

JUN 24 2015

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-14-1037-DaKiKu
	)		
OFF DOCK USA, INC.,	)	Bk. No.	12-41328
	)		
Debtor.	)	Adv. No.	13-01778
	)		
OFF DOCK USA, INC.,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
BEACH BUSINESS BANK,	)		
	)		
Appellee.	)		

Argued and Submitted on September 18, 2014  
at Pasadena, California

Filed - June 24, 2015

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

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Appearances: Larry Wayne Gabriel of Jenkins Mulligan & Gabriel  
LLP argued for appellant Off Dock USA, Inc.;

Gayle I. Jenkins of Winston & Strawn, LLP argued  
for appellee Beach Business Bank.

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\*This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8024-1.

1 Before: DAVIS\*\*, KIRSCHER, and KURTZ, Bankruptcy Judges.

2 Memorandum by Judge Davis  
3 Partial Concurrence and Partial Dissent by Judge Kurtz

4 **INTRODUCTION**

5 Appellant Off Dock USA, Inc. ("Off Dock") appeals the  
6 bankruptcy court's order dismissing its amended adversary  
7 complaint against Appellee Beach Business Bank ("Beach"). For  
8 the reasons set forth below, we AFFIRM.

9 **FACTS<sup>1</sup> AND PROCEDURAL HISTORY**

10 Off Dock's amended complaint contained three causes of  
11 action, as follows: (1) for breach of the implied covenant of  
12 good faith and fair dealing; (2) for breach of fiduciary duty;  
13 and (3) for intentional interference with prospective economic  
14 advantage. The amended complaint refers to and attaches the  
15 November 5, 2009 agreement for a \$1,650,000 loan, and the  
16 March 30, 2011<sup>2</sup> agreement for a \$3,000,000 loan.

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20 \*\*Hon. Laurel E. Davis, United States Bankruptcy Judge for  
21 the District of Nevada, sitting by designation.

22 <sup>1</sup>We take judicial notice of the adversary proceeding docket  
23 and the documents filed through the electronic docketing system.  
24 See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),  
25 887 F.2d 955, 957-58 (9th Cir. 1989) (appellate court may take  
judicial notice of underlying bankruptcy records).

26 <sup>2</sup>Where the amended complaint refers to a 2010 loan, it also  
27 refers to Exhibit 2, the 2011 loan agreement. It thus appears  
28 that other references in the amended complaint to a 2010 loan are  
in error, and this memorandum will use the term 2011 loan  
instead.

1 According to Off Dock's amended complaint<sup>3</sup>, in 2003 and 2004,  
2 Off Dock launched, through its predecessor business names, a  
3 business of owning and operating an intermodal depot facility for  
4 storing and maintaining cargo shipping containers. Off Dock  
5 subsequently leased 15 acres in the City of Carson, California,  
6 to use as the staging area for its business.

7 In 2006, Beach provided Off Dock with an initial \$250,000  
8 credit facility that consisted of a \$150,000 loan and a \$100,000  
9 line of credit. Thereafter, Off Dock and Beach communicated  
10 frequently regarding Off Dock's business operations and  
11 profitability.

12 Off Dock exhausted its credit line, and in December 2008,  
13 Beach and Off Dock entered into a forbearance agreement. As a  
14 condition of the forbearance agreement, Beach required Off Dock  
15 to hire an outside consultant, Phelps Consulting Group, Inc. and  
16 its principal Ted Phelps (collectively "Phelps"), to oversee Off  
17 Dock's day-to-day business operations, which Off Dock claims was  
18 equivalent to a liquidating receiver for Beach. Off Dock was  
19 also required to close its accounts with other financial  
20 institutions and keep all of its accounts at Beach.

21 In the first quarter of 2009, Off Dock obtained a new loan  
22 from Beach in the amount of \$1,650,000, and Off Dock's 2006 loan  
23 with Beach was repaid from the proceeds. Off Dock claims that  
24 Beach insisted the 2009 loan proceeds could only be used to pay  
25 "qualified account payables," resulting in non-payment of

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26  
27 <sup>3</sup>The facts are drawn from the amended complaint, which we  
28 must accept as true. Maya v. Centex Corp., 658 F.3d 1060, 1068  
(9th Cir. 2011).

1 government fees, taxes, executive compensation or any vendor  
2 whose account payable was in excess of 45 days.

3 In December 2009, after Phelps had been paid approximately  
4 \$450,000, Off Dock fired Phelps with Beach's consent. Off Dock  
5 then hired Plan Bravo Partners, LLC, whose principals were  
6 Charles W. Stevens and Joseph Prochot (collectively "Bravo").

7 Off Dock claims that through Bravo, Beach exerted undue  
8 control over Off Dock alleging that Beach instructed Bravo as to  
9 what collections to make and Beach communicated directly with Off  
10 Dock's customers and a prospective customer. The alleged undue  
11 control by Beach is claimed to have resulted in an adverse impact  
12 on Off Dock's interests and business operations.

13 In 2010, Off Dock began discussions with a new client to  
14 expand its business and develop an exclusive repair program for  
15 chilled containers, which required additional funding. Off Dock  
16 alleges that Beach insisted upon meeting the customer, visiting  
17 the proposed site for the project, and preparing numerous cash  
18 flow projections to determine the size and structure of the loan.  
19 However, the 2009 loan agreement contained a negative covenant  
20 that prevented Off Dock from engaging in "business activities  
21 substantially different than those in which Borrower is presently  
22 engaged."

23 In 2011, Beach loaned Off Dock \$3,000,000, which extended  
24 and increased the 2009 loan. Off Dock claims the 2011 loan was  
25 conditioned upon the continued employment of Bravo and prepayment  
26 of Off Dock's lease obligation on the City of Carson lease in a  
27 manner designed to eliminate Beach's exposure on the loan and  
28 result in a guarantee of the entire 2011 Loan by the Small

1 Business Administration.

2 In December 2011, Off Dock claims it attempted to terminate  
3 Bravo because Bravo, who was paid in excess of \$750,000, provided  
4 no benefit to Off Dock and adversely impacted Off Dock's  
5 financial condition. Bravo was ultimately terminated in February  
6 2012, after a "transition period" mandated by Beach.

7 Beach did not disburse the final \$150,000 of the 2011 Loan.  
8 Off Dock claims Beach did so with knowledge that Off Dock would  
9 not be able to fund or fulfill the existing contracts for its new  
10 business opportunity, thus causing Off Dock to lose this new  
11 business opportunity.

12 In April 2012, Beach declared a default of the 2011 Loan.  
13 Off Dock claims that Beach refused to meet with Off Dock's  
14 management, swept Off Dock's bank accounts, and notified Off  
15 Dock's major vendors to pay Beach directly or risk double  
16 liability. Beach then sought, but did not obtain, the  
17 appointment of a receiver.

18 On September 14, 2012, Off Dock filed a petition for  
19 chapter 11 relief in the Central District of California, Los  
20 Angeles Division, as Case No. 2:12-bk-41328-TD. Two months  
21 later, Off Dock commenced its adversary proceeding against Beach,  
22 seeking damages for breach of fiduciary duty and breach of the  
23 implied covenant of good faith and fair dealing.

24 The bankruptcy court granted Beach's motion to dismiss the  
25 complaint under Rule 7012<sup>4</sup> and Civil Rule 12(b)(6), with leave to

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26  
27 <sup>4</sup>Unless specified otherwise, all chapter and section  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
(continued...)

1 amend, holding as follows:

2 (1) The relationship between a lending institution  
3 and a borrower is not fiduciary in nature, absent  
4 special circumstances such as a lender's unusually  
5 active participation in the financed enterprise. See  
6 *Nymark v. Heart Fed. Savings & Loan Assoc.*, 231 Cal.  
7 App. 3d 1089, 1093 n.1, 1096 (1991). A commercial  
8 lender is entitled to pursue its own economic interests  
9 in a loan transaction. *Id.*

10 (2) The First Cause of Action, Breach of Fiduciary  
11 Duty, must be dismissed because the Complaint does not  
12 allege anything more than a series of arms-length  
13 transactions in which Plaintiff Off Dock . . . and  
14 [Beach] negotiated terms [Beach] utilized to protect  
15 its investment.

16 (3) The implied covenant of good faith and fair  
17 dealing is a supplement to express contractual terms.  
18 See *Pasadena Live, LLC v. City of Pasadena*, 114 Cal.  
19 App. 4th 1089, 1093-94 (2004). Therefore, [Off Dock]  
20 must cite to specific contractual terms from which it  
21 asserts the implied covenant arises here.

22 (4) The Second Cause of Action, Breach of the  
23 Implied Covenant of Good Faith and Fair Dealing, must  
24 be dismissed because [Off Dock] does not cite to  
25 specific contractual terms with respect to [Beach's]  
26 pre-contract negotiation conduct and distribution of  
27 loan proceeds. [Off Dock] does not identify how  
28 [Beach's] exercise of discretion in identifying  
"qualifie[d] accounts payable" frustrates [Off Dock's]  
ability to receive the rights or benefits of the  
agreement.

Off Dock then filed its amended complaint. The amended complaint  
adds a third cause of action for intentional interference with  
prospective economic relations and inexplicably reduces and  
summarizes the allegations of the complaint into a document that  
is only five paragraphs longer than the complaint. The amended  
complaint also contains copies of the 2009 and 2011 loan

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26 <sup>4</sup>(...continued)  
27 all "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure.

1 agreements.

2 Beach, again, promptly moved to dismiss, arguing that the  
3 amended complaint merely repackaged the same allegations  
4 previously deemed insufficient to state claims for relief. The  
5 bankruptcy court agreed and dismissed the amended complaint  
6 without leave to amend, holding that "Plaintiff's First Amended  
7 Complaint adds no new allegations but is simply a reconfiguration  
8 of the allegations of the original complaint," incorporating by  
9 reference Beach's motion and reply filed with respect to the  
10 complaint. However, the record is not clear as to the reasons  
11 why the bankruptcy court dismissed the new third cause of action  
12 for relief for intentional interference with prospective economic  
13 relations, raised for the first time in the amended complaint.<sup>5</sup>  
14 Off Dock timely appealed this order.<sup>6</sup>

15 **JURISDICTION**

16 The bankruptcy court had jurisdiction under 28 U.S.C.  
17 §§ 1334 and 157(b) (2) (A) and (O). We have jurisdiction under  
18 28 U.S.C. § 158.

19 **ISSUE**

20 Did the bankruptcy court err when it dismissed the claims  
21 for relief stated in Off Dock's amended complaint?

22 **STANDARD OF REVIEW**

23 We review de novo the bankruptcy court's Civil Rule 12(b) (6)  
24

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25 <sup>5</sup>Beach's motion to dismiss the amended complaint was  
26 submitted on the pleadings.

27 <sup>6</sup>Off Dock does not appeal the bankruptcy court's denial of  
28 leave to amend. We, therefore, do not address that portion of  
the bankruptcy court's ruling.

1 dismissal. Barnes v. Belice (In re Belice), 461 B.R. 564, 572  
2 (9th Cir. BAP 2011).

3 **DISCUSSION**

4 **I. Civil Rule 12(b)(6) Standards**

5 When we review a matter de novo, we consider the matter anew  
6 as if the bankruptcy court had not previously ruled. Sachan v.  
7 Huh (In re Huh), 506 B.R. 257, 262 (9th Cir. BAP 2014) (en banc).  
8 Therefore, we apply the same standards to Civil Rule 12(b)(6)  
9 dismissal motions that all other federal courts are required to  
10 apply. In re Belice, 461 B.R. at 572-73.

11 Under Rule 7012 and Civil Rule 12(b)(6), a bankruptcy court  
12 may dismiss a complaint if it fails to "state a claim upon which  
13 relief can be granted." To survive a Civil Rule 12(b)(6)  
14 dismissal motion, a complaint must present cognizable legal  
15 theories and sufficient factual allegations to support those  
16 theories. See Johnson v. Riverside Healthcare Sys., LP, 534 F.3d  
17 1116, 1121-22 (9th Cir. 2008). As the Supreme Court has  
18 explained:

19 [A] complaint must contain sufficient factual matter,  
20 accepted as true, to state a claim to relief that is  
21 plausible on its face. . . . A claim has facial  
22 plausibility when the plaintiff pleads factual content  
23 that allows the court to draw the reasonable inference  
24 that the defendant is liable for the misconduct  
25 alleged. . . . Threadbare recitals of the elements of  
26 a cause of action, supported by mere conclusory  
27 statements, do not suffice.

24 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations and  
25 internal quotation marks omitted).

26 In reviewing the sufficiency of a complaint under Civil  
27 Rule 12(b)(6), we must accept as true all facts alleged in the  
28 complaint and draw all reasonable inferences in favor of the

1 plaintiff. Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir.  
2 2011); Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d  
3 1038, 1043 n.2 (9th Cir. 2008). However, we do not need to  
4 accept as true conclusory allegations in a complaint or legal  
5 characterizations cast in the form of factual allegations. Bell  
6 Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007).

7 We also may consider the existence and content of documents  
8 attached to and referenced in the complaint as exhibits. Lee v.  
9 City of L.A., 250 F.3d 668, 688 (9th Cir. 2001); Durning v. The  
10 First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Even  
11 where a document is not physically attached to the complaint, we  
12 may consider its existence and contents when its authenticity is  
13 not contested and when it necessarily is relied upon by the  
14 plaintiffs in their complaint. See United States v. Ritchie,  
15 342 F.3d 903, 907-908 (9th Cir. 2003); Lee, 250 F.3d at 688.

16 **II. Breach of the Implied Covenant of Good Faith and Fair**  
17 **Dealing (First Claim for Relief)**

18 The bankruptcy court originally dismissed this claim for  
19 relief in the complaint because it: (1) failed to cite to  
20 specific contractual terms from which the implied covenant  
21 allegedly arises in this case; (2) failed to cite to specific  
22 contractual terms with respect to Beach's pre-contract  
23 negotiation conduct and distribution of loan proceeds; and  
24 (3) failed to identify how Beach's exercise of discretion in  
25 identifying "qualified accounts payable" frustrates Off Dock's  
26 ability to receive the rights or benefits of the agreement.  
27 Because it adds "no new allegations but is simply a  
28 reconfiguration of the allegations of the original complaint,"

1 this claim for relief was also dismissed when the bankruptcy  
2 court granted the motion to dismiss the amended complaint. The  
3 reconfigured amended complaint generally described and attached  
4 copies of the 2009 and 2011 loan agreements, but it did not  
5 identify any of their terms, and reduced from seven to four the  
6 operative paragraphs of this claim for relief. Based upon our de  
7 novo review, the amended complaint fails to satisfy the relevant  
8 standards and the bankruptcy court properly dismissed it.

9 As a preliminary matter, because the implied covenant is a  
10 **supplement to an existing contract**, it does not require parties  
11 to negotiate in good faith **prior to entering** into any agreement.  
12 For that reason, any allegations that a defendant violated the  
13 implied covenant **during** the negotiation of a loan fail to state a  
14 claim. McClain v. Octagon Plaza, LLC, 159 Cal. App. 4th 784, 799  
15 (2008) (citing Racine & Laramie, Ltd., Inc. v. Dep't of Parks &  
16 Recreation, 11 Cal. App. 4th 1026, 1032 (1992)). Off Dock is  
17 thus not able to rely upon the first 12 paragraphs of the amended  
18 complaint to support this cause of action because those  
19 paragraphs allege facts that occurred prior to the parties'  
20 execution of the 2009 and 2011 loan agreements.

21 In California, "[t]he implied covenant of good faith and  
22 fair dealing is limited to assuring compliance with the **express**  
23 **terms** of the contract, and cannot be extended to create  
24 obligations not contemplated by the contract." Pasadena Live,  
25 LLC v. City of Pasadena, 114 Cal. App. 4th 1089, 1094 (2004)  
26 (quoting 1 Witkin, Summary of Cal. Law (2003 supp.) Contracts,  
27 § 743, p. 449) (emphasis in original). Because the covenant is  
28 implied into the contract, it is limited to ensuring compliance

1 with the express contractual terms agreed to by the parties and  
2 does not create additional obligations on the parties. See  
3 Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 36 (1995)  
4 (“[T]he covenant is implied as a supplement to the express  
5 contractual covenants, to prevent a contracting party from  
6 engaging in conduct that frustrates the other party’s rights to  
7 the benefits of the agreement.”). In order to prevail, a  
8 plaintiff must “identify the specific contractual provision that  
9 was frustrated.” Plastino v. Wells Fargo Bank, 873 F. Supp. 2d  
10 1179, 1191 (N.D. Cal. 2012) (citation and internal quotation  
11 marks omitted).

12 Other than to provide copies of the 2009 and 2011 loan  
13 agreements as exhibits, the amended complaint wholly fails to  
14 identify any express provision of either loan agreement that is  
15 disturbed by the alleged breaches of the implied covenant.  
16 Instead, Paragraph 34 of the amended complaint claims that Beach  
17 breached the implied covenant of good faith and fair dealing by  
18 “exercising complete dominion and control over Off Dock’s  
19 business operations, including controlling the use of the loan  
20 proceeds such that Off Dock was denied the benefit of its bargain  
21 (the use of the loan proceeds).” The rest of this claim for  
22 relief consists of incorporation by reference of the prior  
23 33 paragraphs of the amended complaint which are likewise devoid  
24 of any express term of either loan agreement.

25 Further, a cause of action for breach of the implied  
26 covenant fails when the contract authorizes defendant’s actions.  
27 See Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.,  
28 2 Cal. 4th 342, 374 (1992). As set forth on page one of each

1 loan agreement, Beach's obligation to make loan advances under  
2 each loan agreement was "subject to the fulfillment to [Beach]'s  
3 satisfaction of all of the conditions set forth in this Agreement  
4 and in the Related Documents." Those conditions include, among  
5 other terms, Off Dock's multiple covenants and representations  
6 made in support of each loan, as well as the absence of an event  
7 of default. Moreover, each loan agreement authorized Beach to  
8 cease loan advances even in the absence of an event of default:

9       CESSATION OF ADVANCES. If Lender has made any  
10       commitment to make any Loan to Borrower, whether under  
11       this Agreement or under any other agreement, Lender  
12       shall have no obligation to make Loan Advances or to  
13       disburse Loan proceeds if: . . . (E) Lender in good  
14       faith deems itself insecure, even though no Event of  
15       Default shall have occurred.

16       For all of these reasons, the amended complaint fails to  
17       state facts giving rise to a plausible claim and we affirm the  
18       bankruptcy court's order dismissing the first claim for relief.

19 **III. Breach of Fiduciary Duty (Second Claim for Relief)**

20       In California, "[t]he relationship between a lending  
21       institution and its borrower-client is not fiduciary in nature.  
22       Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089,  
23       1093 n.1 (1991). "A commercial lender is instead entitled to  
24       pursue its own economic interests in a loan transaction." Id.  
25       "This right is inconsistent with the obligations of a fiduciary  
26       which require that the fiduciary knowingly agree to subordinate  
27       its interests to act on behalf of and for the benefit of  
28       another." Id. As a result:

      [A] financial institution owes no duty of care to a  
      borrower when the institution's involvement in the loan  
      transaction does not exceed the scope of its  
      conventional role as a mere lender of money. . . .  
      Normal supervision of the enterprise by the lender for

1 the protection of its security interest in loan  
2 collateral is not active participation in the financed  
3 enterprise beyond that of the ordinary role of a lender  
4 in a loan transaction.

4 Id. at 1096-1097. (Citations, brackets and internal quotation  
5 marks omitted.)

6 Thus, "a lender does not assume any obligations regarding  
7 the viability of the project or investment which is financed by  
8 the loan funds as long as the conduct of the lender is limited to  
9 the activities which customarily are associated with the lending  
10 function." Peterson Dev. Co. v. Torrey Pines Bank, 233 Cal. App.  
11 3d 103, 119 (1991) (citations and internal quotation marks  
12 omitted).

13 Off Dock alleges that Beach exceeded the role of a  
14 conventional lender by exerting excessive control over Off Dock's  
15 business operations and thus committed a breach of fiduciary  
16 duty. In order to prevail, Off Dock must prove: "the existence  
17 of a fiduciary relationship, its breach, and damage proximately  
18 caused by that breach." Pierce v. Lyman, 1 Cal. App. 4th 1093,  
19 1101 (1991).

20 Off Dock's amended complaint asserts that Beach had a  
21 "fiduciary responsibilit[y] to act in the best interests of Off  
22 Dock," citing Barrett v. Bank of Am., 183 Cal. App. 3d 1362  
23 (1986). Off Dock appears to rely upon dicta contained in the  
24 Barrett court's discussion of trial court error in failing to  
25 provide a jury instruction on constructive fraud, wherein the  
26 court states "[t]he relationship of a bank to depositor is at  
27 least quasi-fiduciary" and recognizes a "duty of disclosure of  
28 facts which may place the bank or a third party at an advantage

1 with respect to the customer.” Id. at 1369.

2 Barrett involved the question of constructive fraud. In  
3 Barrett, the bank’s loan officer advised the borrowers that they  
4 would be released from personal guarantees if they consummated a  
5 merger of their business, but withheld information that the bank  
6 stood to benefit from the merger. Id. at 1365, 1369. The  
7 borrowers in Barrett had also shared unfavorable confidential  
8 information with the officer and relied upon the officer’s  
9 advice. Id. at 1369.

10 We agree with the bankruptcy court that the continued  
11 validity of Barrett is questionable:

12 The holding[] of . . . *Barrett* [is] inconsistent with  
13 both past authority and current trends in the law. It  
14 has long been regarded as axiomatic that the  
15 relationship between a bank and its depositor arising  
16 out of a general deposit is that of a debtor and  
17 creditor. . . . A debt is not a trust and there is not  
18 a fiduciary relation between debtor and creditor as  
19 such. The same principle should apply with even  
20 greater clarity to the relationship between a bank and  
21 its loan customers.

22 Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476 (1989).

23 Off Dock’s other case authority<sup>7</sup> also fails to establish the  
24 existence of a fiduciary duty. Wagner v. Benson, 101 Cal. App.  
25 3d 27 (1980), involved claims against a lender brought by

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26 <sup>7</sup>Pension Trust Fund for Operating Eng’rs v. Fed. Ins. Co.,  
27 307 F.3d 944, 949-55 (9th Cir. 2002) is an action by an  
28 investment trust against its insurance company for the insurance  
company’s failure to defend the investment trust in a third party  
action for fiduciary breach. The Pension Trust case did not  
address the substantive sufficiency of the allegations of the  
breach of fiduciary claims (on which Pension Trust prevailed at  
trial against Winncrest), but whether the allegations alone were  
sufficient to trigger a duty to defend.

1 individual plaintiffs who speculated in a cattle raising program.  
2 A third party, MSR, acted as the plaintiffs' agent in buying,  
3 maintaining and marketing the cattle, including "prenegotiating"  
4 plaintiffs' loan with the bank. Beef prices declined and costs  
5 rose, ultimately resulting in a default of the loan. Plaintiffs  
6 sued the bank, alleging that the bank had assured them the  
7 investment was "safe" and the margin calls to maintain the 75%  
8 loan to value ratio would be minimal. The trial court dismissed  
9 plaintiff's negligence and bad faith claims and limited trial to  
10 the claim for misrepresentation. The court of appeals affirmed  
11 summary disposition of the plaintiffs' claims at trial,  
12 reiterated the general rule enunciated by Nymark and held "[t]he  
13 Bank's limited involvement in the MSR enterprise falls far short  
14 of the extensive control and shared profits which give rise to  
15 liability." Wagner, 101 Cal. App. 3d at 35.

16 In addition, Kim v. Sumitomo Bank of Calif., 17 Cal. App.  
17 4th 974 (1993), is not applicable here. Off Dock's  
18 representation that Kim held "a borrower [sic] exercises  
19 excessive control over a borrower where the lender dominate[s]  
20 the borrower to the extent that the borrower has lost its  
21 separate identity," is erroneous. That language was not the  
22 court's holding, but was merely a quote from a law review article  
23 cited by plaintiffs and rejected by the court. Id. at 980. Kim  
24 instead involved an action for fiduciary breach arising from the  
25 loan document's requirement for a disbursing agent, wherein the  
26 court of appeals affirmed the trial court's order granting  
27 summary judgment in favor of the bank, holding as a matter of law  
28 that the bank was not liable as either a "control lender" or

1 based upon a theory of fiduciary breach. Id. at 979-984.

2        Similar to the borrowers in Kim, Off Dock complains of  
3 conduct that is authorized by the agreements it signed with Beach  
4 and thus cannot argue these requirements form the basis of a  
5 claim for breach of fiduciary duty. Off Dock's most pervasive  
6 allegation challenges the forbearance agreement's requirement  
7 that Off Dock hire outside management consultants. However, the  
8 2009 loan agreement maintains this requirement by its provision  
9 that Off Dock comply with all of the terms and conditions of the  
10 forbearance agreement. Both loan agreements require Off Dock to  
11 maintain executives and management with the same qualifications  
12 and experience as present personnel, with written notice to Beach  
13 of any changes.

14        Off Dock also heartily complains about the quantity of  
15 business and financial information provided to Beach, sometimes  
16 gained through direct communications with Off Dock's outside  
17 consultants, vendors, and customers. Both loan agreements  
18 contain extensive provisions that grant Beach "free access" to  
19 virtually all of Off Dock's premises, operations, books and  
20 records, regardless of whether or not such information is in the  
21 possession of third parties. Additionally, Off Dock must provide  
22 Beach with periodic financial reports, permit Beach to "examine  
23 and audit" Off Dock's books and records, and provide Beach with  
24 financial reports requested by Beach "at such frequency and in  
25 such detail as lender may reasonably request."

26        Off Dock's fatal problem here is the conclusory allegations  
27 of the amended complaint. As noted above, despite the bankruptcy  
28 court's dismissal of its complaint for failure to state a claim

1 for relief, Off Dock chose to reduce, in a reconfigured fashion,  
2 rather than enhance the allegations in the amended complaint. In  
3 doing so, Off Dock's allegations have become even more conclusory  
4 and thus less likely to state a claim for relief for breach of  
5 fiduciary duty. In identifying the "special relationship"  
6 between Off Dock and Beach, the amended complaint simply  
7 concludes that Beach's requirement for outside consultants  
8 results in Beach's "dominion and control" over Off Dock's  
9 operations, with one line about collections and "interfacing with  
10 Off Dock's customers," which as set forth above, is authorized by  
11 the loan agreements.

12 The Supreme Court has made it clear that "labels and  
13 conclusions" or "formulaic recitation of the elements of a cause  
14 of action" are insufficient. Plaintiff must instead articulate  
15 "enough facts to state a claim to relief that is plausible on its  
16 face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). As  
17 a result, "the non-conclusory 'factual content,' and reasonable  
18 inferences from that content must be plausibly suggestive of a  
19 claim entitling the plaintiff to relief." Moss v. United States  
20 Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). "Threadbare  
21 recitals of the elements of a cause of action, supported by mere  
22 conclusory statements, do not suffice." Ashcroft v. Iqbal,  
23 556 U.S. 662, 678 (2009). "[A]nalyzing the sufficiency of a  
24 complaint's allegations is a 'context-specific task that requires  
25 the reviewing court to draw on its judicial experience and common  
26 sense.'" Sheppard v. David Evans & Assocs., 694 F.3d 1045 (9th  
27 Cir. 2012) (citing Iqbal, 556 U.S. at 679).

28 Because Off Dock's second amended complaint did not allege

1 any legally cognizable harm arising from any fiduciary breach,  
2 the bankruptcy court did not err when it dismissed Off Dock's  
3 fiduciary breach claim.

4 **IV. Intentional Interference with Prospective Economic Relations**  
5 **(Third Claim for Relief)**

6 The amended complaint adds a new claim for intentional  
7 interference with prospective economic relations. Under  
8 California law, such a claim has five elements: "(1) an economic  
9 relationship between the plaintiff and some third party, with the  
10 probability of future economic benefit to the plaintiff; (2) the  
11 defendant's knowledge of the relationship; (3) intentional acts  
12 on the part of the defendant designed to disrupt the  
13 relationship; (4) actual disruption of the relationship; and  
14 (5) economic harm to the plaintiff proximately caused by the acts  
15 of the defendant." Korea Supply Co. v. Lockheed Martin Corp.,  
16 29 Cal. 4th 1134, 1153 (2003) (citation and internal quotation  
17 marks omitted).

18 To establish the third element, Off Dock must also plead  
19 that Beach's conduct "was wrongful by some legal measure other  
20 than the fact of interference itself." Id. at 1153 (citation and  
21 internal quotation marks omitted).

22 An act is not independently wrongful merely because  
23 defendant acted with an improper motive. . . . [T]he  
24 law usually takes care to draw lines of legal liability  
25 in a way that maximizes areas of competition free of  
26 legal penalties. . . . The tort of intentional  
27 interference with prospective economic advantage is not  
28 intended to punish individuals or commercial entities  
for their choice of commercial relationships or their  
pursuit of commercial objectives, unless their  
interference amounts to independently actionable  
conduct. . . . We conclude therefore that an act is  
independently wrongful if it is unlawful, that is, if  
it is proscribed by some constitutional, statutory,

1 regulatory, common law, or other determinable legal  
2 standard.

3 Id. at 1158-59. Off Dock asserts this requirement for  
4 independently actionable conduct is satisfied because the amended  
5 complaint alleges that Beach failed to fully fund the loan and  
6 improperly directed the manner in which loan proceeds were  
7 distributed. However, in California, a creditor is entitled "to  
8 take all legal steps to obtain payment of [a] debt owed to it,  
9 even if the result was that [the debtor] would default on its  
10 obligations to other creditors." Webber v. Inland Empire Inv.,  
11 74 Cal. App. 4th 884, 906 (1999). Indeed, "exercise of [a]  
12 contractual right does not constitute wrongful conduct. . . ."  
13 Weststeyn Dairy 2 v. Eades Commodities Co., 280 F. Supp. 2d 1044,  
14 1090 (E.D. Cal. 2003). We have already determined that the loan  
15 agreements authorized Beach to direct and withhold advances, even  
16 in the absence of an event of default. Thus, based upon our de  
17 novo review of the amended complaint, Off Dock did not allege  
18 conduct that is independently actionable. As a result, Off Dock  
19 fails to allege an essential element to this claim for relief.  
20 For these reasons, Off Dock has failed to allege all of the  
21 elements necessary to establish a cause of action for intentional  
22 interference with prospective economic relations, and we affirm  
23 the bankruptcy court's dismissal of the third cause of action of  
24 the amended complaint.

25 **CONCLUSION**

26 The judgment of the bankruptcy court is AFFIRMED.

27  
28 Partial Concurrence and Partial Dissent begins on next page.

1 KURTZ, Bankruptcy Judge, concurring in part and dissenting in  
2 part:

3  
4 While I agree with my colleagues' conclusion that the  
5 bankruptcy court correctly dismissed Off Dock's claim for  
6 intentional interference with prospective economic relations, I  
7 disagree with their conclusion that Off Dock failed to state  
8 legally-sufficient claims for breach of fiduciary duty and for  
9 breach of the implied covenant of good faith and fair dealing.

10 In Pension Trust Fund for Operating Eng'rs v. Federal Ins.  
11 Co., 307 F.3d 944, 955 (9th Cir. 2002), the Ninth Circuit Court  
12 of Appeals interpreted California law and explicitly held that "a  
13 lender . . . owes a fiduciary duty to a borrower when it  
14 excessively controls or dominates the borrower." Id. Following  
15 Pension Trust Fund for Operating Eng'rs, the Ninth Circuit  
16 reiterated this interpretation of California law in Giles v. Gen.  
17 Motors Acceptance Corp., 494 F.3d 865, 882 n.1 (9th Cir. 2007).  
18 Unlike my colleagues, I believe I am bound by Pension Trust Fund  
19 for Operating Eng'rs's interpretation of California law on this  
20 point. Footnote 7 of the majority decision attempts to explain  
21 why we do not need to follow Pension Trust Fund for Operating  
22 Eng'rs, but I do not find footnote 7 persuasive.

23 I also believe that the allegations in Off Dock's amended  
24 complaint adequately pled a claim for breach of fiduciary duty.  
25 Unlike my colleagues, I do not perceive as conclusory Off Dock's  
26 allegations regarding Beach's dominion and excessive control over  
27 Off Dock's operations. Indeed, I see the allegations as quite  
28 specific on this point. According to the allegations,

1 particularly those in paragraphs 12, 15, 17, 18 and 22 of the  
2 amended complaint, Beach insisted, in and after 2009, that Off  
3 Dock hire and pay for specific consultants (identified in the  
4 amended complaint by name), further insisted that these  
5 consultants be given day-to-day control over Off Dock's  
6 operations, and further insisted that the consultants take their  
7 orders from Beach.

8         The amended complaint also contained some specifics  
9 regarding how Beach exercised control through the consultants.  
10 For instance, in paragraphs 26 and 27 of the amended complaint,  
11 Off Dock alleged that, at Beach's insistence, the consultants ran  
12 Off Dock's bookkeeping and accounting departments, interfaced  
13 with Off Dock's clients, attended or participated in sales  
14 efforts, controlled Off Dock's hiring and firing of personnel,  
15 interviewed customers and prospective customers so that Beach  
16 could approve them, controlled payments made to vendors, and made  
17 collection demands on Off Dock's customers, even when Off Dock  
18 would not have made such demands, out of fear that it would  
19 adversely affect its business relationship with those customers.  
20 These specifics meet or exceed the level of factual detail  
21 required to state a claim under federal law. See Fed.R.Civ.P. 8  
22 (requiring "a short and plain statement of the claim showing that  
23 the pleader is entitled to relief."). The amended complaint also  
24 adequately explained how Beach violated its fiduciary duty: by  
25 putting its own interest in minimizing its risk exposure arising  
26 from the loans over Off Dock's interest in successfully operating  
27 its business.

28         I likewise believe that these same allegations sufficiently

1 pled a claim for breach of the implied covenant of good faith and  
2 fair dealing. The majority decision opined that this claim was  
3 legally insufficient because it did not explicitly identify the  
4 particular provision of the loan agreements implicated by this  
5 claim. I disagree. I consider it obvious which contractual  
6 obligation of Beach's was implicated: its obligation to make  
7 loan advances to Off Dock under certain terms and conditions.  
8 See generally Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th  
9 Cir. 2009) (citing Twombly and noting that court, in making  
10 determination on a motion to dismiss, must consider both the  
11 factual content of the complaint and all reasonable inferences  
12 that can be drawn from that factual content). In my view, the  
13 amended complaint adequately alleged that Beach, in bad faith,  
14 stripped Off Dock of its principal contractual benefit under the  
15 loan agreements - the receipt of loan funds - by taking control  
16 of Off Dock's operations and making operational decisions based  
17 on Beach's own interests as opposed to making operational  
18 decisions based on Off Dock's interests.

19 Alternately, the majority decision opines that the implied  
20 covenant of good faith and fair dealing is not violated by  
21 conduct that the parties' agreement explicitly permits. However,  
22 I have not found anything in the record indicating that any  
23 provision of the parties' various agreements permitted Beach to  
24 exercise dominion and control over Off Dock's operations and run  
25 those operations to suit its own interests and in a manner  
26 adverse to Off Dock's interests.

27 In closing, I note my suspicion that Off Dock's claims  
28 likely would have made excellent candidates for resolution by

1 summary judgment. Nonetheless, I believe that its claims for  
2 breach of fiduciary duty and for breach of the implied covenant  
3 of good faith and fair dealing were legally sufficient as alleged  
4 and should have survived Beach's 1`Fed.R.Civ.P. 12(b)(6) motion  
5 to dismiss.

6       Accordingly, I respectfully concur in part and dissent in  
7 part. I only would have affirmed the bankruptcy court's  
8 dismissal of Off Dock's claim for intentional interference with  
9 prospective economic relations.

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