UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARICULTURA DEL NORTE, S. DE R.L. DE C.V., et al.,

Plaintiffs,

-against-

No. 14 Civ. 10143 (CM)

WORLDBUSINESS CAPITAL, INC., et al.,

Defendants.

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS WBC AND UMAMI'S MOTIONS TO DISMISS

McMahon, J.:

Plaintiffs Maricultura Del Norte, S. de R.L. de C.V. ("Marnor") and Servax Bleu, S. de R.L. de C.V. ("Servax,") assert a variety of common law claims as well as violations of federal antitrust law against Defendants Worldbusiness Capital, Inc. ("WBC"), Umami Sustainable Seafood, Inc. ("Umami"), Craig A. Tashjian ("Tashjian"), and Amerra Capital Management, LLC ("Amerra," and together with Tashjian, "Amerra Defendants").[1]

This case arises out of a loan Marnor obtained from WBC in 2005 to fund its operations.

Marnor farms and fishes Bluefin Tuna off the coast of Baja California, Mexico, and by 2010, had defaulted on the loan, which was secured by its fishing vessels. In order to strengthen its operations and obtain resources to pay back the loan, Marnor formed a joint venture with Servax in 2012.

[1] The Complaint also names the Overseas Private Investment Corporation ("OPIC") as a defendant. Plaintiffs have since stipulated to a voluntary dismissal of all claims as against OPIC. (*See* Docket ##31, 40.)

The joint venture was never able to operate according to plan, because shortly after it was formed, WBC foreclosed on Marnor's vessels. Plaintiffs allege that Marnor wanted to pay off the loan so the vessels would be released, but it needed WBC to tell them exactly how much in principal, interest and fees was needed to extinguish the debt. WBC allegedly refused. Lacking this information, Marnor says it was deprived of its contractual right to cure the default and obtain release of the vessels. The foreclosure proceedings are ongoing in Mexico, where a judgment for the principal amount of the debt has already been entered against Marnor and the vessels remain seized, which means that Marnor cannot use the vessels to fish for tuna.

Shortly after initiating foreclosure proceedings, WBC assigned the loan and the rights under it to Umami – Plaintiffs' principal competitor in the Bluefin Tuna industry. Like WBC, Umami allegedly refused to tell Marnor how much was needed to pay off the loan in full. According to the complaint, Defendant Amerra and its managing director Defendant Tashjian encouraged Umami to obtain WBC's rights (and provided funding for it to do so) after exploiting confidential information Servax had disclosed to Amerra – including the fact that Marnor was in default on the loan – in connection with a potential bid for financing. Amerra and Tashjian allegedly broke their promise of confidentiality and conspired with Umami to cut Plaintiffs out of the Bluefin Tuna market.

Defendants WBC and Umami move to dismiss all claims asserted against them.[2] For the reasons stated below, the motions are granted in part and denied in part.

FACTS

Unless otherwise noted, the facts are taken from Plaintiffs' complaint and the accompanying exhibits.

[2] The court has dealt with the Amerra Defendants' motion to dismiss in a separate opinion.

A. The Parties

Plaintiff Marnor is a privately-held Mexican company engaged in aquaculture and fishing operations off of the coast of Baja California, Mexico.

Plaintiff Servax is also a privately-held Mexican company engaged in fish farming and exportation in Baja California, Mexico. In the spring and early summer of 2012, Servax, through its nonparty affiliate, Altex, entered into a joint venture with Marnor.

Defendant WBC is a privately-held Delaware commercial finance company that specializes in providing loans to foreign businesses engaged in international trade with the U.S.

Defendant Umami is a publicly-traded Nevada company with operations that fish and farm Blue Fin Tuna off the coast of Baja California, Mexico. Umami acquired WBC's loan to Marnor.

Defendant Amerra is a privately held Delaware principal investment firm focusing on agricultural investments. Amerra has an office in New York.

Defendant Tashjian is a Managing Director of Amerra.

B. The WBC Loan and Marnor's Default

In 2005, Plaintiff Marnor entered into a credit agreement with WBC ("the Credit Agreement"). Under the terms of the Credit Agreement, dated December 16, 2005, WBC agreed to loan Marnor up to $9.9 million so Marnor could expand and operate its aquaculture business. The loan was secured by a First Preferred Mexican Fleet Mortgage and Second Preferred Mexican Ship Mortgage ("the Mortgages") on Marnor's vessels in favor of WBC. By its terms, the Credit Agreement is governed by New York law, although none of the parties thereto resides in or has an office in New York. Compl., Ex. A, § 10.03.

Although Marnor discharged its obligations under the Credit Agreement for several years, it was in default by March 2010, at which point it owed $5.2 million in principal. Marnor continued

to pay the interest on the loan through 2012, and until the latter half of 2012, WBC did not exercise any of its remedies under the Credit Agreement or the Mortgages. WBC's remedies under the Mortgages included its right to "exercise all of the rights and remedies in foreclosure and others given to Mortgagees by provisions of applicable law, including but not limited to, the provisions of the laws of the United Mexican States." Compl., Ex B (Sec. 12(g)).

The Mortgages allow for Marnor to cure its default at any time by making payment in full:

> (a) If at any time after an Event of Default and prior to the sale of the Vessels by the Mortgagee or prior to completion on any foreclosure proceeding the Mortgagor *offers completely to cure all Events of Default and pay all expenses, advances and damages to the Mortgagee consequent on such Events of Default, with interest at the Late Payment Rate, the Mortgagee shall accept such offer and payment and restore the Mortgagor to its former position . . . .*

Compl., Ex. B (Section 20) (emphasis added).

C. Marnor Attempts to Cure, and WBC Commences Foreclosure Proceedings

In the first half of 2012, Marnor formed a joint venture with Plaintiff Servax. The two companies entered into multiple contracts, pursuant to which Marnor and Servax agreed to commence joint operations as soon as Marnor eliminated all liens and encumbrances on its assets – at which point Servax would acquire substantially all of those assets. As part of the joint venture, Servax was to provide funding to help Marnor cure its default.

In August 2012, Marnor executives contacted Leslie Galbraith, WBC's CFO, to advise her about Marnor's joint venture with Servax and to inquire about a future relationship with the new venture. Philippe Charat, Marnor's principal, explained to Galbraith that the resolution of Marnor's default was a material term of the joint venture agreement.

Galbraith told Charat that before any discussion of a continuing relationship could begin, she needed all parties to recognize that Marnor "has been in default under our loan agreement for over two years and that after a number of failed restructuring attempts WBC and OPIC are in the

process of foreclosing on the vessels. I would also indicate that any restructuring of [Marnor's] operations – through [the new joint venture] or otherwise – must, in our view, contemplate full and prompt payment of the Loan." Compl., Ex. H. Charat told Galbraith that they would be happy to meet with her "to settle this issue." *Id.*

As mentioned above, WBC had done nothing to realize on its security interest or to collect the loan for over two years, during which period Marnor was paying only interest. However, later on the very day when it first learned of the joint venture, WBC caused Marnor to be served with process in the Mexican foreclosure action, in which WBC sought to realize on its collateral, the vessels securing the loan ("the Foreclosure Proceeding"). Marnor's fleet was immediately arrested and prevented from leaving port during the pendency of proceedings. Plaintiffs do not allege that Marnor made a formal written offer to repay the loan in full at any time prior to the commencement of the Foreclosure Proceedings.

After receiving the foreclosure papers, Marnor tried to contact WBC, but WBC would not discuss the matter outside the Foreclosure Proceedings. So, in early November, Charat sent a letter to WBC purporting to exercise Marnor's contractual right to cure its default. The letter stated that Marnor "exercises its right to pay the total amount of the secured obligations, to which end I request an immediate final account statement, to proceed forthwith with payment." Compl., Ex. K. It asked for a final account statement detailing "the total amount of accrued interests of the secured obligations." *Id.* The letter informed WBC that it would make payment within 24 hours of approval of a settlement agreement by the Mexican court. *Id.*

At the time, Marnor and Servax estimated that Marnor's debt to WBC, including principal, interest, and fees, amounted to approximately $6.5 million. They do not allege that they ever

informed WBC of their estimate or attempted to verify their calculation with WBC. They certainly did not tender payment in that amount to WBC.

The next week, WBC's president, Brett Silvers, responded to Charat's letter. He contested that Marnor's letter constituted "formal notice under the Credit Agreement," and then stated:

> The Borrower has the right at any time to repay the Loan and other obligations owed under the Credit Agreement. The Borrower could have made such a request to the court in Ensenada after the filing of the Foreclosure Proceeding, but, so far, has elected not to do so. Please consult with your legal counsel in the Foreclosure Proceeding and follow the legal procedures applicable to such proceedings for repayment of the obligations. Any delay by the Borrower in making such arrangements for payment will result in additional liability for interest and expenses.

Compl., Ex. L.

Plaintiffs allege that they continued trying to resolve the matter through Mexican counsel – albeit apparently without making any application to the Mexican court or tendering any payment – but returned to Galbraith when that failed. She responded as she always had: "This matter is being handled exclusively through the pending legal proceeding in the Federal court in Ensenada. As noted some time ago, please have your Mexican counsel contact [WBC's Mexican counsel] to arrange for payment." *Id.*

No payment, total or partial, having been received (or, apparently, tendered), on January 28, 2013, the Mexican court entered a judgment against Marnor in the Foreclosure Proceedings. The judgment ordered Marnor to make payment of the principal amount of $5.2 million within five days, after which time the court would hear motions for determination of the amount of interest and other costs that were due. Zamora Decl., ¶ 44. Marnor's payment of the judgment at this point in time would have allowed the Mexican courts to liquidate the debt, including any costs and other fees owed. *Id.* ¶ 91. But despite its insistence that it was trying to cure and retrieve its boats, Marnor

did not pay the $5.2 million and did not ask the court to determine the other amounts owed. Instead, it took an appeal from the judgment.

At the same time, Plaintiffs tried to continue out-of-court discussions to resolve the debt. Plaintiffs' representatives set a meeting with WBC's Mexican counsel (Jose Abizaid) for February 2013. But when they arrived at his offices, Abizaid stated that he had been instructed not to speak with Marnor and Servax regarding payment.

Shortly after the abortive meeting, Abizaid told Marnor that the amount needed to pay off the loan in full was $7.9 million. Abizaid's figure allegedly included fees that were incurred after Marnor "offered" to pay off the loan, including over a million dollars in attorney and custodian fees. Abizaid did not, however, explain how he reached that exact figure. Needless to say, Marnor seized on that fact to avoid tendering the payment it was supposedly so eager to make.

D. Plaintiffs Learn That WBC Assigned the Loan to Umami

On February 8, 2013, WBC and Umami filed an assignment agreement, dated February 7, 2013, in the Foreclosure Proceedings, thereby disclosing that WBC had assigned its rights to Marnor's principal competitor, Umami. Plaintiffs claim that WBC made the assignment despite Marnor's "commitment" to pay back the loan, and with knowledge that Umami was Marnor's chief competitor. Plaintiffs also allege that WBC "affirmatively and knowingly concealed" that it was negotiating or had consummated the assignment throughout the course of Marnor's and WBC's communications about repaying the loan – which, it should be noted, continued for some time after the assignment was made.

Marnor then set out to discuss repayment with Umami. Marnor alleges that Umami instructed its Mexican counsel to demand $9 million in payment for the loan – a figure Plaintiffs claim was grossly inflated (although they insist that they are in no position to ascertain the exact

amount they owe). Despite disagreement over the sum demanded, Plaintiffs allegedly agreed to pay the money to secure release of Marnor's vessels and retire its debt. But, less than a week before they were supposed to meet with Umami to pay the $9 million, Umami allegedly informed them it had no interest in accepting payment. Plaintiffs do not allege that they tendered, or tried to tender, any payment to Umami; nor do they explain why a meeting was necessary when Marnor could have simply sent a check or wired funds.

Plaintiffs allege that Marnor's business has declined substantially without access to the vessels. Because its fleet is not available to it, Marnor has had to hire vessels on contract, and it has not been able to hire nearly the number of fishing vessels it needs. As a result, the complaint alleges that Umami has come to dominate the Bluefin Tuna import market in the United States.

PLAINTIFFS' CLAIMS

The gravamen of the complaint with respect to WBC and Umami is that they breached their contractual duties by failing to provide Marnor a payoff amount for the loan, thereby frustrating Marnor's attempt to cure its default. The complaint asserts three claims against WBC and Umami in common: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; and (3) tortious interference with contractual relations. It also asserts a claim for fraudulent concealment against WBC (but not Umami) and a claim for violation of the Sherman Act against Umami (but not WBC). Plaintiffs originally asserted breach of fiduciary duty claims against WBC and Umami, and a conversion claim against Umami. In opposing the current motions, they stated that they "will stipulate to the dismissal, without prejudice, of their claims for breach of fiduciary duty and conversion." Opp. Br. at 1 n.1 (Docket #72). I thus consider these claims to be withdrawn.

DISCUSSION

A. Standard for Motion to Dismiss

In deciding a motion to dismiss under Rule 12(b)(6), the Court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 44 (2d Cir. 2003); *see also Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007).

However, to survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotations, citations, and alterations omitted). Thus, unless a plaintiff's well-pleaded allegations have "nudged [her] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed." *Id.* at 570; *Iqbal*, 556 U.S. at 680.

B. Defendants' Motions to Dismiss are Granted in Part and Denied in Part

1. Breach of Contract/Breach of Implied Covenant of Good Faith and Fair Dealing

The contract allegedly breached in this case are the Mortgages, specifically the provision allowing Marnor to cure any default. Before turning to the merits, I must determine what law to apply.

Although the Credit Agreement contains a clear choice of law provision specifying New York law, the Mortgages simply provide that they are "granted under the provisions of (i) Article 92 of the General Law of Communications of the United Mexican States, (ii) Articles 1, 14 paragraph II, 90, 91, 92, 93 and 94 of the Navigation Law of the United Mexican States, (iii) and under the provisions of Article 2893 of Title 15 of the Second Part of the Fourth Book of the Civil Code for the Federal District of the United Mexican States." Compl., Ex. B, § 1.

Plaintiffs' Mexican law expert contends that this is not a choice of law provision, but instead relates only "to perfection, effect of perfection, and priority of a security interest in collateral." Loperena Decl., ¶¶ 59-61. However, Plaintiffs' expert does not opine on what law applies to the Mortgages.

Defendants' expert, on the other hand, argues that the Mortgages are governed by Mexican law. Zamora Reply Decl., ¶ 47. He opines that, "the sections of the law cited in the Mortgages are the basis under which Mexican law regulates all aspects of maritime mortgages." *Id.* at ¶ 45. He also notes that the default provisions of the Mortgages give the lender the right to exercise all remedies that may be available to it, including specifically those remedies available under Mexican law. *Id.* at ¶ 44.

Federal courts apply the law of the forum state to determine choice of law issues. For contract claims, New York choice of law principles require courts to "evaluate the 'center of

gravity' or 'grouping of contacts', with the purpose of establishing which state has the most significant relationship to the transaction and the parties." *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 394 (2d Cir. 2001) (citation and quotation marks omitted). New York courts rely on the Restatement of Conflict of Laws, which "in addition to the traditionally determinative choice of law factor of the place of contracting, offers . . . other factors to be considered in establishing this 'most significant relationship': the places of negotiation and performance; the location of the subject matter; and the domicile or place of business of the contracting parties." *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 618 N.Y.S.2d 609, 612, 642 N.E.2d 1065 (1994) (quoting Restatement (Second) of Conflict of Laws § 188[2]).

Plaintiffs argue that, because the Credit Agreement provides for New York law to govern, the parties thereby intended to "create a New York-centric business relationship." Opp. Br. at 9. They contend that the Credit Agreement should be read together with the Mortgages, such that the Credit Agreement's choice of law provision should be read into the Mortgages. The cases they cite apply the well-settled principle that, "all writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together, even though they were executed on different dates and were not all between the same parties." *This Is Me, Inc. v. Taylor*, 157 F.3d 139, 143 (2d Cir. 1998). Plaintiffs recognize, however, that whether multiple agreements should be read as a single agreement is a fact question for the trier of fact. *See TVT Records v. Island Def Jam Music Group*, 412 F.3d 82, 89 (2d Cir. 2005). Only when "the documents in question *reflect no ambiguity as to whether they should be read as a single contract*, the question is a matter of law for the court." *Id.* (emphasis added).

The Credit Agreement and Mortgages do not clearly express that they should be read as a single agreement. The Mortgages contain no clause incorporating the Credit Agreement. The

Credit Agreement itself provides that New York law will govern the promissory notes that were executed contemporaneously with the Credit Agreement, but it says nothing about what law applies to the Mortgages, which were granted under Mexican law (not surprisingly, since Marnor and its boats were in Mexico); at least portions of the Mortgages are governed by Mexican law. Nothing on the face of the documents leads to the conclusion that the Mortgages should be read to incorporate the Credit Agreement's choice of law provision – on the contrary, it is illogical that the Mortgages should be governed in part by Mexican law and in part by some other law.

Mexico is obviously the jurisdiction with the "most significant relationship" to the contract. It is Marnor's principal place of business, the place where the security for the loan is located, and the place where the parties envisioned enforcement of the Mortgages taking place. Indeed, Mexican law is the only law referenced in the Mortgages; this strongly suggests that the parties intended Mexican law to govern the Mortgages.

Aside from the fact that the Credit Agreement is governed by New York law, Plaintiffs do not suggest any reason whatever that New York law should govern. New York has absolutely no relationship to the Mortgages. The grantor of the Mortgages, Marnor, is a Mexican corporation. The Grantee, WBC, is a Delaware corporation, with its principal place of business in Connecticut. The Assignee, Umami, is a Nevada corporation, with its principal place of business in California. Plaintiffs do not allege that the Mortgages were entered into in New York, or that Marnor's breach of contract (which is what triggered WBC's rights under the Mortgages) were committed in New York. The loan documents may be governed by New York law, but this is without question a Mexican-centric transaction, especially insofar as the Mortgages – which do nothing more than grant the lender rights in the collateral, which is located in Mexico – are concerned. Therefore,

Mexico has the most significant relationship to the Mortgages, and under New York choice of law principles, Mexican law governs Plaintiffs' contract claim. Having so concluded, I note that the parties point to no difference in Mexican and New York law that would be material to a decision on this motion.

Turning to the merits: Plaintiffs allege several breaches by WBC and Umami. They allege that (1) "WBC refused to provide a statement of Marnor's account, accept payment in full, and release Marnor's vessels," Compl., ¶ 226; (2) Umami refused to accept a $9 million payment to cure the default, Compl., ¶ 234; and (3) WBC breached the contract by assigning its rights to Umami.

Under Mexican contract law, an injured party may recover damages for breach of contract. Zamora Decl., ¶ 113.

As a threshold matter, WBC and Umami argue that Plaintiffs should be judicially estopped from arguing that Marnor was "ready, willing and able to repay its debt," because Marnor took they opposite position in the Foreclosure Proceedings. I reject this contention.

Judicial estoppel is "an equitable doctrine invoked by a court at its discretion," which guards against the "improper use of judicial machinery." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The doctrine operates to "prevent[] a party from a prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.*

The Second Circuit "has consistently limited the application of judicial estoppel to situations where a party both takes a position that is inconsistent with one taken in a prior proceeding, and has had that earlier position adopted by the tribunal to which it was advanced." *Uzdavines v. Weeks Marine, Inc.*, 418 F. 3d 138, 148 (2nd Cir. 2005).

In this case, Plaintiffs are not estopped from arguing that they were willing and ready to pay the debt under both prongs of the test. First, there is no proof in the record before me that Plaintiffs argued to the Mexican court that they were unwilling or unable to pay the debt. Defendants have provided the court with a certified copy of a translation of the answer that was filed in the Mexican Foreclosure Proceeding. In that proceeding, Marnor defended on a number of technical grounds; among other things, it asserted that the agreement was invalid insofar as Marnor's corporate purpose did not allow it to execute the Mortgages. *See* Zamora Decl., ¶ 27; Dianni Decl., Ex. D (Answer, ¶ 1). But after reviewing the answer it does not appear that Marnor told the Mexican court that it could not and would not pay the debt if forced to do so. Instead, it said that, for technical reasons, it did not really owe WBC any money.

In this court Marnor admits that it owes WBC money, and it asserts that it was at all relevant times ready, willing, and able to pay the debt, and that only Defendants' actions prevented it from doing so. I am skeptical about that assertion; nothing about Marnor's behavior suggests that it was ever ready, willing, or able to pay the debt, and many things suggest that it was not. But I cannot say that the argument it now makes to this court is the converse of the argument that Marnor made in the Mexican foreclosure.

Furthermore, for judicial estoppel to apply the argument made in the other court must have been adopted by that court. *Uzdavines*, 418 F. 3d at 148. Marnor lost in the Foreclosure Proceeding, so obviously the Mexican court did not adopt whatever argument it made.

Therefore, judicial estoppel does not apply. We turn to the three asserted breaches.

Failure to Provide Payoff Amount: The first asserted breach alleged is the failure of Defendants to provide Marnor with a payoff number so it could cure its default. WBC and Umami

contend that they did not breach of the contract by failing to provide a payoff number, because there is no express contractual provision requiring them to do so.

While the Mortgages do not explicitly state that the lender must provide a total payoff amount when the borrower seeks to cure, that is a reasonable interpretation of the lender's contractual obligations. The contract gives the borrower the right to cure; the lender must accept payment, provided Marnor pays "the total Obligations hereby secured including any interest accrued thereon to the date of such payment *and pay all expenses incurred by the [lender] in connection with such Event of Default*." Compl., Ex. B (Section 20) (emphasis added). While Marnor ought to be able to calculate how much it owed in principal and interest at any given time, the lender – and only the lender – knows what expenses it has incurred "in connection with" the default. Since the express terms of the contract permit Marnor to cure, but condition its ability to effect a cure on having information that is peculiarly within the control of its lender, it would seem to be a breach of the cure provision for WBC, and later Umami, to withhold that information from Marnor. The complaint alleges that that is precisely what they did.

There is no particular reason why the Mortgages should have had to spell this out. In ordinary circumstances, lenders like to be paid, and are happy to provide borrowers with the amount owed and dispense with costly legal proceedings to collect on the debt. When (for example) a real estate transaction closes, it is customary for the lending bank to provide a payoff number to its borrower. Plaintiffs allege that WBC and Umami refused to behave in the customary way because WBC, and later Umami, were not interested in letting Marnor cure its default, but wanted to retain the seized vessels. Plaintiffs have adequately alleged a breach of contract.

In addition to pleading a breach of the express term of the contract that permits Marnor to cure, the pleading plainly asserts that the same conduct makes out a violation of the duty of good faith and fair dealing.

Mexican law impose on contracting parties a duty to operate in good faith. Zamora Decl. ¶ 108. That duty requires the parties "to act in good faith in complying with a party's own obligations under the express terms of a contract," Zamora Decl., ¶ 108. And while the duty of good faith and fair dealing "does not create additional obligations not set forth in the contract," *id.* at ¶ 112, Mexico, like New York, "prohibits either party from acting in a manner which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275, 305 (S.D.N.Y. 1998) (citation omitted). The duty under Mexican law is "confirmation of the requirement of a party to fulfill his express contractual obligations in good faith." Zamora Decl., ¶ 107.

A breach of the duty of good faith and fair dealing is no different than a breach of any other duty imposed by a contract; it gives rise to an action for breach. While Plaintiffs have pleaded breach of the duty of good faith and fair dealing as a separate cause of action, that separate claim (Count Two) must be dismissed as duplicative, since Plaintiffs do not allege that Defendants owed them a duty of good faith independent of their duties under the Mortgages themselves. *See Fleisher v. Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290, 299 (S.D.N.Y. 2012); *Dorset Indus., Inc. v. Unified Grocers, Inc.*, 893 F. Supp. 2d 395, 405 (E.D.N.Y. 2012). However, the complaint pleads facts that, if believed, could and probably would be found to violate the contractual duty to operate in good faith and so as not to prevent the counterparty from realizing the benefit of its bargain; without information from the lender (or later, from its assignee), Marnor could not exercise its undoubted right to cure. That would constitute a breach of contract under Count One.

I note that the result would be the same if the Mortgages were governed by New York law, as Plaintiffs allege. *See, e.g.*, *Dalton v. Educational Testing Serv.*, 663 N.E.2d 289, 292, 639 N.Y.S.2d 977, 979 (1995); *M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990).

Defendants also argue that Plaintiffs have not adequately alleged that Marnor suffered any damage flowing from the breach, because whatever damages Plaintiffs suffered are from Marnor's own default and failure to pay the debt through the Foreclosure Proceedings. To this end, WBC and Umami make much of the fact that various procedural avenues were open to Marnor in the Foreclosure Proceedings. *See* Zamora Decl.

But whether Marnor could have paid its debt through the Foreclosure Proceedings is immaterial to whether Plaintiffs have adequately pled damages caused by a breach of contract. The contract provided that Marnor had a right to cure its default, both before and after a foreclosure proceeding commenced. On this pleading, Marnor first approached WBC about curing before the Foreclosure Proceedings began (only to have them commenced within hours thereafter – a curious development). Furthermore, the contract could have provided that capitulation to and payment through an already-commenced foreclosure proceeding was the only possible way for Marnor to cure. It did not.

To be sure, the fact that Marnor did not seek to repay the debt through the Foreclosure Proceedings may have an impact on *the amount* of damages it is entitled to receive for any breach it can prove. For example, if it is indeed the case that Marnor could have gotten its vessels back two years ago – by making an appropriate motion immediately after the Mexican court entered a judgment in foreclosure – then it will be impossible for Marnor to prove any damages from and after the time when the motion would have been decided. But information about Marnor's ability to effect a cure through foreclosure is extraneous to the four corners of the complaint, and so is not

properly considered on a Rule 12(b)(6) motion to dismiss (though it may prove relevant on a motion for summary judgment). Plaintiffs have adequately pleaded damages flowing from the breach: they assert that Marnor was unable to use its vessels during the Bluefin Tuna fishing season because it was not able to exercise its contractual right to cure the default.

Refusal to Accept $9 Million: The second alleged breach is Umami's refusal to accept the $9 million it told Marnor was owed. However, Marnor does not allege that it tendered, or attempted to tender, any payment to Umami. The complaint alleges that Umami told Marnor the amount needed to cure the default was $9 million. It then pleads that Marnor sought to set up a meeting with Umami, which was delayed for a number of weeks because of "scheduling conflicts."[3] Eventually Umami canceled the meeting. On these facts, Plaintiff has not alleged that Umami breached the contract by refusing to accept a curative payment. Marnor has never actually shown up with a check, or even put one in the mail only to have it returned uncashed, so it cannot proceed on this theory of breach of contract.

Assignment of the Loan as Breach: Finally, Plaintiffs allege that WBC breached the implied covenant by assigning the loan to Umami. They argue that the assignment was forbidden because it was not expressly authorized by the Credit Agreement. As a fallback, Plaintiffs argue that even if the contract gave WBC discretion to assign the loan, WBC's discretion had to be exercised in good faith, *Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1575 (2d Cir. 1994) – which it was not, because the contract was assigned to Marnor's biggest competitor.

The Credit Agreement is governed by New York law, so the fact that the right to assign is not mentioned in that agreement is of no moment. "Under New York law, a contract may be freely

[3] Given the purported urgency with which Marnor wanted to pay off the loan and cure the default, it is curious that mysterious delays always seemed to occur whenever it came time to actually tendering payment.

assigned in the absence of language which expressly prohibits assignment." *Cohen v. LTF Real Estate Co.*, 2009 WL 1373542, at *4 n.3 (E.D.N.Y. May 15, 2009); *Mosdos Chofetz Chaim, Inc. v. RBS Citizens, N.A.*, 14 F. Supp. 3d 191, 228 (S.D.N.Y. 2014). WBC did not breach the contract merely by assigning the loan to Umami.

As for the exercise of discretion, Plaintiffs plead no facts that would give rise to the inference that WBC acted in bad faith simply by assigning the loan to its competitor. In conclusory fashion, the complaint alleges that, "WBC knew, or should have known, that Umami acquired the rights, obligations and causes of action under the Credit Agreement and Mortgages to gain an unfair and unlawful competitive advantage against Marnor." Compl., ¶ 248. But the complaint contains no facts to support this bare conclusion. Furthermore, it would not matter if it did. In the absence of a provision prohibiting assignment to a specific party, WBC – which was engaged in a commercial transaction and owed no special duty to its borrower – was permitted to assign the loan to whomever it wished.

Plaintiffs have thus failed to state a breach of contract claim against WBC for assignment of the loan. They will not be permitted to proceed on this theory, either.

The only breach of contract theory on which Plaintiffs may proceed is that WBC, and later Umami as its assignee, violated the Mortgages by withholding from Marnor information that Marnor needed in order to cure its default, and that was in their sole custody and control.

2. Tortious Interference with Contractual Relations

Plaintiffs allege that Defendants refused "to allow Marnor to cure its default and extinguish the debt, and release Marnor's vessels from the seizure and the Mortgages." Compl., ¶ 292. They claim that this allegedly tortious conduct, "resulted in a disruption of Marnor and Servax's joint venture by causing breaches of Marnor and Servax's underlying contracts and disrupting the performance of Marnor and Servax's obligations thereunder." *Id.* According to Plaintiffs, a term

of the underlying joint venture contracts (which are not a part of this record) requires Marnor to free its assets of all liens and encumbrances.

Again, the parties disagree about whether New York or Mexican law governs this claim.

Federal courts sitting in diversity look to the forum state's choice of law principles to decide what law to apply. *See Fin. One Pub. Co. v. Lehman Bros. Special Fin.*, 414 F.3d 325, 331 (2d Cir. 2005). For tort claims, New York law prescribes an "interest analysis," which is a "flexible approach intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Id.* (quoting *Matter of Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 613 N.E.2d 936 (1993)).

Under this analysis, the law of the jurisdiction where the tort occurs applies. *AroCHEM Int'l, Inc. v. Buirkle*, 968 F.2d 266, 270 (2d Cir. 1992). When "the defendant's [tortious] conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred." *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E. 2d 679, 683 (1985). Because an element of Plaintiffs' tort claim "requires that the plaintiff suffer damages, which is the last event that would render a putative tortfeasor liable," the locus of the tort is where the damages are suffered. *See Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc.*, 241 F. Supp. 2d 246, 277 (S.D.N.Y. 2002).

Here, Plaintiffs argue that New York law should apply because Defendants' allegedly tortious conduct – failing to provide Plaintiffs a payoff amount and accept payment – "took place somewhere in the United States." Opp. Br. at 18. Notably, they do not suggest that any of the conduct took place in New York. New York law does not reign supreme in all fifty states.

But the locus of the tort is where Plaintiffs' damages were suffered, not where the conduct occurred, because the damages are an element of the tort that would make Defendants liable. Plaintiffs are Mexican companies, with principal places of business in Mexico, and business operations that take place off the Mexican coast. The harm allegedly suffered is due to Plaintiffs' inability to secure the release of their fishing vessels, which have been seized by a Mexican court. Because the vessels remain seized, Plaintiffs allege that they have suffered damages in their ability to fish and farm Bluefin Tuna off the coast of Baja California, Mexico. The locus of the tort is thus Mexico, where Plaintiffs suffered the damages that would make Defendants liable.

There is absolutely no argument in favor of applying New York law. Nothing whatever happened here that is relevant to this claim.

Plaintiffs try to escape the logical conclusion that Mexican law applies to their claims. They argue that applying Mexican law would "frustrate the purposes underlying the law by allowing a party to commit a tort with impunity." Opp. Br. at 16. But a litigant's unhappiness with the law of one jurisdiction is not a sufficient reason to discard it. *See Ecoban Fin. Ltd. v. Grupo Acerero Del Norte, S.A. de C.V.*, 108 F. Supp. 2d 349, 355 (S.D.N.Y. 2000). Nor can it be said that applying Mexican law would allow Defendants to "commit a tort with impunity." If Defendants' conduct was permissible under the law that governs their conduct (*i.e.*, Mexican law), then Defendants committed no tort at all. It is irrelevant that Defendants might have committed some tort were they located in New York.

Plaintiffs also argue that, although "the location of the injury resulting from the [tortious] conduct is the determinative consideration" in *most* cases, the real question is which jurisdiction has the greatest interest. Opp. Br. at 18. Assuming that to be true, however, New York has literally no interest in this proceeding. The contracts that were allegedly interfered with – by a Connecticut

corporation and a Nevada corporation, neither of which is alleged to have its principal place of business (or, for that matter, any office whatever) in New York – are contracts between two Mexican corporations concerning a Mexican joint venture. Ironically, the one contract in which New York might be deemed to have some interest is the Credit Agreement, which is governed by New York law; yet a Mexican court has already concluded that Marnor breached that agreement, so that issue is not even before me!

Sussman v. Bank of Israel, 801 F. Supp. 1068 (S.D.N.Y. 1992), is not to the contrary. In *Sussman*, the plaintiffs asserted various fraud claims against several Israeli entities after the Israeli bank in which they invested collapsed. The Israeli defendants moved to dismiss on the ground of *forum non conveniens*, arguing that Israel was the proper place to hear the claims. In the course of analyzing the motion, the court considered what jurisdiction's law would govern the claims. Plaintiffs, who were U.S. citizens or permanent residents, argued that U.S. law – rather than Israeli law – should govern their claims, while defendants argued that Israeli law should apply. The court recognized that the tort claims required it to use New York's "interest analysis" for conduct-regulating torts. Although Plaintiffs argued that U.S. law should apply because they felt the economic impact of the tort in the U.S., the court stated that "this Court has regarded the place where the victim of fraud or negligence suffered economic loss as less significant for choice of law purposes than the law of the place by which the defendant's conduct is evaluated." *Id.* Because the tortious conduct occurred in Israel, Israeli law governed.

Contrary to Plaintiffs' claims, *Sussman* supports the argument that the locus of the tort is the controlling factor under New York choice of law analysis. Here, the tort occurred in Mexico, because Mexico is the locus of the last event that would make WBC liable (*i.e.*, the damages suffered by Plaintiffs).

Therefore, Mexican law governs the tort claim.

Defendants' expert states that Mexican law does not recognize a claim for tortious interference with contract. Zamora Decl.,¶ 133; *see also Grupo Televisa, S.A. v. Telemundo Commc'ns Grp., Inc.*, 485 F.3d 1233, 1235 (11th Cir. 2007) (acknowledging that Mexican law does not recognize a claim for tortious interference). General tort principles under Mexican law do not impose liability unless the allegedly tortious action is "in violation of a specific statute." *Id.* at ¶ 122. Zamora submits that the allegedly tortious conduct here would not be actionable under Mexican law, because what WBC and Umami did (failed to provide a payoff number) does not violate any specific Mexican statute.

Plaintiffs' multiple experts on Mexican law do not contradict Zamora's opinion. Indeed, Plaintiffs' Mexican law experts do not even discuss their tort claims at all. Although Plaintiffs argue in a footnote (without any citation to their experts' opinions or Mexican law) that an act need not be "illegal" under laws of Mexico for a tort claim to be recognized, neither Plaintiffs nor their experts dispute that an action must be "in violation of a specific statute" to constitute illegal activity under Mexican tort law. Opp. to WBC and Umami's Motions to Dismiss at 16 n.3 (Docket #79). Plaintiffs do not allege that the conduct of WBC and/or Umami violates a specific statute in connection with their tortious interference claim.

Because Plaintiffs do not counter Defendants' expert's statement that no tort claim for tortious interference lies in these circumstances, Plaintiffs fail to state a claim under Mexican law, and the tortious interference claim must be dismissed.

But Plaintiffs' claim would fail even if I analyzed it under New York law.

Under New York law, "the elements of tortious interference with contract are (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge

of the contract; (3) the defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401-02 (2d Cir. 2006) (quoting *Lama Holding Co. v. Smith Barney Inc.*, 646 N.Y.S. 2d 76, 82 (1996)).

Defendants contend that Plaintiffs' claim fails because they do not allege either that (1) WBC or Umami procured any breach, or (2) that Plaintiffs suffered any damages *as a result* of that breach. Defendants argue that any breach of the underlying joint venture contracts was incidental to the exercise of the lender's contractual rights under the Mortgages. As for damages, Defendants contend that the damages flow from Marnor's failure to pay its loan, not from their allegedly tortious conduct. They would win dismissal of this cause of action, however, for two reasons that Defendants do not even argue.

First, the conduct that allegedly constitutes tortious interference is exactly the same conduct that Plaintiffs assign as a breach of contract under Count One: Defendants' refusal to provide a payoff amount and accept payment in full. Because New York law does not permit the same conduct to be assigned as both a breach of contract and a tort, Plaintiffs' tortious interference claim is duplicative of its breach of contract claim, and so would have to be dismissed on that ground alone. *See Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 58 (2d Cir. 2012); *Fixed Income Shares: £Series M v. Citibank N.A.*, No. 14-CV-9373 JMF, 2015 WL 5244707, at *13 (S.D.N.Y. Sept. 8, 2015).

Second, the complaint contains no allegation that anything WBC or Umami did was "without justification." Defendants had the legal right to exercise their contractual rights to foreclose on the vessels and require full payment before releasing them, and their actions were indubitably undertaken to protect WBC and Umami's contractual interests. To the extent the

underlying joint venture contracts were breached, the breaches were incidental to WBC's and Umami's exercising their contractual rights to foreclose on the vessels. And under New York law, "A claim for tortious interference with contractual relations requires intentional interference, not merely intrusion that is negligent or *incident to some other lawful purpose*." *Costanza Const. Corp. v. City of Rochester*, 135 A.D.2d 1111, 1111 (App. Div. 1987) (emphasis added); *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 589 (2d Cir. 2005).

Plaintiffs do not allege that they ever tendered full payment, or even partial payment, or that they undertook to extinguish the lien using the procedures available to them in the Mexican court. Had they so alleged, the answer here might have been different (assuming, contrary to fact, that New York law governed in this instance). But they do not. End of story.

3. Fraudulent Concealment – Against WBC

Plaintiffs allege that WBC fraudulently concealed the fact that it had assigned Marnor's loan to Umami throughout the time Plaintiffs were communicating with WBC about curing Marnor's default.

As with the other claims, the parties urge this court to adopt the law more favorable to their arguments. Plaintiffs argue for the application of New York law, while Defendants argue for Mexican law.

For the same reasons that Mexican law governs Plaintiffs' tortious interference claim (*i.e.*, the damages they suffered occurred in Mexico and hence the locus of the tort is Mexico), Mexican law also governs their fraudulent concealment claim. There is no allegation that any fraudulent representation or concealment occurred in New York, or that it had any impact anywhere except in Mexico.

WBC's expert contends, without disagreement from Plaintiffs' experts, that Mexican law imposes no duty on WBC to disclose its intention to assign the loan or its assignment of the loan in these circumstances. According to Zamora, "under Mexican Tort Law . . . nobody is obligated towards another person unless positive law imposes an obligation, duty or liability, or the obligated person has consented to it." Zamora Decl., ¶ 123. He submits that, "Mexican law would . . . pose no independent duty on WBC to disclose to Marnor its intent to assign the loan to Umami." *Id.* at ¶ 132. Such duties "must arise out of a written contract or statute," and Zamora says he is not aware of statutes obligating WBC to disclose its intent to assign *id.*; Plaintiffs certainly do not cite to any. Nor do Plaintiffs point to any contractual obligation requiring WBC to disclose its intention to assign or assignment of the loan.

Plaintiffs' Mexican law experts do not even discuss Plaintiffs' tort claims, and so do not contest Zamora's contention that Mexican law would not obligate WBC to disclose its intention to assign the loan to Umami or its assignment to Umami. *See* Loperena Decl.; Vega Decl. Because no claim for fraudulent concealment would lie in these circumstances, Plaintiffs do not state a claim under Mexican law.

4. Sherman Act Violations – Against Umami

Umami asserts the same objections to the Sherman Act claims as did the Amerra Defendants. For the reasons discussed in the court's opinion granting in part and denying in part the Amerra Defendants' motion to dismiss, Umami's motion to dismiss the Sherman Act claim is granted.

C. Principles of Abstention and International Comity Do Not Warrant a Stay or Dismissal

Defendants argue in the alternative that, if I do not dismiss the complaint for failure to state a claim, I should stay or dismiss the action on international comity and abstention grounds because of the pendency of a related proceeding in Mexico.

"A court has the inherent power to dismiss or stay an action based on the pendency of a related proceeding in a foreign jurisdiction." *Ole Media Mgmt., L.P. v. EMI Apr. Music, Inc.*, No. 12 CIV. 7249 PAE, 2013 WL 2531277, at *2-3 (S.D.N.Y. June 10, 2013). Although the Second Circuit has not adopted a formal test for abstention, it has recognized the need for "an evaluation of various factors, such as the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction." *Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

However, the court cautioned that, "this list is not exhaustive, and a district court should examine the totality of the circumstances to determine whether the specific facts before it *are sufficiently exceptional to justify abstention*." *Id.* (emphasis add) (citation and quotation marks omitted). Because only exceptional circumstances warrant abstention, "the task of a district court evaluating a request for dismissal based on a parallel foreign proceeding is not to articulate a justification *for* the exercise of jurisdiction, but rather to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction." *Id.* at 93 (emphasis in original). "Circumstances that routinely exist in connection with parallel litigation cannot reasonably be considered exceptional circumstances, and therefore the mere existence of an adequate parallel

action, by itself, does not justify the dismissal of a case on grounds of international comity extension." *Id.* at 94-95.

Defendants point to no "exceptional circumstances" to justify abstention here. Indeed, there are good reasons not to abstain because, even when the Foreclosure Proceedings result in a final judgment, none of the issues remaining here will be resolved. There is no contract claim pending in the Foreclosure Proceeding. Defendants do not suggest that they will be able to plead any judgment as *res judicata*, and indeed, a final judgment allocating the vessels to Umami in satisfaction of the debt does nothing to determine whether or not WBC and/or Umami breached any of their contractual requirements.

Of course, there is an entirely separate question about whether this court should be the forum for litigating claims arising under Mexican law concerning a Mexican transaction that has absolutely no linkage to New York. I recognize that the claim is related to a claim for breach of contract against Amerra and Tashjian, whose offices in New York were the place where allegedly confidential information was disclosed to Umami. (See accompanying decision on the motion to dismiss filed by Amerra and Tashjian). But if ever there were an instance of the tail wagging the litigation dog, this case is surely it. Still, no party has made a motion to dismiss all or part of this case on forum non conveniens grounds, and the court has by now invested substantial time in the matter. We shall see it through to the end.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss is granted in part and denied in part. The Clerk of the Court is directed to remove the motions at Docket ## 59 and 64 from the Court's list of pending motions.

Dated: November 24, 2015

U.S.D.J.

BY ECF TO ALL COUNSEL