because Comerica never succeeded
4 to Toyama’s interest, Comerica never had any obligation under the SNDA to fund construction of the
5 Replacement Premises. Comerica also argues that Dollar Tree’s attempt to import an obligation to
6 construct new premises into the SNDA, regardless of whether Comerica succeeded to the obligations
7 of the landlord, is nonsensical because it would create an obligation to advance funds to Toyama when
8 Comerica had no obligation to do so under a defaulted loan, and would provide Dollar Tree, the tenant,
9 with greater rights against Comerica than possessed by Toyama, the borrower. Comerica notes that the
10 FAC alleges that the Mervyn’s bankruptcy constituted an event of default under Mervyn’s lease with
11 Toyama, entitling Comerica to cease funding under the BLA. FAC ¶¶ 138, 140, 144; BLA §§ 1.28,
12 7.15, 9.7, 10.1.

13 Second, Comerica argues that the SNDA only applies to Dollar Tree’s Original Premises, not
14 to any Replacement Premises, and thus Comerica’s refusal to continue advancing funds to Toyama to
15 build new premises for Dollar Tree cannot constitute a breach of the SNDA. The SNDA defines the
16 “Premises” to which it applies by reference to the Original Lease:

17 The Tenant is the present tenant under a lease dated, June 9, 2003, Toyama Partners,
18 LLC, as Landlord, as successor in interest to Pacific/DSL No. 2, known as Dollar Tree
19 Store #2567, Circuit City Plaza, Newark, California (the “Premises”), to include
Commencement Letter dated September 2, 2003 (said documents, including
amendments, being sometimes hereinafter referred to as the “Lease”).

20 SNDA, Recital A. The Original Lease describes the Premises as having a square footage of 17,635
21 square feet and dimensions of approximately 110 linear feet of frontage by 160 lineal feet of depth, and
22 by reference to site plan attached to the Original Lease. Original Lease ¶¶ A(1), B(1). The site plan,
23 in turn, identifies Dollar Tree’s premises. *Id.* Ex. A. As Comerica notes, the FAC alleges and the
24 Amended and Restated Lease provides, that the Amended and Restated Lease applies to a different
25 premises with different dimensions in a different location. The FAC alleges that Toyama and Comerica
26 intended to “relocate Dollar Tree to another location in the Shopping Center,” and that the Replacement
27

1 Premises would be “a new 15,000 square foot store to be created within the reconfigured space formerly
2 occupied by a record store.” FAC ¶ 18; *see also* Amended and Restated Lease § A(1)(a) defining the
3 Premises to which it applies as “15,000 square feet rectangular with a store frontage of approximately
4 100 lineal feet.”

5 In response, Dollar Tree argues that “whether the [SNDA] extends to the Amended and Restated
6 Lease is a non-issue,” Opp’n at 17:18-19, because Dollar Tree’s damages from the failure to construct
7 the Replacement Premises flow from Comerica’s original breach of the Original Lease. “In essence,
8 the Amended and Restated Lease simply provided an opportunity to mitigate the damages from
9 Comerica’s breach, which had already occurred. Thus, if Toyama had performed under the Amended
10 and Restated Agreement, Dollar Tree’s damages against Comerica for breaching the [SNDA], *i.e.*, lost
11 profits from the decline and cessation of its sales during the reconstruction period, would have been
12 limited. Given, however, the material consideration under the Amended and Restated Lease (*i.e.*, failure
13 to construct/deliver the Replacement Premises), Comerica is liable for everything that flowed from its
14 breach, including Dollar Tree’s loss of its premises in the Shopping Center.” Opp’n at 17:11-17. Dollar
15 Tree also argues that the SNDA applies to the Amended and Restated Lease, and not just the Original
16 Lease, because the SNDA applies to the lease and “amendments.” SNDA, Recital A.

17 The Court concludes that Dollar Tree has failed to state a claim against Comerica for breach of
18 the SNDA based upon a failure to fund construction of the Replacement Premises. Regardless of
19 whether the SNDA applies only to the Original Lease, or also to the Amended and Restated Lease,
20 Comerica’s obligation to continue funding the loan ceased upon an event of default. Dollar Tree’s
21 claim of breach necessarily requires a construction of the SNDA that would require Comerica to
22 construct new premises for Dollar Tree when it had no obligation to advance funds to Toyama under
23 a defaulted loan. “When an instrument is susceptible of two interpretations, the court should give the
24 construction that will make the instrument lawful, operative, definite, reasonable and capable of being
25 carried into effect and avoid an interpretation which will make the instrument extraordinary, harsh,
26 unjust, inequitable or which would result in absurdity.” *City of El Cajon v. El Cajon Police Officers’*
27

1 *Assn*, 49 Cal. App. 4th 64, 71 (1996) (internal citations omitted). Here, even if the SNDA is susceptible
2 to the interpretation urged by Dollar Tree, the Court finds that such an interpretation would be
3 “extraordinary, harsh, inequitable [and would] result in absurdity.” Accordingly, the Court concludes
4 that Dollar Tree has not stated a claim against Comerica for breach of the SNDA by failing to fund the
5 construction of the Replacement Premises.

6
7 **II. Breach of the implied covenant of good faith and fair dealing in the SNDA**

8 “The covenant of good faith and fair dealing, implied by law in every contract, exists merely to
9 prevent one contracting party from unfairly frustrating the other party’s right to receive the benefits of
10 the agreement actually made.” *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 349 (2000). “The implied
11 covenant imposes certain obligations on contracting parties as a matter of law - specifically, that they
12 will discharge their contractual obligations fairly and in good faith.” *Mundy v. Household Fin. Corp.*,
13 885 F.2d 542, 544 (9th Cir. 1989). The covenant, however, “cannot be endowed with an existence
14 independent of its contractual underpinnings” and it “cannot impose substantive duties or limits on the
15 contracting parties beyond those incorporated in the specific terms of their agreement.” *Guz*, 24 Cal.
16 4th at 349.

17 The FAC alleges that “[t]he express terms of the negotiated SNDA contemplated that Comerica
18 would not disturb, interfere with or diminish Dollar Tree’s occupancy and tenancy, which was essential
19 to Dollar Tree’s ability to operate a retail business at the Shopping Center” (FAC ¶ 175) and that
20 “[u]nder the implied duty of good faith and fair dealing inherent in the negotiated SNDA, Comerica was
21 prohibited from depriving Dollar Tree of the benefit of the SNDA, which was undisturbed occupancy
22 and tenancy and tenancy in the Shopping Center.” FAC ¶ 176. The FAC alleges that Comerica violated
23 the implied covenant of good faith and fair dealing by “financing redevelopment that forced Dollar Tree
24 to vacate its store in the Shopping Center,” and “approving the Amended and Restated Lease, funding
25 the \$500,000 closing fee, and then refusing to finance the construction of the Replacement Premises
26 after Dollar Tree vacated its store in the Shopping Center.” *Id.* ¶ 177. The FAC alleges that “at the time
27
28

1 of signing the SNDA, Comerica knew or had reason to know that the significant and material
2 reconstruction of the Shopping Center would violate the Original Lease, and thereby constitute a
3 material breach. Comerica’s knowledge that it would violate the SNDA before it entered the SNDA
4 constitutes a per se violation of the implied covenant of good faith and fair dealing.” *Id.*

5 In addition, the FAC alleges that “Comerica knew that Mervyn’s had filed for bankruptcy at the
6 time that Dollar Tree vacated its store in the Shopping Center in September 2008. Under the implied
7 duty of good faith and fair dealing inherent in the negotiated SNDA, prior to Dollar Tree vacating its
8 store, Comerica was obligated to notify Dollar Tree that it considered Mervyn’s bankruptcy to constitute
9 an event of default under the BLA, and that Comerica believed it had a right to cease funding for
10 construction of the Replacement Premises.” *Id.* ¶ 179.

11 The Court concludes that Dollar Tree has failed to state a claim for breach of the implied
12 covenant of good faith and fair dealing in the SNDA against Comerica. Dollar Tree’s claim that
13 Comerica breached an implied covenant because Comerica knew or had reason to know that the Original
14 Lease would be breached is simply a restatement of Dollar’s Tree’s breach of contract claim, and for
15 the reasons discussed above, fails. Similarly, for the reasons discussed above, there is no basis for
16 imposing a duty on Comerica under the SNDA to fund construction of the Replacement Premises for
17 Dollar Tree.

18 The express terms of the SNDA only state that Comerica would not diminish or interfere with the
19 tenant’s possession and occupancy, and nothing in the agreement extends to a broader covenant not to
20 interfere with Dollar Tree’s ability to operate a retail business at the shopping center after Dollar Tree
21 voluntarily vacated the original premises. Moreover, there is no justification for implying that Comerica
22 agreed to continue financing the construction even in the event of default by the borrower. Plaintiff’s
23 allegations seek to “impose substantive duties or limits on the contracting parties beyond those
24 incorporated in the specific terms of their agreement” and are inappropriate. *Guz*, 24 Cal. 4th at 349.

25 Dollar Tree’s claim that Comerica was obligated to inform Dollar Tree that it considered the
26 Mervyn’s bankruptcy to constitute an event of default also seeks to impose duties beyond those
27
28

1 contained in the SNDA. The SNDA provides, *inter alia*, that “[s]o long as Tenant is not in default . .
2 . Tenant’s possession of the Premises under all of the terms, covenants and conditions of the Lease . .
3 . shall not be diminished or interfered with by Lender, and Tenant’s occupancy of the Premises under
4 all of the terms, covenants and conditions of the Lease shall not be disturbed by Lender during the term
5 of the Lease” SNDA ¶ 3. It cannot be implied from this paragraph that Comerica had the duty to
6 notify Dollar Tree that Comerica considered the Mervyn’s bankruptcy to constitute an event of default
7 under the BLA. Moreover, as Comerica notes, Paragraph 6 of the SNDA provides that “Tenant hereby
8 agrees to give Lender simultaneous notice of any default by the Landlord under the Lease or any
9 occurrence that would give rise to Tenant’s right to exercise any remedies under the Lease” *Id.*
10 ¶ 6. Thus, the SNDA imposed a duty on Dollar Tree to notify Comerica if Toyama defaulted. If the
11 parties had wished to impose a duty on Comerica to notify Dollar Tree of defaults under the BLA, the
12 parties could have done so. Indeed, the FAC alleges that Dollar Tree and Comerica negotiated the
13 language of the SNDA, and that Dollar Tree initially refused to sign the SNDA because it did not
14 include certain language vis a vis Comerica. *See* FAC ¶¶ 7-9.

15
16 **III. Tortious interference with Dollar Tree’s original lease with Toyama**

17 Under California law, to state a claim for intentional interference with a contract, a plaintiff must
18 allege: “(1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this
19 contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual
20 relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.”
21 *Quelimane Co. v. Stewart Title Guaranty Co.*, 960 P.2d 513, 530 (Cal. 1998). Intent to interfere with
22 the contract does not need to be the primary purpose of the defendant’s acts; rather, intent may be shown
23 if the defendant “knows that the interference is certain or substantially certain to occur as a result of his
24 action.” *Id.* at 531 (*quoting* Rest.2d Torts, § 766, com. j, p. 12).

25 The FAC alleges that “based upon, *inter alia*, Toyama’s email communication to Comerica,
26 Comerica’s knowledge and/or possession of the site plans for redevelopment of the Shopping Center,
27
28

1 and the content of the Building Loan Disbursement Plan contained in Exhibit B to the BLA, Comerica
2 knew, or at the very least was substantially certain, that at the time of executing both the SNDA and
3 BLA and disbursing funds to Toyama, Toyama would breach the Original Lease . . . that Dollar Tree
4 would be forced to vacate its store in the Shopping Center due to the construction activity and either
5 relocate to the inferiorly located proposed ‘Major 3’ space, relocate to some other space in the Shopping
6 Center, or cease operations in the Shopping Center . . . [and that] Toyama’s activities would, with the
7 assistance of Comerica, materially interfere with Dollar Tree’s interests under the Original Lease,
8 including without limitation in the manner alleged in Paragraph 112 [of the FAC].” FAC ¶¶ 187-89.

9
10 The Court concludes that the facts alleged in the complaint, taken with the documents
11 themselves, do not give rise to a plausible theory that by Comerica funding a reconstruction project, it
12 was reasonably certain that Toyama would breach the parties’ Original Lease agreement. As stated
13 above, as a condition of the loan approval, Toyama warrantied to Comerica that the loan would not
14 result in a breach of any lease agreements. BLA § 7.9. The fact that Toyama’s plans contemplated
15 building Dollar Tree a new store does not make it substantially certain that Dollar’s Tree’s right to quiet
16 enjoyment under the Original Lease would be violated.

17
18 **IV. Unfair competition under California Business and Professions Code § 17200**

19 Dollar Tree’s claim under California Business and Professions Code § 17200 incorporates all
20 of its previous allegations and alleges that “[t]he aforesaid actions of defendants constituted unlawful,
21 unfair and fraudulent business acts and practices pursuant to California’s Unfair Competition Law.”
22 FAC ¶ 196. California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 et seq.,
23 prohibits “any unlawful, unfair or fraudulent business act or practice.” *Cel-Tech Communic’ns, Inc. v.*
24 *Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999). “By proscribing ‘any unlawful’ business
25 practice, section 17200 ‘borrows’ violations of other laws and treats them as unlawful practices that the
26
27
28

1 unfair competition law makes independently actionable.” *Id.* at 539-40 (citation omitted). Because the
2 Court has dismissed all claims against Comerica, this claim is also be DISMISSED as to Comerica.

3
4 **CONCLUSION**

5 For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant
6 Comerica’s motion to dismiss without leave to amend (Doc. No. 80).

7
8 **IT IS SO ORDERED.**

9
10 Dated: December 1, 2010



11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUSAN ILLSTON
United States District Judge