IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
NNN 400 CAPITAL CENTER 16, LLC, *et al.*,	)	Case No. 16-12728 (JTD)
	)	(Jointly Administered)
Debtor(s).	)	
	)	**Re: D.I. 278**
NNN 400 CAPITAL CENTER, LLC, *et al.*,	)	
	)	
Plaintiff(s),	)	
v.	)	Adv. Proc. No. 18-50384 (JTD)
	)	
WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF COMM 2006-C8 COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES; LNR PARTNERS, LLC, a Florida Limited Liability Company; BERKADIA COMMERCIAL MORTGAGE, LLC, a Delaware Limited Liability Corporation; LITTLE ROCK - 400 WEST CAPITAL TRUST, a Delaware Statutory Trust; SOMERA ROAD, INC., a New York Corporation; and TACONIC CAPITAL ADVISORS, LP, a Delaware Limited Partnership,	)	
	)	
Defendant(s).	)	**Re: Adv. D.I. 268**

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

INTRODUCTION

This adversary proceeding was tried, along with Plaintiffs' objection to Defendant, Little Rock-400 West Capital Trust's claim made in the main bankruptcy proceeding, in December 2019. During the trial, the Court heard testimony from eight live witnesses and accepted hundreds of

[1] The parties have consented to the entry of a final judgment of this Court. Bankruptcy Courts may enter final judgments on non-core matters where parties knowingly and voluntarily consent. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015).

exhibits into evidence. After trial, the parties submitted deposition designations of an additional 20 witnesses and sought the admission of hundreds of additional exhibits. The Court having considered the testimony and the exhibits makes the following findings of fact and conclusions of law.

I. Findings of Fact

A. The Parties and Their Representatives

The Plaintiffs are 32 tenant-in-common ("TIC") Delaware LLCs created to own an undivided interest in commercial property located at 400 W. Capitol Ave., Little Rock, Arkansas (the "Regions Center"). The Plaintiffs invested in the Regions Center as part of an Internal Revenue Code Section 1031 tax deferred exchange. The Regions Center serves as collateral for a 10-year commercial mortgaged backed security ("CMBS") loan with a maturity date of September 1, 2016. As of the filing of the Plaintiffs' bankruptcy petitions, the Loan was in default.

Moses Tucker Real Estate, Inc. ("Moses Tucker"), manages the Regions Center for Plaintiffs pursuant to the Sub-Property Management Agreement between FGG (asset manager) and MTRE. (Trial Ex. J-256).

Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Comm 2006-C8 Commercial Mortgage Passthrough Certificates ("Wells Fargo"), was the previous holder of the Note (as defined herein), which was later acquired by Little Rock-400 West Capital Trust ("LR-400") on June 13, 2017. [Trial Ex. J-83 ¶ 28; J-862].

LNR Partners, LLC ("LNR"), on behalf of Wells Fargo, acted as the special servicer for the Loan until 2017. [Trial Ex J-83 ¶ 18]. LNR, as special servicer, was responsible for enforcing

the terms of the Loan, including approving certain leases and requests for new property managers. [Polcari Dep. at 31:9-17].

Berkadia (together with Wells Fargo and LNR, "Prior Lender"), on behalf of the Wells Fargo and KeyBank National Association ("KeyBank")[2], was the sub-sub-servicer for the Loan, whose duties included reviewing reimbursement requests as well as other routine loan administration tasks. [Trial Tr. at 1358:5-7, 1426:17-1427:5; Trial Ex. J-271 § 3.01].

Somera Road, Inc. ("Somera") is a private equity firm that invests in real estate. [Ross Dep. at 23:9-10]. In March 2017, Somera began assisting the Plaintiffs in refinancing the Loan which was at the time in default. Findings of Fact, §§ I(D), I(F)(1) infra.

Taconic Capital Advisors, LP (beneficial owner of LR-400; "Taconic") is an investment firm that provides capital for real estate investments. [Trial Tr. at 720:23-721:14; Trial Ex. J-277]. Taconic is a capital advisor that Somera often looks to as a capital source, working together on approximately 10 (ten) percent of Taconic's portfolio. [Jordan Dep. at 65:21-66:3]. Taconic and Somera typically negotiate and agree upon detailed terms in connection with deals that they work on together. [Trial Tr. at 772:16-18]. On August 18, 2016, Taconic and Somera entered into a Master Confidentiality Agreement (the "Somera/Taconic MCA") to govern the disclosure of information related to potential transactions between Taconic and Somera. [Trial Ex. J-161].

B. The Loan Documents

On August 18, 2006, the Plaintiffs and Bank of America, N.A. entered into a 10-year CMBS agreement (the "Loan") with a maturity date of September 1, 2016. [Trial Ex. J-263 (the

[2] Midland Loan Services was the master servicer of the Loan. [Trial Ex. J-1554, J-158; Polcari Dep. at 27:17-28:5.) KeyBank National Association was the sub-servicer of the Loan and Berkadia acted as sub-sub-servicer on KeyBank's behalf. [Trial Ex. J-1554].

"Loan Agreement"); Trial Ex. J-264 (the "Note", and together with the Loan Agreement, the "Loan Documents")]. The Regions Center serves as collateral for the Loan. [*Id*.]. On September 25, 2006, Bank of America assigned the Loan and Note to LaSalle Bank, N.A., who then assigned them to a CBMS Trust managed by Wells Fargo on January 2, 2008. [Trial Ex. J-1407, J-1592]. Wells Fargo maintained ownership of the Loan and Note until 2017, when they were purchased by LR-400.

C. Approvals and Reserve Requests

1. Asset Manager Approval

In February 2014, the Plaintiffs retained FGG, Inc. ("FGG") as their asset manager, replacing the former asset manager. On April 4, 2014, FGG submitted a request to Berkadia to approve FGG as the new asset manager. [Trial Ex. J-372]. FGG provided Berkadia with documentation, information and fees of $2,000.00 as requested in furtherance of the approval process. [Trial Ex. J-274, J-372]. LNR, as special servicer, was responsible for reviewing and approving the request, and therefore, Berkadia forwarded Plaintiffs' request to LNR. [Trial Ex. J-373]. Upon receiving the request, LNR asked Plaintiffs to pay LNR a fee of $21,500 in connection with its review of the new asset manager and a retainer of $7,500 for potential legal costs associated with the review. [Trial Ex. J-281, J-268; Trial Tr. at 328:12-21]. Plaintiffs paid the requested fees without questioning their amount or purpose. [Trial Ex. J-268; Trial Tr. at 326:6-20; 328:12-331:16; 446:22-448:11].

On February 25, 2016, Robert Dyess, Plaintiffs' former counsel, attempted to address the nearly two-year old change of management application by sending a letter to LNR's counsel Steve Simon. [Polcari Dep. at 76:25-77:13; Trial Ex. J-274]. Mr. Dyess pointed out to Mr. Simon that the loan agreement stated that Wells Fargo shall not unreasonably withhold, condition, or delay approvals. [Polcari Dep. at 86:14-25; Trial Ex. J-274]. Although LNR had not formally approved

FGG as the asset manager, from early 2014 through 2016—when FGG was replaced with Moses Tucker—Berkadia and LNR treated FGG as the asset manager. [Getty Dep. at 193:23-194:16; Trial Tr. at 386:9-15, 388:19-21, 390:14-19]. On June 5, 2016, LNR issued a Retroactive Consent to Change Property Manager and Addition of a Guarantor; however, there is no evidence that this was ever delivered to the Plaintiffs [Trial Ex. J-272; Polcari Dep. at 13:11-14]. The Plaintiffs first learned of the retroactive consent just before the deposition of Mr. Polcari. [Polcari Dep. at 23:13-18]. Also, Berkadia admits that it had no record or knowledge of the approval of FGG as replacement asset manager. [O'Keefe Dep. at 78:24-79:11].

At trial, Lori McGhee ('McGhee"), Moses Tucker's corporate representative, confirmed that the asset manager approval process had no effect on the UBS refinancing or the Calmwater refinancing efforts, nor did it cause the Plaintiffs' maturity date default.[3] [Trial Tr. at 381:20-383:3].

2. Lease Approvals

Plaintiffs take issue with the Wells Fargo and its agents' lease approval process. [Trial Ex. J-083; Second Amended Complaint (the "SAC")]. On May 1, 2000, the Twentieth Floor Corporation d/b/a the Friday Firm, entered into a lease at the Regions Center. On August 14, 2014, Plaintiffs submitted a request to Berkadia for approval of an extension of the Friday Firm lease, which was forwarded to LNR for approval as the special servicer. [Tr. Transcript 270:19-24, 314:1-315:8; Trial Ex. J-1511]. LNR approved the Friday Firm lease on November 5, 2014. [Trial Ex. J-382].

[3] The UBS and Calmwater refinancing efforts are discussed infra at Findings of Fact, § I(D).

In August 2015, the Plaintiffs entered into a lease agreement with RGN-Little Rock I, LLC ("Regus") for an eleven (11) year lease at the Regions Center. [Trial Ex. J-229]. On September 26, 2015, FGG submitted a lease approval request to Berkadia, who later forwarded the request to LNR. [Trial Ex. J-390]. Plaintiffs executed the Regus lease on or around October 12, 2015, prior to LNR's approval of the lease. [Trial Ex. J-396]. LNR did not approve the lease until April 20, 2016. [Trial Ex. J-1477, J-1582). LNR could not provide any reason for the delay in approval of the Regus lease. (Polcari Dep. at 218:8-221:25). LNR required that Plaintiffs pay a $2,000 fee in connection with its review of the Regus lease. [Trial Ex. J-1477].

On September 14, 2016, the Plaintiffs entered into a lease agreement with Wilson & Associates ("Wilson"). [Trial Ex. J-500]. On October 13, 2016, Plaintiffs submitted a request to LNR for approval of the Wilson lease. [Trial Ex. J-587 at LNR0007391-2]. LNR conditionally approved the lease on October 28, 2016. [Trial Ex. J-283; *see also* Trial Ex. J-032].

At trial, McGhee confirmed that the lease approval process had no effect on the UBS refinancing or the Calmwater refinancing efforts, nor did it cause the Plaintiffs' maturity date default. [Trial Tr. at 381:20-383:3].

3. Requests for Reserve Funds

Wells Fargo held and controlled reserve accounts at KeyBank for payment of tenant improvements and leasing commissions pursuant to the Loan Documents and servicing agreements. [Trial Tr. at 278:21-279:1; Trial Ex. J-263, Art. 9]. On November 8, 2014, Plaintiffs submitted a request to Wells Fargo for approval and payment of leasing commissions with respect to the Friday Firm Lease. [Trial Ex. J-383]. The requested reserve funds were not released until nearly four (4) months after the lease was submitted for approval, which was approximately one

month after approval of the lease. McGhee testified at trial that because the Plaintiffs paid the Friday Firm Lease commissions out of the operating account, the one-month delay between the lease approval and release of reserve funds had an impact on the Plaintiffs' cash flow. She did not, however, provide any specifics as to how it was affected. [Trial Tr. at 293:7-22, 322:14-324:7]. Berkadia acknowledged that the delay was caused by an employee missing a note in their system. [O'Keefe Dep. at 206:20-207:17; Trial Ex. J-238].

On December 3, 2015, Plaintiffs' property manager submitted a request for approval and payment of leasing commissions with respect to the Regus lease. [Trial Ex. J-610]. Plaintiffs then submitted a revised request on April 28, 2016, which was approved on June 7, 2016. [*Id.*]. LNR could not provide any reasons for the delay in the release of Regus tenant improvement escrow funds. [Polcari Dep. at 218:8-221:25].

Berkadia, on behalf of Wells Fargo, indicated that it would not consider any requests for the release of reserve funds to pay tenant improvement costs and real estate taxes in the month prior to maturity, although there appears to be no provision in the Loan Agreements that supports that position.[4] [Trial Tr. at 366:3-367:4, 367:13-368:4, 368:16-20, 369:5-11; Trial Ex. J-1480, J-263).

At trial, McGhee confirmed that the reimbursement request process had no effect on the UBS refinancing or the Calmwater refinancing efforts, nor did it cause the Plaintiffs' maturity date default. [Trial Tr. 381:20-383:3].

[4] The Loan Agreement provides that the lender has no obligation to disburse funds from any of the reserve accounts, or consent to approve leases following an Event of Default. [Trial Ex. J-263 (Loan Agreement) §§ 9.5(a), 9.7(f), 20.2].

4. Fees Charged by the Servicers

Under the terms of the Subservicing Agreement, Plaintiffs' escrow deposits had to be deposited into KeyBank custodial accounts. [O'Keefe Dep. at 236:4-14].

Pursuant to Section 9.7(a)(ii) of the Loan Agreement, except during the occurrence and continuance of an event of default, the Plaintiffs were entitled to all interest earned on escrowed funds held in interest-bearing reserve accounts. [5] [Loan Agreement § 9.7]. That included interest on all of the Plaintiffs' interest-bearing reserve accounts as defined in Section 1.1 of the Loan Agreement. The Loan Agreement does not address compensation for sub-servicers. Berkadia's compensation, however, is addressed in the Subservicing Agreement with KeyBank. [Trial Ex. J-271; the "Subservicing Agreement"]. Section 4.01 of the Subservicing agreement states that:

> As the Subservicer's sole consideration under this Agreement, the Subservicer shall be entitled to retain interest or other investment earnings on the deposit amounts in the Moody's CMBS Accounts ***(but only to the extent of net investment earnings and to the extent not required to be paid to the Borrower under applicable law or the related Loan Documents)***. Subject to KeyBank National Association being an eligible depository institution under the PSA relating to the SSA, KRECM, or its affiliate KeyBank National Association, shall be entitled to retain interest or other investment earnings on the deposit amounts in the Non-Moody's CMBS Accounts (but only to the extent of net investment earnings and to the extent not required to be paid to the Borrower under applicable law or the related Loan Documents). Notwithstanding anything to the contrary in this Agreement or otherwise, ***the Subservicer shall not be entitled to collect or retain any consideration in connection with the performance of its duties and obligations under this Agreement other than any interest or other investment earnings on the deposit amounts in the Moody's CMBS Accounts as described in this Section 4.01***. (emphasis added).

[5] Interest-Bearing Reserve Account shall mean collectively the Replacement Reserve Account, the Required Repair Account, the Excess Cash Reserve Account, the Operating Expense Reserve Account, the Extraordinary Expense Reserve Account, the Leasing Reserve Account, and the Blue Cross Blue Shield Reserve Account. Interest-Bearing Reserve Funds shall mean collectively the replacement reserve funds, the Required Repair Funds, the Excess Cash Reserve Funds, the Operating Expense Reserve Funds, the Extraordinary Reserve Funds, the Leasing Reserve Funds and the Blue Cross Blue Shield Reserve Funds. [Trial Ex. J-263 at NNN400CC000076].

[Subservicing Agreement § 4.01]. This section of the Subservicing Agreement limits the compensation that Berkadia is entitled to, specifically excluding interest from accounts that the Plaintiffs are entitled to under Section 9.7(a)(ii) of the Loan Agreement.

Nothing in the record suggests, as alleged by Plaintiffs, that Berkadia took interest payable to Plaintiffs under Section 9.7(a)(ii) of the Loan Agreement. Not all escrowed funds under the Loan Agreement are due to be interest-bearing, and interest earned on those funds is paid to Berkadia under Section 9.7(a)(i). [O'Keefe Dep. at 105:8-115:9].

Although the Subservicing Agreement limited Berkadia's compensation to interest from certain accounts, Berkadia, in connection with performing its duties as sub-servicer, also required Plaintiffs to pay certain servicing fees in addition to the interest it received from accounts that were excluded from its compensation. [O'Keefe Dep. at 244:1-5].

LNR also required payment of fees in connection with performance of its duties as special servicer. The fees that LNR imposed were based entirely on the judgment of its asset managers. [Polcari Dep. at 295:15-24]. This decision is made on a case-by-case basis without any standardized, written, or agreed-upon process. [Polcari Dep. at 292:13-293:17, 294:2-13].

The Pooling and Servicing Agreement (the "PSA") governs the relationship between Wells Fargo and LNR and provides for these types of fees and who gets to retain them. [Polcari Dep. at 60:4-61:22, 116:9-117:3, 149:25-150:11; Trial Ex. J-1501]. Plaintiffs are not a party to the PSA between Wells Fargo and LNR. [Polcari Dep. at 59:19-60:10, 64:21-65:9]. According to LNR's representative, special servicers charge consent and processing fees as a matter of practice, as opposed to under the authority of provisions within Loan Documents. [Polcari Dep. at 113:2-3].

Berkadia and LNR assert that they have a legal basis for charging its servicing fees pursuant to the Loan Agreement, pointing Section 17.5 of the Loan Agreement.[6] Section 17.5, however, refers to expenses incurred by the lender under specific circumstances, none of which include the services which Berkadia and LNR performed. Neither Berkadia or LNR point to language in the Subservicing or Pooling and Servicing Agreement that provides for the fees that they charged Plaintiffs in connection with their duties as sub-servicer and special servicer.

D. Efforts to Refinance

As stated above, the Loan matured on September 1, 2016. Leading up to the maturity date, Plaintiffs made numerous efforts to refinance the Loan. In April 2016, the Plaintiffs hired Mark Rubin ("Rubin") of Rubin & Rubin to represent them in their efforts to refinance the Loan as it approached maturity. Plaintiffs attempted to begin refinancing discussions with Berkadia. Berkadia, however, chose not to engage in negotiations. [Trial Ex. J-446]. Nothing in the evidentiary record indicates that Berkadia was obligated to negotiate with the Plaintiffs as a potential refinancing source. Moreover, Berkadia's lack of engagement did not affect Plaintiffs' refinancing effort, as the Plaintiffs viewed Berkadia as a potential alternative and continued to pursue refinance opportunities with other lenders. [Rubin Dep. at 213:19-20, 228:22-229:12].

In addition to Berkadia, Plaintiffs also contacted UBS Real Estate Securities Inc. ("UBS") to discuss a potential refinancing. [Dortona Dep. at 107:3-13]. On June 13, 2016, Plaintiffs and

[6] Section 17.5 of the Loan Agreement states, in relevant part, that "all reasonable costs and expenses (including reasonable, actual attorneys' fees and disbursements . . .) reasonably incurred by Lender in accordance with this Agreement in connection with . . . (d) the negotiation, preparation, execution, delivery and administration of any consents, amendments, waivers or other modifications *to this Agreement and the other Loan Documents* and any other documents or matters requested by Lender; . . . (g) enforcing or preserving any rights, *in response to third party claims or the prosecuting or defending of any action or proceeding or other litigation, in each case against, under or affecting Borrower, this Agreement, the other Loan Documents, the Property, or any other security given for the Loan;* and (h) enforcing any obligations of or collecting any payments due from Borrower under this Agreement . . ." Loan Agreement § 17.5.

UBS agreed to a term sheet. [Trial Ex. J-062, J-451]. The UBS financing was originally expected to close on August 15, 2016. [Trial Ex. J-456]. The UBS term sheet was for a 10-year CMBS term loan and was subject to an exclusivity provision until August 31, 2016. [Trial Ex. J-451].

On August 4, 2016, Plaintiffs entered into a lease agreement with the Mitchell Williams law firm. [Trial Ex. J-003]. The lease was contingent upon Plaintiffs closing the UBS refinancing by August 31, 2016. [*Id*.]. The UBS closing date was pushed back numerous times before the last expected closing date of September 19, 2016. [Trial Ex. J-459, J-476]. Each time that the UBS closing date was pushed back, Plaintiffs sought and obtained an extension from Mitchell Williams. [Trial Ex. J-004, J-005, J-006, J-007, J-361].

On September 13, 2016, UBS decided that it would terminate negotiations with the Plaintiffs after receiving a CBRE listing which identified approximately 41,913 square feet of space available for sublease with a Regions Center tenant. [Dortona Dep. at 192:7-196:15]. This available space constituted what UBS described as "dark space." [Dortona Dep. at 53:7-25]. "Dark space" is space that is under lease at a property but is not being utilized by a tenant. [Dortona Dep. at 53:22-25]. The Defendants had no role in UBS's decision not to go through with the financing, a fact to which Plaintiffs have stipulated.[7] As a result of the UBS financing falling through, Plaintiffs sought and obtained its third extension from Mitchell Williams, this time to September 30, 2016. [Trial. Ex. J-006].

Plaintiffs contacted Calmwater Capital, a potential financing source, shortly after the UBS loan fell through. [Trial Ex. J-192]. Plaintiffs and Calmwater then agreed upon a term sheet for a

[7] On November 15, 2019, in order to resolve a discovery dispute, the parties stipulated to the following facts, among others: a) Defendants' alleged conduct , solely with respect to the UBS refinancing, did not cause any damages to Plaintiffs; and b) Plaintiffs will not pursue any claims in this case which are based on the failed UBS refinancing. [Adv. D.I. 399].

$33 million credit facility. [Trial Ex. J-040]. Plaintiffs initially wanted to close on September 30, 2016. Calmwater, however, had no intention of closing on September 30th, as they were still conducting due diligence and negotiating key deal terms. [Lim Dep. at 73:16-24, 74:10–21]. Rubin, himself, confirmed that as of October 1, 2016, they were still negotiating Loan Documents, "including budgets, reserves, carve-out guarantees and other important elements of the transaction." [Trial Ex. J-544]. Given that the Calmwater loan would not close by September 30th, Plaintiffs sought and obtained another extension from Mitchell Williams. [Trial Ex. J-007]. The new deadline to close on a loan was October 3, 2016. [*Id*.].

As of October 3, 2016, there were still "open items" related to the Calmwater loan. [Trial Ex. J-245; McGhee Dep. at 192:16-19; *see also* Trial Ex. J-556]. As of October 4, 2016, Calmwater was still awaiting an organizational chart from Plaintiffs, a task which Rubin suggested "would take away from many other important hurdles." [Trial Ex. J-553 at CW009110-12]. With the October 3rd deadline now past, Plaintiffs sought yet another extension from Mitchell Williams, this time extending the deadline to October 6, 2016. [Trial Ex. J-361]. It was not until this point that Mitchell Williams discovered that the loan Plaintiffs were negotiating with Calmwater was a bridge loan which provided only a two-year term. [Trial Ex. J-013]. Because its proposed lease would last well beyond that two-year loan term, Mitchell Williams demanded that Calmwater escrow $2 million for Mitchell Williams' expected tenant improvements. [Selig Dep. at 26:7-27:17].

By October 6th, there were still open items that were, according to Calmwater, mostly Plaintiffs' responsibility to address. [Trial Ex. J-213]. Those open items included the terms of the loan guarantee to be signed by Plaintiffs' property manager as well as the escrowed funds demanded by Mitchell Williams. [Trial Ex. J-205, J-206]. As a result, the deadline to approve the

lease was moved once again to October 11, 2016. [Trial Ex. J-019]. By October 11th, however, the outstanding issues remained open. [Trial Ex. J-213]. As a result, Mitchell Williams notified Mark Rubin that it would exercise its right to terminate the lease if the Plaintiffs did not close on a loan, which included the demanded tenant improvement escrow, by 4:00pm that day. [Trial Ex. J-211]. Calmwater ultimately declined to fund the escrow and Mitchell Williams exercised its right to terminate the lease. [Trial Ex. J-215].

Given the increased risk as a result of Mitchell Williams terminating its lease, Calmwater, although still willing to move forward with negotiations, demanded new terms for the proposed loan. [*Id*.]. Plaintiffs and Calmwater, thereafter, never closed on the refinancing. [Lim Dep. at 106:22-108:1].

On April 7, 2017, Plaintiffs executed a term sheet with Ladder Capital, another financing source. [Trial Ex. J-1146]. On May 2, 2017, Rubin testified that, after being assured by Ross that Somera could obtain a better deal, he informed Ladder Capital that the term sheet must be terminated immediately. [Trial Ex. J-1109]. Plaintiffs and Ladder Capital renewed the term sheet some time before June 6, 2017, when they agreed to extend the closing date to July 15, 2017. [Trial Ex. J-1120]. On June 7, 2017, prior to LR-400's purchase of the Note, Rubin discontinued negotiations with Wells Fargo over refinancing the loan. [Trial Ex. J-804].

On November 30, 2017, after LR-400's purchase of the Note, Ladder Capital wrote to Rubin that Ladder Capital "would very much like to refinance your existing loan per the terms of the loan application you have previously executed with Ladder. It is unfortunate that so much time has passed and the communication from your side stopped, but we remain very interested in finally progressing this file to a successful closing." [Trial Ex. J-1133]. Although Ladder Capital expressed in November 2017 that it was interested in moving forward with the original terms from

April 2017, Rubin testified that Ladder Capital terms changed due to Taconic's purchase of the Note. [Trial Tr. at 1194:13-1198:16]. The Court finds that Rubin's testimony is not credible in light of the other available evidence.

E. Payoff Statement and Late Payment Charge

As part of the refinancing effort, Plaintiffs needed to provide a payoff statement to potential financing sources. The Plaintiffs first requested a payoff statement from Berkadia on June 29, 2016 while negotiating a potential refinancing with UBS [Trial Ex. J-454]. In response, on July 8, 2016, Berkadia provided the Plaintiffs with an Estimated Payoff Statement. [Trial Ex. J-456]. On July 12, 2016, Berkadia advised the Plaintiffs that the loan could not be paid off until August 29th due to notice requirements in the Loan Agreement. [Trial Tr. at 881:10-20; Trial Ex. J-457]. Plaintiffs made several attempts over the next month or so following up with Berkadia on their request for a final Payoff Statement. [Trial Tr. at 882:1-6; Trial Ex. J-459, J-474, J-475, J-498, J-513, J-518, J-527].

On August 11, 12, and 18, 2016, Berkadia requested information relating to a mezzanine loan that Plaintiffs had entered into in connection with the original investment in the Regions Center. Berkadia informed the Plaintiffs that they were unable to provide the Plaintiffs with a payoff statement by August 31st due to KeyBank's request for evidence that the mezzanine loan on the property was satisfied. [Trial Tr. at 369:16-370:19, 1207:7-17, 1410:15-1411:16; Trial Ex. J-270, J-464, J-468, J-474, J-475, J-479, J-1481, J-1499]. On August 18, 2016, McGhee forwarded Berkadia's request concerning the mezzanine loan to Rubin. [Trial Ex. J-469]. Rubin acknowledged on August 21, 2016 that he and his colleagues were handling the mezzanine loan issue. [Trial Ex. J-471]. Rubin did not provide the requested mezzanine loan information to Berkadia until September 23, 2016. [Trial Ex. J-513].

The mezzanine loan was a part of the initial loan package with Bank of America, from whom Wells Fargo purchased the Note, and was satisfied in 2006. The information related to the mezzanine loan was in the possession of both Berkadia and LNR prior to August 31, 2016. [Trial Tr. at 369:16-370:19, 370:22-371:15, 1412:4-13; Trial Ex. J-1579, J-1587, J-1592]. Berkadia admitted that it was not allowed to provide the Plaintiffs with a payoff statement without the master servicer being "content" that the mezzanine loan was satisfied. [O'Keefe Dep. at 223:15-22]. LNR confirmed from its own files that the mezzanine loan had been satisfied in connection with the Loan. [O'Keefe Dep. at 226:10-17; Trial Ex. J-1579].

After the Loan was declared to be in default and transferred to LNR as special servicer, Plaintiffs redirected their requests for a payoff statement to LNR. [Trial Tr. at 888:8-13, 1259:5-24; Trial Ex. J-543]. LNR delivered the payoff statement to the Plaintiffs on Friday, September 30, 2016. [Trial Ex. J-539]. The payoff statement included a late payment charge in excess of $1.2 million. [*Id.*]. Plaintiffs allege that the inclusion of the late payment fee caused them to be unable to refinance the Loan. The factual record does not support this contention.

On August 30, 2016 Berkadia informed the Plaintiffs that there "will be charged late fees and default interest for each day that the loan does not pay off after that date." [Trial Ex. J-479]. LNR later added a late fee on the principal balance to the payoff statement. [Trial Ex. J-531]. LNR also included attorneys' fees in the amount of $7,992, "other charges" in the amount of $25,686.68, and miscellaneous fees in the amount of $4,250. [Trial Ex. J-539]. LNR did not provide any details to substantiate these charges.

Under the Pooling and Servicing Agreement, LNR was entitled to all default interest. [Polcari Dep. at 320:7-321:24]. The Late Payment Charge referenced in the Note does not refer to maturity default. Article 8 of the Note states, "If any principal or interest payment is not paid by

Borrower before the fifth (5th) day after the date the same is due . . . Borrower shall pay to [Wells Fargo] upon demand an amount equal to the lesser of four percent (4%) of such unpaid sum . . . in order to defray the expense incurred by [Wells Fargo] in handling and processing such delinquent payment." [Trial Ex. 264, Art. 8].

When asked about the expenses referenced in the language of the Note, Article 8, Mr. Polcari of LNR could not identify any of the lender's expenses associated with "handling and processing the delinquent payment." [Polcari Dep. at 262:12-263:5; Trial Ex. J-264]. Mr. Polcari also did not have any information on the cost to "compensate the lender for the loss of the use of the delinquent payment." [Polcari Dep. at 264:2-24; Trial Ex. J-264]. Still further, Mr. Polcari did not have any information to support any of the fees and charges asserted in the payoff statement. [Polcari Dep. at 277:23-284:9].

Upon receipt of the payoff statement containing the late payment charge, the Plaintiffs contacted LNR requesting that the late charge be removed. [Trial Tr. at 1265:12-1266:24, 1300:12-16; Trial Ex. J-551, J-1614]. The Late Payment Charge was reduced after negotiations between counsel for the parties. [Trial Tr. at 1267:17-1268:9, 1314:15-1315:19, 1317:18-1318:6, 1320:7-19, 1322:24-1323:19; Trial Ex. J-1614, J-1615, J-1616, J-1621]. LNR then agreed conceptually to remove the late payment charge altogether, subject to the Plaintiffs closing on the Calmwater loan and executing certain releases, but never committed to doing so in a signed document. [Trial Tr. at 1211:13-1212:11, 1267:17-1268:9, 1270:1-2, 1270:8-14, 1323:20-1324:11, 1337:24-1338:4; Trial Ex. J-563, J-569, J-576, J-1564, J-1623]. LNR acknowledged the late payment charge was removed from the amount due from the Plaintiffs on the CMBS Loan [Polcari Dep. at 184:14-24; Trial Ex. J-563]. At trial, Defense counsel represented to the court that the late payment charge has been "completely waived". [Trial Tr. at 60:4-7].

F. Master Confidentiality Agreements

1. Somera's Involvement with Plaintiffs

Ian Ross ("Ross"), the Managing Principal of Somera made the initial contact with the Plaintiffs. [Ross Dep. at 11-12]. He learned of the Regions Center bankruptcy through a real estate investment news subscription service, and on December 15, 2016 contacted plaintiff's bankruptcy counsel, Thomas Francella ("Francella"). [Ross Dep. at 11:13-25, 12:2-6, 12:14-22; Trial Ex. J-310, J-650, J-651, J-652]. Francella referred Ross to Rubin as he was the lawyer working on the refinancing of the Regions Center. [Ross Dep. at 74:12-24, 76:24-25, 77:2-9, 85:2-8; Trial Ex. J-310]. Ross attempted to contact Rubin over the next month, and they ultimately spoke in late February 2017. [Ross Dep. at 74:25-75:13, 75:22-23; Trial Ex. J-311].

Ross, on behalf of Somera, pursued a deal for the Regions Center "to work with those [Plaintiffs] to provide capital to the [Plaintiffs] through a third-party capital providing source, acquire their notes (sic), pay off the loan . . . , recapitalize the equity, and create value for [Somera], our equity, and the [Plaintiffs], rather than them being in litigation, foreclosure, and bankruptcy." [Ross Dep. at 79:16-80:10].

Rubin, on behalf of the Plaintiffs, agreed to work collaboratively with Somera, which Rubin alleges, represented itself as a lender, to acquire the Note at a discount to the amount then sought by Wells Fargo through its special servicer, LNR. [Reeser Dep. at 14:19-24; Rubin Dep. at 318:5-320:15].

Somera's general counsel, Michael Fralin ("Fralin"), sent Rubin a draft confidentiality agreement on March 2, 2017. [Ross Dep. at 91:16-21; Trial Ex. J-091]. Both attorneys negotiated changes which were incorporated into the drafts. [Fralin Dep. at 264;5-9; Trial Ex. J-097; Rubin Dep. at 325:12-19]. Rubin revised the document to reflect that he was executing it on behalf of his

clients for deals to be defined pursuant to a schedule to the agreement. [Trial Ex. J-355]. Somera and Rubin, on behalf of the Plaintiffs, entered into the Master Confidentiality Agreement ("the Somera/Plaintiff MCA") on March 6, 2017. [Trial Ex. J-355]. Taconic was not a party to the Somera/Plaintiff MCA. [*Id*.].

While the Somera/Plaintiff MCA refers to "clients" of Rubin & Rubin, the particular clients are not identified in the schedule. The Somera/Plaintiff MCA does refer to particular Proposed Transactions, which included "Regions Center Loan– Little Rock, AK.." [Trial Ex. J-355]. The schedule of Proposed Transactions, signed by Ross and Rubin, was dated effective March 10, 2017, four days after the stated effective date of the Somera/Plaintiff MCA itself. [Trial Ex. J-355]. The term "Proposed Transaction" is not further defined or explained in the Somera/Plaintiff MCA. *Id*. Although Somera asserts that the Plaintiffs are not a party to the Somera/Plaintiff MCA, Ross, as CEO and corporate representative of Somera, was aware that Mark Rubin signed the Somera/Plaintiff MCA as representative for the Plaintiffs. [Ross Dep. at 79:16-80:10, 84:18-22; 88:13-22, 131:12-23]. Further, emails between Somera and Taconic indicate that the parties understood that Rubin was acting as an agent of the Plaintiffs. [Trial Ex. J-714].

Under the Somera/Plaintiff MCA, Rubin & Rubin and Somera agreed to disclose to each other certain information regarding any "Proposed Transaction." Any "Recipient" of "Confidential Information" (as defined in the Somera/Plaintiff MCA), may share it with, among others, "advisors" and "financing sources," who are defined as "Representatives." [Trial Ex. J-355, ¶ 1]. The Somera/Plaintiff MCA further states, "Recipient further agrees that it and each of its Representatives will use the Confidential Information exclusively for the purpose of evaluating the Proposed Transaction, and shall not use the Confidential Information (a) for its own benefit,

(b) for the benefit of any third party, or (c) to Provider ' s detriment. [Trial Ex. J-355, §3]. The Somera/Plaintiff MCA defines "Confidential Information" as follows:

> (i) "Confidential Information" shall include, but is not limited to, all documents, financial statements, reports, forecasts, projections, surveys, diagrams, records, engineering reports and all other written or oral information, as well as diskettes and other forms of electronically transmitted data, furnished or made available to Recipient or Recipient's employees, trustees, members, partners, subsidiaries, agents, advisors, shareholders, counsel , financing sources, or representatives or any affiliate of any of the foregoing (collectively, its "Representatives") by or on behalf of Provider relating to any Proposed Transaction, as well as any written memoranda, notes, analyses, reports, compilations, or studies prepared by Recipient or any Representative (in whatever form or medium) that contain, or are derived from, such documents or other information furnished or made available by or on behalf of Provider.
> "Confidential Information" shall not include information furnished or made available by or on behalf of Provider if such information (a) is or becomes generally available to the public, other than as a result of a disclosure by or through Recipient or its Representatives in violation of this Agreement; (b) is or becomes available to Recipient from a source (other than Provider or its respective Representatives) not bound, to the best knowledge of Recipient or its Representatives, by any legal, contractual or other obligation to Provider prohibiting or limiting the disclosure of such Confidential Information; (c) has been or is independently developed by Recipient or its Representatives without reference to any Confidential Information; or (d) is required to be disclosed by Applicable Law (as defined below).

[Trial Ex. J-355 at § 1(i)]. The Somera/Plaintiff MCA contained limitations on parties' actions with respect to the Proposed Transactions. Section 8 of the Somera/Plaintiff MCA states that:

> For a period of eighteen (18) months from the date of the applicable Schedule (unless provided otherwise in the applicable Schedule), Recipient agrees it will not, directly or indirectly, without Provider's written consent, (a) enter into any oral or written agreement or arrangement of any kind for or in connection with a Proposed Transaction, (b) initiate, maintain or respond to any contact with the owner of the underlying property or any note secured thereby the underlying property relation to the Proposed Transaction, any obligor or borrower related to the Proposed Transaction, or any of the respective employees or representatives of the foregoing (except in the ordinary course of business unrelated to the Proposed Transaction), or (c) otherwise circumvent or undermine the Provider's opportunity with respect to the Proposed Transaction. Recipient will instruct its Representatives to similarly restrain themselves and act accordingly under this Section 8.

[Id. at § 8].

2. Materials Provided to Somera

At trial, Plaintiffs offered proof that prior to LR-400's purchase of the Note, Rubin, and others working at his direction, provided the following information to Somera about the Regions Center (the "Provided Information"):

(a) Operating statements for 2014, 2015, and 2016 [Trial Ex. J-053];
(b) Budget for 2017 [Trial Ex. J-053, J-054];
(c) Tenant Improvement ("TI") and Leasing Commission ("LC") Schedule [Trial Ex. J-053, J-054];
(d) Capital Expenditure Schedule [Trial Ex. J-053, J-054];
(e) Rent roll [Trial Ex. J-053, J-054];
(f) Photographs of the Regions Center [Trial Ex. J-053];
(g) Data regarding sales of properties comparable to the Regions Center [Trial Ex. J-053];
(h) Appraisals and appraisal summaries for the Regions Center [Trial Ex. J-053];
(i) Co-Star office reports for the Regions Center [Trial Ex. J-053];
(j) Corrupted Argus report for the Regions Center [Trial Ex. J-168; J-710][8];
(k) Loan payoff statements dated October 1, 2016 and May 1, 2017 [Trial Ex. J-313, J-146]; and
(l) written settlement offer from Plaintiffs to Duane Morris as counsel for Wells Fargo on behalf of Plaintiffs. [*See* Trial Ex. J-093, J-094, J-095 (e-mails from Somera to Mark Rubin providing draft sections, input and redline edits for settlement letter sent to lender)].

All of the information provided by Plaintiffs to Somera was, in some fashion or form, either publicly available, distributed by Plaintiffs without a confidentiality agreement to numerous third-parties, provided to Taconic from a source other than Plaintiffs, or reproduced by Somera without using the Provided Information.

On March 10, 2017, the Plaintiffs emailed Regions Center financial information, including an Appraisal, 2017 Budget, Rent Roll, TI, LC and Capex Requirements to Somera. [Ross Dep. at 101:10-14; Trial Ex. J-1294]. Subsequently, to fulfill an information request from Plaintiffs, Somera pulled a Trustee Report from Bloomberg. [Trial Tr. at 1515:14-1516:13 (explaining that

[8] Joe LeMense informed Rubin that the Argus file was corrupted. Rubin confirmed that he did not have a working file to send. [Trial Ex. J-168].

a Trustee Report is "a summary of the performance of the [CMBS] loan, which Regions Center was one of the collateral")]. The Report was provided to Rubin on March 13, 2017. [*Id*.].

Somera did make use of the Provided Information. Joe LeMense ("LeMense") performed underwriting for the Regions Center for Somera. [Trial Tr. at 1481:23-1482:2]. LeMense stated he used the Plaintiffs' Provided Information in his underwriting for the Regions Center. [Trial Tr. at 1579:19-23, 1589:5-11, 1591:11-15, 1594:3-9, 1597:17-1598:2, 1629:10-20]. LeMense further stated that the Provided Information received from the Plaintiffs is the type of financial documentation typically reviewed in his underwriting. [Trial Tr. at 1589:13-16, 1591:16-19, 1594:10-13, 1594:14-1595:21, 1598:3-1599:1, 1599:12-1600:6]. LeMense also stated that he treated the Plaintiffs' Provided Information as confidential and that they were marked as confidential. [Trial Tr. at 1600:7-11, 1601:15-17].

Seth Denison, a loan broker engaged by the Plaintiffs, prepared a package of materials that he shared with at least 17 third-party lenders[9], each without an obligation to the keep the provided materials confidential. (*See* Trial Ex. J-1059; Denison Trial Dep. at 53:6-54:21, 56:8-20]. He shared this package by sending nearly identical e-mails to the prospective lenders, attaching the vast majority of the Provided Information (the "Denison E-mail").

Specifically, Denison testified that his e-mail to Jon Gitman with BridgeInvest Funds, a bridge financing lender in Miami, is a sample of the package he sent to the other prospective lenders, *i.e.*, the Denison E-mails. [Denison Dep. at 264:22-265:8; Trial Ex. J-053, J-054]. The e-mail to Jon Gitman indicated that he was attaching the information without any requirement that

[9] When questioned about an email from Denison to Mark Rubin stating "I've had discussions and shared the package with 67 different lenders", Denison clarified that statement, stating that the actual number of parties that the "package" was sent to was closer to 17 and that he had discussions or mentioned the Regions Center to the others. Denison explained that a subsequent email to Mark Rubin stated that he sent 45 follow up emails to potential lenders with whom he previously contacted. [Denison Trial Dep. at 53:6-56:20].

Gitman or BridgeInvest Funds keep it confidential. [Denison Dep. at 267:11-25, 268:1-4, 269:10-23]. The materials attached to Denison's email included: (i) Operating Statements for 2014, 2015, and 2016; (ii) Budget Worksheet for 2017; (iii) TI/LC Schedule for the next 3 years; (iv) Capex schedule for next 6 years; (v) Rent Roll; (vi) Pictures of the property; (vii) Comparable sales (taken from June 2016 appraisal); (viii) Appraisal Summary (taken from June 2016 appraisal); and (ix) Co-Star Market Report. In at least four instances, Denison sent the Denison E-mail without even speaking to the prospective lender beforehand. [*See e.g.*, Trial Ex. J-1167, J-1187, J-1198, J-1218].

Neither Denison nor his employer at the time, Hart Advisors, signed confidentiality or nondisclosure agreements with any of the prospective lenders. [Denison Dep. at 259:13–25, 260:1-25, 261:1-13, 271:3-14, 283:15-25, 284:1-8]. Denison could not recall a single prospective lender to whom this information was given being subject to a confidentiality agreement. [Denison Dep. at 259:18-261:13]. Moreover, Plaintiffs failed to provide evidence that *they* required Denison to sign a confidentiality agreement with prospective lenders. [*See* Rubin Dep. at 297:1–5 (does not know whether Denison obtained confidentiality agreements)]. Indeed, Plaintiffs produced no evidence of written confidentiality agreements between Plaintiffs, or their agents, and the prospective lenders that received the Provided Information. [Rubin Dep. at 291:13–292:1 (does not know if confidentiality agreements were signed)].

Denison testified that boilerplate confidentiality language in his corporate e-mail signature auto-attached occasionally and is "kind of the industry norm." [Denison Dep. at 269:1–9]. Denison also testified that the confidentiality legend does not appear on all his e-mails, that the legend simply "auto-attaches" to his e-mails depending on what device an e-mail is sent from, and that the legend can attach to e-mails that contain no confidential information. [Denison Dep. at 271:21–272:13].

Somera did not receive the Provided Information until March 10, 2017 at the earliest, when Rubin forwarded a copy of the Denison E-mail to Ross. [Trial Ex. J-053, J-054].[10] That is almost four weeks after Denison had distributed the same package of documents to prospective lenders via the Denison E-mails, which included nearly all of the information identified at trial regarding the Regions Center as provided to Somera by Rubin.

Moses Tucker, the Regions Center's property manager, also transmitted Plaintiffs' financial information. For example, Moses Tucker retained Cooper Horowitz, a New York real estate financing firm, to find potential refinancers with no evidence of a confidentiality agreement. [Rubin Dep. at 283:9–21 (unable to recollect if Cooper Horowitz signed a confidentiality agreement)]. McGhee, testified that Moses Tucker also gave prospective lenders budgets, financial statements, rent rolls, and possibly other documents. [McGhee Dep. at 242:7–20].

Some of the Provided Information was filed by the Plaintiffs or other parties in the bankruptcy proceeding. LeMense testified that much of the Provided Information was available in the bankruptcy record and that in certain instances, the bankruptcy records included additional information and was more current. [Trial Tr. at 1488:1-1489:8 (testifying that the more current data available in bankruptcy records was more useful than older data), 1490:10-1495:6, 1496:10-1497:11]. LeMense testified that current data is most useful and helpful for purposes of underwriting—more so than any historical data—because current data simply is more accurate. [Trial Tr. at 1488:1-8].

[10] Trial Ex. J-687 is another copy of the e-mail from Denison as forwarded to Somera on March 10, 2017 that was admitted as Trial Ex. J-053 (forwarded copy of the Denison E-mail with all attachments other than the Excel workbook) and Trial Ex. J-054 (the Excel workbook). Because Trial Ex. J-687 is referenced frequently in the trial record, the Court will reference that exhibit where necessary to avoid confusion. Trial Ex. J687 is a combination of Trial Ex. J-053 and J-054.

The Monthly Operating Report for the Regions Center, for example, which was filed by Wells Fargo in the Plaintiffs' bankruptcy case on April 21, 2017, included a cash flow statement, a general ledger, bank reconciliation reports and bank statements, images of cancelled checks, an accrual-based income statement, an accrual-based balance sheet, a list of aging accounts payables, and a list of aged accounts receivable. [Trial Ex. J-698].

In addition, Wells Fargo filed a detailed proof of claim in Plaintiffs' bankruptcy case that attached a Rider containing much of the information in the December 1, 2016 payoff statement, the Note documents, and other documents that also contained information provided to Somera regarding the Regions Center.

The information in the statements for 2014, 2015, and 2016 (referred to as "Operating Statements") for those years in the Denison E-mail was also available in the bankruptcy filings. [Trial Ex. J-1361, J-1366, J-692, J-1370, J-1375, J-1380; *see e.g.* Trial Tr. at 1487:11–1497:11 (LeMense testifying that the monthly operating report dated February 21, 2017 and the accrual based income statement for January 2017, among others, contain materially the same type of information as the annual statements received from Rubin)].

The information in the Budget Worksheet for 2017[11] was also available in bankruptcy filings. [Trial Ex. J-1334, J-1361 and J-1370; *see* Trial Tr. at 1498:2 –1503:13 (LeMense testifying that the Budget Worksheet contains materially the same information as bankruptcy filings Trial Ex. J-1361 (12-week cash flow forecast and budget worksheet), and Trial Ex. J-1370 (20-week budget worksheet)].

[11] For clarity, the Excel workbook circulated as part of the Denison E-mail (Trial Ex. J-687) contains the following tabs: Budget Worksheet, Projected Revenue, Leasing Commissions and Tenant Improvements, Capital Expenses, Financial Summary, and Tenancy Schedule I. (*See id.).* In the copy admitted as Trial Ex. J-687, referenced exclusively in LeMense's testimony, the documents included in the Excel workbook are not Bates referenced, as these printouts were generated from a native copy of the Excel workbook.

The information in the Revenue Projections, TI and LC Schedule and Capital Expenditure Schedule contained materially the same information as bankruptcy filings. [Compare Trial Ex. J-687 *with* J-1366; Trial Tr. at 1503:19-1507:5 (LeMense testifying that the lease revenue information in the projections also appears in the bankruptcy records), 1507:6–1509:15 (LeMense testifying that the same accounts payable aging, tenant improvements, and capital expenditures were available in Trial. Ex. J-1366)].

Also, identical copies of the loan payoff statement provided by Rubin to Somera were filed in the bankruptcy records. [*See* Trial Tr. at 1528:15-1529:11, 1530:6-1533:10; compare Trial Ex. J-719 *with* J-1393, J-1396 (same loan payoff statement from LNR); Trial Tr. at 784:22-786:4 (Jordan explaining why payoff statement was meaningless due to Taconic's access to Trepp, which is "a CMBS data and analytics tool where anyone who trades CMBS bonds has access to" . . . and that Trepp "shows you the loan balance, any reserves, any late fees, accrued interest, and then all you have to do is walk forward, the default interest, which is a simple day count calculation" . . . "we do this all the time. We're within pennies, generally.")].

Other information contained in the appraisal summaries for the Regions Center was also available in public tax records and bankruptcy filings. [Trial Ex. J-1364, J-1374; *see* Trial Tr. at 1520:20-1523:17 (LeMense testifying that the appraisal results in Schedule D of the bankruptcy filings contained the same information as the appraisal summary provided)].

Some of the Provided Information was available on electronic databases. Somera had direct access to extensive data about the Regions Center, which overlapped the Provided Information, from many sources, including electronic database products such as Bloomberg L.P. [Trial Tr. at 1510:22-1514:20; Trial Ex. J-982]. In March of 2017, Somera accessed a Trustee Report from Bloomberg that included information about debt service on the Note, Plaintiffs' default on the

Note, Plaintiffs' bankruptcy filings, and the status of Loan refinancing efforts. [Trial Tr. at 1515:14-1516:13; Trial Ex. J-166 (Trustee report dated March 2017 summarizing loan performance)]. In the spring of 2017, Somera accessed a Bloomberg report on the Regions Center that contained, among other information, the original and then-current balances of Plaintiffs' mortgage loan, the name of the original mortgage lender and the Note master servicer, as well as information on revenue, leasing commissions, tenant improvement expenditures, and capital expenditures. [*See* Trial Tr. at 1510:14-1513:4, Trial Ex. J-982 (the same information provided regarding Regions Center in a Bloomberg report); *see also* Trial Tr. at 1632:18-1634:20 (payoff statement information in Bloomberg)]. Photographs of the Regions Center were also available in Bloomberg . *See* Trial Tr. at 1519:14-20]. The information used by LeMense to prepare the Argus report for the Regions Center was also available on Bloomberg. [*See* Trial Tr. at 1567:13-1569:17, 1610:21-23, 1631:2-10 (establishing that Somera could not access Argus data allegedly provided by Mark Rubin because it was corrupt and that Somera had to rebuild the data assumptions in the Argus software from information available on Bloomberg in order to create the report)]. Argus is real estate underwriting software that allows the user to create projections of property performance. [*Id*.].

Data regarding sales of properties comparable to the Regions Center contained in an Appraisal was also available in public tax records, market reports, and CoStar reports. [*See* Trial Tr. at 1523:23-1524:24]. CoStar office reports for the Regions Center are available to anyone willing to pay to access one. CoStar is a subscription-based service that contains commercial real estate information for a given property and market. [Trial Ex. J-659; *see* Trial Tr. at 1518:7-21; *see also* Denison Dep. at 279:6-279:13, 281:22-282:4].

3. Somera's Involvement with Taconic

Somera, under the Somera/Plaintiff MCA, had an affirmative duty to inform its Representatives (as defined in the Somera/Plaintiff MCA) of the confidential nature of the Provided Information. [Trial Ex. J-159 at ¶3]. Taconic, as a financing source, was a Representative of Somera with respect to the Somera/Plaintiff MCA. Both Somera and Taconic acknowledged that Taconic was a "financing source" for Somera; however, James Jordan, a principal of Taconic asserts that Taconic is not a representative of Somera as there was no affiliation between Somera and Taconic prior to LR-400's purchase of the note. [Ross Dep. at 36:16-22; Trial Tr. at 757:20-758:1]. The Court finds that Jordan was not testifying regarding his understanding of the term "Representative" as defined in the Somera/Plaintiff MCA.

Somera and Taconic first discussed the Regions Center before the Somera/Plaintiff MCA was executed. [Ross Dep. at 99:18-24, 100:5-13]. Somera and Taconic take conflicting positions as to whether Somera provided the MCA to Taconic. [Trial Tr. at 641:20-642:17 (Jordan testifying that neither he or Taconic were made aware of the Somera/Plaintiff MCA); Ross Dep. at 35:12-19 (When asked if Somera made Taconic aware of the Somera/Plaintiff MCA, Ross responded "Yes, of course. That's why we signed a confidentiality agreement with them.")]. Somera and Taconic had an existing Master Confidentiality Agreement (the "Somera/Taconic MCA"). It was not until April 24, 2017, that Ross emailed Taconic counsel Erin Rota ("Rota"), asking for the Regions Center to be added to the Somera/Taconic MCA. [Trial Ex. J-703; Ross Dep. at 111:20-112:14]. On April 25, 2017, Rota emailed Ross and Somera's counsel Fralin a fully executed Schedule to the Somera/Taconic MCA adding the Regions Center, as requested by Ross. [Trial Ex. J-706; Ross Dep. at 112:20-24].

Taconic, as a Representative, was subject to the same confidentiality restrictions as Somera. [Trial Ex. J-159 at ¶3]. Taconic treated the documents it received from Somera as confidential. [Trial Tr. at 644:14-22; Lam Dep. at 76:14-23, 77:20-78:14]. As discussed above, however, none of the Provided Information was actually confidential under the terms of the Somera/Plaintiff MCA.

There was extensive sharing of Provided Information between Somera and Taconic prior to Somera and Taconic adding the Regions Center to the Somera/Taconic MCA. [Trial Tr. at 1555:2-12; Ross Dep. at 33:22-34:2; 34:19-35:14). On March 21, 2017, Ross emailed Jordan a settlement letter from the Plaintiffs to Wells Fargo. (Trial Tr. at 650:10-651:1; Trial Ex. J-127]. On March 29, 2017, Ross emailed Jordan further financial information regarding the Plaintiffs' settlement offer to Wells Fargo, suggesting a strategy for Taconic's purchase of the Note. [Trial Tr. at 653:10-658:8; Trial Ex. J-128].

On April 3, 2017, Ross emailed Jordan, requesting that he "get color from LNR ASAP." Trial Tr. at 658:10-659:1; Trial Ex. J-129]. On April 24, 2017, counsel for the Plaintiffs emailed Ross a settlement letter to Wells Fargo's counsel and an updated LNR payoff statement. Ross then forwarded this information to Taconic employee Andrew Lam ("Lam"), at 2:27 PM, stating "Couple things to get you up to speed." [Trial Tr. at 667:8-668:2; Lam Dep. at 129:18-130:14; Trial Ex. J-138, J-313]. Lam confirmed receipt of Ross' email at 2:29 PM the same day. [Trial Tr. at 666:21-667:7; Ross Dep. at 110:19-24; Trial Ex. J-314].

On April 25, 2017, Ross emailed Jordan a spreadsheet with calculations for the purchase of the Regions Center Note. Ross sent a similar email the next day to Jordan, Lam and Eric Sitman ("Sitman"), stating, "We should be spending real time on the Regions deal if we believe we can get it from LNR at par. 30% can be bought from TICs at discount, 30% can be created through

dilution…", describing the potential deal as "screaming IRR." [Trial Tr. at 670:7-12, 671:14-673:8, 675:6-13; Lam Dep. at 186:2-13; Ross Dep. at 114:5-115:10, 117:23-118:7; Trial Ex. J-171, J-317, J-707]. At trial, Jordan was asked how Ross could have known that 30% of the Plaintiffs were willing to sell at a 30% discount, or that they might accept a 30% dilution of their interests. [Trial Tr. at 675:1-13]. Jordan responded that he did not know. [*Id.*]. LeMense was also asked about this and stated that "30 percent is a number that we've guessed at before" but imagines that it was Ross' opinion. [Trial Tr. at 1561:14-1567:4].

On April 27, 2017, at 5:57 AM, Lam emailed Ross and LeMense requesting "everything thing you have," including "rent roll/stacking, historical financials, recent thirds, leasing activity report, etc." [Trial Tr. at 676:21-677:23, 679:3-9; Lam Dep. at 189:24-190:21; Trial Ex. J-712]. In response, 33 minutes later, LeMense emailed Lam a Dropbox link, containing the Plaintiffs' Provided Information, stating "you should have access now." [Trial Tr. at 1628:1-19; Trial Ex. J-175].

On April 30, 2017, Ross emailed Jordan, Sitman, and Lam a draft Somera Term Sheet for Regions Center, stating "FYI this is what we are preparing *to send the TICs via Mark Rubin*. Let's discuss appropriate timing tomorrow." [Trial Tr. at 681:20-682:17; Ross Dep. at 120:21-122:2; Trial Ex. J-714]. (emphasis added). This document further confirms that Somera knew that Rubin was acting in a legal representative capacity for the Plaintiffs.

On May 1, 2017, Lam emailed LeMense requesting information about the property manager at the Regions Center, information Taconic admits it was not sure of at the time. (Trial Tr. at 690:15-691:2; Trial Ex. J-141]. Lam also emailed Ross and LeMense on May 1, and again on May 2, requesting the "latest Argus." [Trial Tr. at 690:6-14, 694:4-9; Lam Dep. at 205:12-207:2, 207:19-208:10, 218:2-25; Ross Dep. at 122:3-11; Trial Ex. J-132, J-717]. Ross responded

to this request on May 2, stating "will send this morning." [Trial Tr. at 1630:7-1631:10, 1632:4-6; Trial Ex. J-144, J-1298]. Later that day, LeMense sent the updated Argus file to Lam. [Trial Tr. at 1638:10-15; Lam Dep. at 226:4-227:6; Trial Ex. J-147]. That same day, Rubin emailed Ross an updated confidential LNR Payoff Statement, which Ross then forwarded to the Taconic team, summarizing his financial analysis. [Trial Tr. at 694:10-695:14, 1188:4-16; Trial Ex. J-098, J-146]. Also on May 2, Ross emailed Jordan asking, "'CAN WE GET THIS DEAL!?!?!?!" [Trial Tr. at 691:3-18; Trial Ex. J-133].

On May 4, 2017 Ross emailed the Taconic team again, stating "…So we would be buying at ~$27,850,000…". Ross further explained that the quoted figure was with the reserves applied to the loan balance. [Trial Tr. at 696:16-697:1, 1632:14-24; Ross Dep. at 133:24-134:21; Trial Ex. J-134, J-178].

Taconic also received information from LNR. Taconic ultimately engaged with LNR in early May 2017, to obtain access to a data room with information supplied by LNR so that Taconic could conduct due diligence on the Regions Center. [*See e.g.*, Trial Ex. J-772 (e-mail correspondence between LNR and Taconic beginning May 15, 2017 through June 1, 2017, referencing the drop box and numerous other documents provided to Taconic including the "Borrower Claim Letter," incorporated into the loan purchase agreement)]. The "Borrower Claim Letter" provided to Taconic by LNR on June 1, 2017 and incorporated into the loan purchase agreement is a copy of the Settlement Offer Letter that Plaintiffs claim contains information that could only have been obtained directly from Plaintiffs as "Confidential Information" pursuant to the Somera/Plaintiff MCA. [Compare Trial Ex. J-772 at 35-39 *with* Trial Ex. J-127]. However, the record shows that Taconic obtained this information directly from LNR and it was incorporated

into the loan purchase agreement. [*Id.*]. James Jordan, a principal at Taconic, testified that he did not inform Ian Ross at Somera prior to making contact with LNR. [Trial Tr. at 779:1-6].

Financial information and information about Plaintiffs' settlement position purportedly contained in spreadsheets prepared by Somera was either (1) publicly available as described above [*See* references above re information found in bankruptcy filings; *see also* Trial Tr. at 1525:19–1527:8 (LeMense testifying that information about Regions Center available in Trial Ex. J-707 was all available from sources other than Mark Rubin), Trial Tr. at 1530:6–1531:16 (LeMense testifying that all information about Regions Center available in Trial. Ex. J-719 was available from sources other than Mark Rubin)], or (2) provided to Taconic directly by LNR [*See e.g.,* Trial Ex. J-732 (e-mail from LNR sending Taconic a link to view due diligence documents) Trial Ex. J-772 (e-mail from LNR sending Taconic a copy of the Settlement Offer Letter), Trial Tr. at 788:19-798:17 (Jordan testifying about receiving a "data dump" from LNR)].

On May 5, 2017, Ross, for Somera, and Lam, for Taconic, together visited the Regions Center in Little Rock. [Lam Dep. at 47:17-24; Ross Dep. at 125:11-21; Trial Ex. J-320, J-321]. Lam stated he was there as part of his due diligence on the Regions Center. [Lam Dep. at 47:25-49:9, 51:9-52:6, 52:17-24]. On May 6, 2017, Ross and LeMense discussed invoicing Taconic for Ross's trip to Little Rock. [Trial Ex. J-179]. Taconic and Somera exchanged emails discussing and agreeing to a split of financial proceeds related to the Regions Center. [Trial Ex. J-181]. There is no evidence in the record that either of these things ever occurred.

On June 11, 2017 counsel for the Plaintiffs wrote an email to Ross reminding him of Somera's obligations under the Somera/Plaintiff MCA, and further warning him that without participation of the Plaintiffs, a purchase of the Note by Somera might be at a price too high to

make a deal after the fact. [Ross Dep. at 149:6-13, 151:9-152:19, 152:20-153:13, 154:13-155:2, 155:3-156:10, 156:20-24, 156:25-158:3, 160:2-19, 160:23-161:8; Trial Ex. J-121].

From the signing of the Somera/Plaintiff MCA until the June 13, 2017 Note purchase by LR-400, Somera never disclosed to Rubin that Taconic was involved in the Regions deal in any way, or that they were providing information to Taconic. [Ross Dep. at 106:25-107:22, 176:15-177:12].

On June 26, 2017, after LR-400's purchase of the Note, Rubin and McGhee (as a representative of the TIC owners), Somera and Taconic entered into the Tri-Party Agreement ("TPA"). [Trial Ex. J-255]. The purpose of the agreement was to "engage in settlement discussions" in relationship to the "Dispute" and to protect and facilitate the exchange of "Confidential Information." [*Id.*]. According to the TPA, the Dispute concerned the bankruptcy cases filed by the TIC owners and claims against the prior lender detailed in a March 21, 2017 letter from Rubin to counsel for Wells Fargo. [Trial Ex. J-255, J-127]. The TPA also reaffirmed the validity of the Somera/Plaintiff MCA. [*Id.*]. Somera's purported role in this agreement was as a facilitator between the borrowers (TIC owners) via Rubin and the lender (Taconic). [Trial Tr. 817:6-10]. These negotiations lasted for the next 6-12 months and involved numerous offers back and forth. [Trial Tr. 761:2-20]. Eventually, negotiations soured, and this Adversary Proceeding was filed. [Trial Tr. 764:18-765:5].

Plaintiffs' claim objection alleges that Taconic and Somera engaged in a fraudulent scheme to procure the sale of the Note for the benefit of Taconic. Nothing in the evidentiary record suggests that Somera and Taconic engaged in fraudulent conduct. The record does show that post Note purchase, Somera and Taconic engaged in discussions regarding ways to effectuate a refinancing of the Note. [Trial Ex. J-296, J-299, J-300, J-301, J-337). On June 19, 2017, Fralin discussed with

Taconic, with the authority of Somera, using a Motion to Dismiss in the underlying bankruptcy action to this case as "leverage against the Debtor" in negotiations. (Trial Tr. at 1649:2-6; Ross Dep. at 189:9-190:6; Trial Ex. J-327]. In December 2017, Ross emailed Lam, Jordan, and Jonathan Reeser ("Reeser"), Vice President of Somera, discussing "gearing up for war" with the Plaintiffs. [Trial Ex. 302]. The general theme of the discussions was Somera and Taconic's belief that the Plaintiffs may not have been getting accurate information on the realities of the litigation. [*See* Reeser Dep. at 90:16-97:3].

The Somera/Plaintiff MCA prohibits Somera and its Representatives from contacting the owners of the Regions Center as well as the owners or the Note without Plaintiffs consent. [Tr. Transcript 750:20-751:19; Jt. 159 at ¶8). Somera retained third-parties Hart Advisors and William White to contact Plaintiffs without having to go through Rubin. [Trial Tr. at 750:20-751:19, 752:22-753:4, 753:10-754:17; Ross Dep. at 224:7-19, 226:3-7, 226:22-227:2, 227:5-20, 228:12-229:3, 244:15-22, 246:10-16, 247:10-248:7, 250:2-5, 250:12-15, 257:3-15, 258:23-259:8; Reeser Dep. at 72:15-73:5, 77:11-78:6, 81:10-82:7, 83:3-9, 91:18-92:8, 104:9-105:11, 120:13-121:10, 121:22-122:11, 122:25-123:4; Trial Ex. J-290, J-291, J-297, J-302, J-304, J-336, J-338, J-1701].Without prior consent from the Plaintiffs, Somera, through its advisor, Hart Advisors, initiated contact with the Plaintiffs in connection with the Regions Center. [Ross Dep. at 256:6-10, 258:8-12; Reeser Dep. at 99:5-100:3; Trial Ex. J-297]. Hart Advisors was rebuffed by those plaintiffs who were contacted.

Taconic also either initiated or maintained contact with LNR in order to purchase the Note. The Plaintiffs never consented to the purchase of the Note by Somera or Taconic. [Ross Dep. at 154:23-155:2]. Under the Somera/Taconic MCA, Taconic could not purchase the note without Somera's consent. [Trial Ex. J-161]. Taconic acknowledged that it could not purchase the Note

without Somera's consent. [Trial Tr. at 703:5-16]. When asked whether Taconic's purchase of the note was something that Somera was prohibited from doing under the Somera/Plaintiff MCA, Fralin confirmed that Taconic's actions would have been a violation of the Somera/Plaintiff MCA if Somera had acquired the Note without the prior consent of Plaintiffs. [Fralin Dep. at 140:4-12, 140:19-141:11].

II. Conclusions of Law

A. Claim Objection & Count V of the SAC[12]

When a claim objection is filed in a bankruptcy case, the burden of proof as to the validity of the claim shifts to different parties at different times. *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir.1992). Pursuant to Bankruptcy Rule 3001(f), the burden of proof first rests on the claimant to establish prima facie evidence of validity by submitting the supporting documentation required under Rule 3001. Fed. R. Bankr.P. 3001. If the proof of claim does not include sufficient supporting documentation, the burden remains with the claimant to prove its claim by a preponderance of the evidence. *In re New Century TRS Holdings, Inc.*, 495 B.R. 625, 633 (Bankr. D. Del. 2013).

Pursuant to section 502 of the Bankruptcy Code, a proof of claim is allowed unless a party in interest objects. 11 U.S.C. § 502(a). When an objection is filed, the burden shifts to the objecting party to present evidence to overcome the presumed validity of the claim that is "of probative force equal to that of the allegations of the creditor's proof of claim." *New Century TRS Holding*, 395 B.R. at 633; *In re United Companies Financial Corp.*, No. 99-450, 2001 WL 1819941, at *1 (Bankr. D. Del. Feb. 1, 2001). If the objecting party overcomes the prima facie validity of the

[12] Count V of the SAC asserts a claim for declaratory relief regarding the late charge asserted by LR-400 which is included in LR-400's proof of claim. Thus, the Court will address Count V and the proof of claim together.

claim, the burden then shifts to the claimant to establish its clam by a preponderance of the evidence. [*Id*.].

As part of its proof of claim, LR-400[13] attached a rider establishing the basis of the claim as well as the supporting loan document, satisfying its initial burden of establishing prima facie validity of its claim.

Plaintiffs later objected to LR-400's claim on four grounds: 1) that the late payment charge is improper under applicable state law, 2) that the fees and expenses must be reasonable and appropriate, 3) that default interest should be disallowed because the lender engaged in wrongdoing or other inequitable conduct, and 4) that LR-400 should not be allowed to assert its claim because it has unclean hands.

During opening statements, Lenders' counsel acknowledged that the late payment charge was waived. In light of the waiver, the Court need not engage in an analysis of whether the late payment charge was proper under Arkansas state law.

The Court now turns to the fees and costs LR-400 asserts in its proof of claim pursuant to section 17.5 of the Loan Agreement. Section 17.5 requires that costs and expenses be reasonably incurred by the lender. Thus, Wells Fargo, LNR, or Berkadia must have actually and reasonably incurred the expenses. As discussed above, when questioned about the expenses, Joseph Polcari, LNR's representative, could not identify the basis for any of the expenses that LNR asserted in its payoff statement as a part of its secured claim. In addition to LNR's representative being unable

[13] The proof of claim was originally filed by Wells Fargo and was transferred to LR-400 when it purchased the Note.

to testify to the basis for the expenses, the lenders failed to introduce any evidence at trial to satisfy its burden with respect to its fees and expenses.

Plaintiffs satisfied their burden with respect to the legal fees and miscellaneous charges asserted in the proof of claim. With the Plaintiffs satisfying their burden, the burden then shifted back to the Lender to prove its claim by a preponderance of the evidence. As discussed above, the Lender failed to meet its burden. Thus, the claim objection is sustained as to the late fees and expenses.

To the extent Plaintiffs' claim objection is based on the doctrine of unclean hands due to actions taken by LR-400, Wells Fargo, Berkadia, or LNR, the objection is overruled. To successfully assert an unclean hands defense to a proof of claim, the objector must show fraud, unconscionability, or bad faith on the part of the plaintiff. *U.S. v. State St. Bank & Trust Co.*, 520 B.R. 29, 69 (Bankr. D. Del. 2014). The application of the unclean hands doctrine in within the sound discretion of the court. *New Valley Corp. v. Corporate Property Associates 2 and 3 (In re New Valley Corp.)*, 181 F.3d 517, 525 (3d Cir. 1999). The record does not show conduct that would support a finding of fraud, unconscionability, or bad faith.

To the extent Plaintiffs' claim objection requests disallowance of the default interest rate due to actions taken by LR-400, Wells Fargo, Berkadia, or LNR, the objection is overruled. As discussed herein, Plaintiffs failed to prove that LR-400, Wells Fargo, Bekadia, or LNR acted in bad faith or that Plaintiffs suffered any harm resulting from the Defendants' conduct.

B. Count I – Breach of Contract (Wells Fargo)

To prevail on their breach of contract claim, Plaintiffs had to show that 1) Plaintiffs and Wells Fargo had a valid contract; 2) Wells Fargo breached a provision of that contract; and 3)

Plaintiffs suffered resulting damages. *Foreman School Dist. No. 25 v. Steele*, 347 Ark. 193, 202 (Ark. 2001). Under Arkansas law, contracts are enforced according their plain language. *Norris v. State Farm Fire & Cas. Co*., 16 S.W.3d 242, 246 (Ark. 2000). Where contracts contain provisions that limit liability, those provisions are enforced when the party fairly entered into a contract, knew of the liability being released, and benefited from the activity which may lead to the liability being released. *Bryan v. City of Cotter*, 344 S.W.3d 654, 658 (Ark. 2009).

Plaintiffs allege that Wells Fargo had a duty to cooperate with Plaintiffs in the performance of their obligations under the Loan Documents, as well as a duty of good faith and fair dealing.[14] Plaintiffs allege that Lender breached these duties by knowingly and intentionally thwarting Plaintiffs effort to pay off the loan, refusing to timely provide a payoff statement upon request, intentionally providing an inaccurate payoff statement, and knowingly and intentionally causing the Mitchell Williams lease to be terminated. Nowhere in the SAC do Plaintiffs point to a specific contractual provision that they allege was breached.

Plaintiffs attempted to meet their burden by introducing evidence of various perceived bad acts by Wells Fargo, Berkadia, and/or LNR. However, as discussed above, Plaintiffs failed to prove at trial that any of these acts caused the Plaintiffs harm. The evidentiary record establishes that Plaintiffs suffered no harm resulting from the lease approval process, the property manager approval process, or the processing of reimbursement requests. Plaintiffs' own witness testified that these processes caused the Plaintiffs no harm. Findings of Fact, §§ I(C)(1)-(3) supra.

Plaintiffs did not meet their burden with respect to their claim that Wells Fargo, Berkadia, or LNR breached the Loan Agreement by not providing a final payoff statement prior to September

[14] The SAC, however, does not contain a count for breach of the duty of good faith and fair dealing.

30, 2016. The Loan Agreement does not provide for a specific time period in which Wells Fargo, Berkadia, or LNR must provide final payoff statements. Furthermore, the record establishes that Plaintiffs' delay in providing Berkadia information relating to the mezzanine loan as well as numerous changes to the closing date contributed to the delay. Furthermore, the evidence presented at trial proved that Plaintiffs did not suffer any harm as a result of not receiving a final payoff statement prior to September 30, 2016. Furthermore, the final payoff statement was to be used in connection with the potential UBS financing, which the Plaintiffs have stipulated was lost for reasons unrelated to Defendants. Findings of Fact, § I(D) supra.

Plaintiffs did not meet their burden with respect to their claim that actions of Wells Fargo, Berkadia, or LNR caused Mitchell Williams to terminate its lease. As discussed above, Plaintiffs own actions contributed to the lease termination. Plaintiffs did not prove at trial that any actions taken by Wells Fargo, Berkadia, or LNR had any effect of Mitchell Williams' decision. To the contrary, the record is clear the Mitchell Williams terminated the lease because Calmwater would not agree to escrow $2 million for the benefit of Mitchell Williams. Findings of Fact, § I(D) supra.

Plaintiffs also failed to meet their burden with respect to their claims that actions of Wells Fargo, Berkadia, or LNR caused Plaintiffs' refinancing efforts to fail. Regarding the UBS refinancing, as discussed above, Plaintiffs' stipulated that no actions taken by Wells Fargo, Berkadia, or LNR caused UBS to refuse to go forward. As it relates to the Calmwater refinancing, Plaintiffs did not prove that any actions taken by Wells Fargo, Berkadia, or LNR caused the Plaintiffs not to close on the Calmwater refinancing. As discussed above, Plaintiffs failure to close on the Calmwater refinancing was due to Mitchell Williams terminating its lease with the Plaintiffs and had nothing to do with any actions by Wells Fargo, Berkadia, or LNR. Findings of Fact, § I(D) supra.

To the extent that Plaintiffs claims seek monetary damages and are based on Wells Fargo, Berkadia, or LNR acting unreasonably or that they unreasonably delayed acting, where the Loan Agreement imposed an obligation to act reasonably or promptly, those claims are barred under section 18.6 of the Loan Agreement. Plaintiffs failed to prove at trial that they did not fairly enter into the Loan Agreement or that they did not know of the limitations on liability contained in section 18.6. The record is clear, however, that Plaintiffs benefitted from the activities upon which their claims are based, i.e., lease approvals, management approvals, and approval of reimbursement requests. Findings of Fact, §§ I(C)(1)-(3) supra.

To the extent that Plaintiffs seek monetary damages in relation to the servicing fees charged by Berkadia and LNR, those payments cannot be recovered under Arkansas' common law voluntary payment rule. Under the voluntary payment rule, "[w]hen one pays money on demand that is not legally enforceable, the payment is deemed voluntary. Absent fraud, duress, mistake of fact, coercion, or extortion, voluntary payments cannot be recovered." *TB of Blytheville, Inc. v. Little Rock Sign & Emblem, Inc.*, 946 S.W.2d 930, 932 (Ark. 1997). Plaintiffs offered no evidence at trial that the servicing fees were paid under fraud, duress, mistake of fact, coercion, or extortion. The payments are therefore unrecoverable even if the fees were not permissible under the Loan Documents.

C. Count II – Negligence (Wells Fargo, Berkadia, and LNR)

Under Arkansas law, to succeed on a negligence claim, the Plaintiffs must establish the existence of a duty on the part of Wells Fargo, Berkadia, or LNR to conform to a specific standard or conduct, the breach of that duty by Wells Fargo, Berkadia, or LNR, an injury to the Plaintiffs caused by the breach, and resulting damages. *Cross v. Western Waste Indus.*, 469 S.W.3d 820, 825 (Ark. Ct. App. 2015); *Chambers v. Stern*, 64 S.W.3d 737, 744 (Ark. 2002) ("To establish a *prima*

facie case of negligence, a plaintiff must show that damages were sustained, that the defendant breached the standard of care, and that the defendant's actions were the proximate cause of the damages").

While, if the facts warrant, a party to a contract may bring an independent tort claim, "a plaintiff may not transform a breach of contract action into a tort claim . . . [t]he breach itself is simply not a tort." *Quinn Cos., Inc. v. Herring-Marathon Grp., Inc.*, 773 S.W.2d 94, 94 (Ark. 1989) (citing *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 602 (6th Cir. 1988) ("The tort liability of parties to a contract arises from the breach of some positive legal duty imposed by law because of the relations of the parties, rather than from a mere omission to perform a contract obligation."), *and Cotton v. Otis Elevator Co.*, 627 F. Supp. 519, 521 (S.D. W. Va. 1986) ("[I]t is no tort to breach a contract, regardless of motive. A tort exists only if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed.")). When no duty of care is owed, outside of the contractual relationship, a negligence claim fails as a matter of law. *Mans v. Peoples Bank of Imboden*, 10 S.W.3d 885, 888 (Ark. 2000).

Plaintiffs failed to prove the elements of their negligence claim at trial. Plaintiffs produced no evidence of a duty, separate and apart from the contractual obligations of Wells Fargo, Berkadia, or LNR under the Loan Documents. Indeed, Plaintiffs negligence claims are based on the same conduct as their breach of contract claim. (Compare SAC ¶¶ 80-83 *with* ¶¶85-88). Therefore, as a matter of law, Plaintiffs negligence claim fails.

Even if Plaintiff would have alleged a duty independent of the contractual relationship, as stated above with respect to Count I, plaintiff failed to prove that they suffered any harm as a result of Wells Fargo, Berkadia, or LNR's conduct.

D. Count III – Tortious Interference (Wells Fargo, Berkadia, and LNR)

To prove a claim for tortious interference, a plaintiff must establish the existence of a valid business expectancy, the defendant's knowledge of that business expectancy, the defendant's intentional interference with the business expectancy, and damages resulting from the interference. *Windsong Enterprises, Inc. v. Upton*, 233 S.W.3d 145, 150 (Ark. 2006). However, "[t]here can be no claim for tortious interference where a busines expectancy is subject to a contingency." *Mercy Health Sys. of Nw. Ark., Inc., v. Bicak*, 383 S.W.3d 869, 876 (Ark. Ct. App. 2011).

The SAC alleges that Lender Defendants interfered with Plaintiffs' expectancy in the Mitchell Williams lease. At trial, Plaintiffs failed to prove two key elements of their tortious interference claim. First, Plaintiffs failed to prove that the Mitchell Williams lease was a valid business expectancy. As discussed above, the lease was subject to multiple contingencies, i.e., closing on a refinancing loan by a certain date and an escrow demand, neither of which occurred. Plaintiffs also failed to prove that Wells Fargo, Berkadia, or LNR engaged in any conduct with intent to interfere with the Mitchell Williams lease. In fact, the record is clear that the conduct of Wells Fargo, Berkadia, and LNR had no effect on Mitchell Williams' decision to terminate the lease.

E. Count IV – Aiding and Abetting Tortious Interference (Berkadia and LNR)

Because Plaintiffs failed to prove their tortious interference claim, as a matter of law, they failed to prove their claim for aiding and abetting tortious interference. *See Hinton v. Bryant*, 367 S.W.2d 442 (Ark. 1963).

F. Count VI – Breach of Master Confidentiality Agreement (Somera)

Plaintiffs contend that Somera breached the MCA between Plaintiffs and Somera by (1) disclosing Confidential Information to a third party, namely Taconic, (2) Using the Confidential Information for purposes of "circumventing a business relationship with Plaintiffs while taking the business opportunities identified in the confidential information for themselves to the exclusion of Plaintiffs. [Adv. D.I. 268, ¶¶ 110-114]. Further, Plaintiffs aver that Somera reproduced and disclosed Confidential Information "for purposes other than negotiating and evaluating the possibility of entering into a business relationship with Plaintiffs, without the prior written permission of Plaintiffs." [*Id.*]. Essentially, the Plaintiffs assert that Somera improperly shared "Confidential Information" with Taconic, giving Taconic an advantage in purchasing the loan from Wells Fargo, circumventing the Plaintiffs' opportunity to purchase the note at a discount.[Adv. D.I. 268, ¶¶ 75, 76].

Somera disagrees, asserting that the Plaintiffs are not parties to the MCA nor are they intended third party beneficiaries; therefore, the Plaintiffs cannot enforce the MCA. [Adv. D.I. 715, ¶ 87]. However, Somera argues, even if the Court were to find that Plaintiffs are a party to the MCA, the Plaintiffs cannot prove a breach, because the Provided Information does not meet the definition of "Confidential Information" as contemplated under the Somera/Plaintiff MCA. [*Id*. at ¶ 93]. Further, Somera cannot be held liable under the Somera/Plaintiff MCA for the alleged actions of Taconic/LR-400 as (1) Taconic was an authorized recipient of information as a "financing source" and (2) Somera notified Taconic of the "confidential" nature of the information as required under the Somera/Plaintiff MCA. [*Id.* at ¶¶ 131-35]. Finally, even if the Plaintiffs could prove those items, their claim fails as they cannot show cognizable damages from the alleged breach. [Id. at ¶159].

Breach of Contract under New York law

The Somera/Plaintiff MCA contains a choice of law provision, stating that "all matters arising out of or relating to this Agreement shall be governed by and construed in accordance with the laws of New York . . ." [Trial Ex. J-355, § 13]. Pursuant to New York Law, the essential elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" *Canzona v. Atanasio*, 118 A.D.3d 837, 838–39 (N.Y. App. Div. 2014) (citing *Dee v. Rakower*, 112 A.D.3d 204, 208–209 (N.Y. App. Div. 2013)); *see Elisa Dreier Reporting Corp. v. Global NAPs Networks, Inc.*, 84 A.D.3d 122, 127 (N.Y. App. Div. 2011); *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 A.D.3d 802, 803 (N.Y. App. Div. 2010).

The Plaintiffs are parties, or at least intended third party beneficiaries to the Somera/Plaintiff MCA

Somera asserts that the Plaintiffs were not a party to the MCA, as they were not listed on the face of the Agreement, nor are they intended third party beneficiaries. [Adv. D.I. 715, ¶ 87]. This was a subject of Somera's Motion to Dismiss Adversary Proceeding [Adv. D.I. 17] which was denied [Adv. D.I. 65]. Plaintiffs disagree, asserting that Rubin entered into the Somera/Plaintiff MCA on behalf of his clients, Ian Ross of Somera was aware that Rubin was signing on behalf of the Debtors, and the parties treated Rubin as a representative of the Debtors. [Adv. D.I. 720 at 27-28].

The Somera/Plaintiff MCA states that the Agreement was "by and between the law firm of Rubin & Rubin P.A. **by and on behalf of its clients** . . ." [Trial Ex. J-355 (emphasis added)].

Further, Ian Ross of Somera initiated the contact after learning of Plaintiff's bankruptcy filing through an industry specific email "blast," contacting Rubin through Plaintiff's bankruptcy counsel as a representative of the Plaintiffs. Findings of Fact, § I(F)(1) supra. Ross was aware Rubin was acting as a representative of the Plaintiffs and was aware of the ownership structure of the Regions Center. [*Id*.].

In order to recover as an intended third-party beneficiary, a party must show, (1) a valid contract exists, (2) it was intended to provide a benefit to the beneficiary, and (3) must be sufficiently immediate to support an award of compensation if the benefit was lost. *Levine v. Harriton & Furrer, LLP*, 92 A.D.3d 1176, 1177 (N.Y. App. Div. 2012). In determining whether a third-party beneficiary exists, courts look at the surrounding circumstances as well as the agreement. *Noveck v. PV Holdings Corp.,* 742 F. Supp. 2d 284, 296 (E.D.N.Y. 2010), *aff'd, appeal dismissed sub nom. Noveck v. Avis Rent A Car System, LLC*, 446 Fed. Appx. 370 (2d Cir. 2011). "The best evidence, however, of whether the contracting parties intended a benefit to accrue to a third party can be ascertained from the words of the contract itself." *Alicea v. City of New York*, 534 N.Y.S.2d 983, 985 (N.Y. App. Div. 1988). The parties do not dispute that the Somera/Plaintiff MCA is a valid contract. [Trial Ex. J-255 at 1 ("Somera and Borrower acknowledge that they are bound by the terms of that certain [Somera/Plaintiff MCA] entered into and effective as of March 6, 2017 . . .")]. The introduction to the Somera/Plaintiff MCA states that Rubin & Rubin is entering into the agreement on behalf of their clients. Trial Ex. J-355]. Further, correspondence between Somera and Taconic indicates that Somera was aware that Rubin represented the Plaintiffs. [Trial Ex. J-714 ("FYI, this is what we are preparing to send the TICs via Mark Rubin.")]. Since the agreement clearly states that Rubin & Rubin was acting on behalf of its clients, and the parties

treated Rubin as a representative of the Plaintiffs, the Court finds that the Plaintiffs were parties to, or at least intended third-party beneficiaries of the Somera/Plaintiff MCA.

1. Somera did not breach the Somera/Plaintiff MCA

i. Information provided does not meet the definition of "confidential information"

Under the Somera/Plaintiff MCA, Provided Information that "**is or becomes** generally available to the public" or, "**is or becomes** available to Recipient from a source (other than Provider or its respective Representatives) . . ." is not considered "Confidential Information." [Trial Ex. J-355 ¶ 1(i)(a), (b) (emphasis added)]. There is no temporal limitation. [*Id*.]. All of the materials provided by Plaintiffs to Somera fall into one of those categories:

Provided Information was widely disclosed, therefore no longer "Confidential."

Somera asserts that most or all of the Provided Materials were made available to numerous third parties without a confidentiality requirement. [Adv. D.I. 715, ¶¶ 24-36].

Once items have been voluntarily exposed to others without a requirement of confidentiality, the provider can no longer claim a property interest in its confidentiality, and an "industry standard" or general understanding of confidentiality will not save it. In *Big Vision Private Ltd. v. E.I. DuPont De Nemours & Co*., 1 F. Supp. 3d 224, 268–69 (S.D.N.Y. 2014), *aff'd* 610 Fed. Appx. 69 (2d Cir. 2015), the court rejected plaintiff's argument that a "universal understanding" of confidentiality in the machine manufacturing industry protected its wide disclosure of the provided information. In that case, plaintiff disclosed its intended formulation to at least 16 separate third parties, all "without licensing the information, exacting written nondisclosure agreements, or even asking each one of them to maintain confidentiality." *Id.* at 269.

At the time Somera received the initial batch of information from Plaintiffs, that very same package of information had been distributed to at least 17 other potential financing sources, by Seth Denison, Plaintiff's agent, without requiring a confidentiality agreement. [Trial Ex. J-1062; Denison Dep. at 259:13–25, 260:1–25, 261:1–13; 271:3–14; 283:15–25, 284:1–8]. There was further evidence of these materials being distributed by Moses Tucker and other agents of the Plaintiff, without requiring a confidentiality agreement. [Rubin Dep. at 283:9-21]. Rubin does not recall if the Moses Tucker or the Cooper Horowitz firms were required to enter into a confidentiality agreement before receiving Regions Center information. The items distributed included the Operating Statements for 2014, 2015, and 2016, Budget Worksheet for 2017, TI/LC Schedule for the next 3 years, Capex schedule for next 6 years, rent roll, pictures of the property, comparable sales (taken from June 2016 appraisal.), appraisal summary (taken from June 2016 appraisal), and a CoStar Market Report. [Trial Ex. J-053, J-054]. Since Plaintiffs widely distributed this information without requiring confidentiality agreements from its recipients, it cannot be considered "confidential."

Further, the Court is not persuaded that boilerplate confidentiality language, which sometimes automatically appended to Denison's transmittal e-mails distributing the Provided Information, created any obligation for the recipient to keep that information confidential. *See Flores v. Anjost Corp.*, 284 F.R.D. 112, 124 (S.D.N.Y. 2012) (rejecting argument that boilerplate confidentiality language at the bottom of transmittal e-mail created a confidentiality agreement where the receipt of the document was not conditioned on acceptance of the e-mail's terms); *Acosta v. Wilmington Tr., N.A.*, 17-CV-6325, 2019 WL 416329, at *5 (S.D.N.Y. Feb. 1, 2019) (rejecting "baseless argument" that boiler-plate disclaimer at the end of the e-mail communications showed that the communications at issue were confidential).

Provided Information was "generally available to the public" in bankruptcy filings.

Much of the information that Plaintiffs assert was "Confidential Information" was available to the general public in the Plaintiffs/Debtors filings in the instant bankruptcy case via PACER.[15] Court records on PACER are considered to be "available to the public." *See Ray v. Fed. Bureau of Prisons, Ne. Region*, No. 3:19-CV-0994, 2020 WL 2556918, at *2 (M.D. Pa. May 20, 2020). Unsealed documents filed in bankruptcy court qualify as "generally available to the public" and are excluded from the definition of "Confidential Information" under the MCA. *See e.g., In re Food Management Group, LLC*, 359 B.R. 543, 553 (Bankr. S.D.N.Y. 2007) ("The plain meaning of § 107(a) mandates that all papers filed with the bankruptcy court are "public records" unless the bankruptcy court "decides to protect the information pursuant to the standards set forth in section 107(b) ...."). For information to be considered "generally available to the public," it does not have to be available in an identical format. *See Sit-Up Ltd. v. IAC InterActiveCorp.*, No. 05 Civ. 9292(DLC) 2008 WL 463884 *15 (S.D.N.Y. Feb. 20, 2008). Nearly all the information that the Plaintiffs assert is Confidential Information is publicly available in its own filings in this bankruptcy case, including: Monthly Operating Reports, Wells Fargo proof of claim, budget worksheets, etc. See Findings of Fact, § I(F)(2) supra. As such, those items do not qualify as "Confidential Information" as contemplated by the Somera/Plaintiff MCA.

Provided Information was Available to Somera from Subscription Services

Somera had direct access to extensive data through Bloomberg that was identical or substantially similar to the Provided Materials. [*See e.g.*, Trial Tr. 1510:22-1515:12; Trial Ex. J-982]. Indeed, the Bloomberg report on the Regions Center obtained by Somera contained the

[15] PACER is an official United States government website (pacer.uscourts.gov) that offers access to all unsealed federal court documents to the public for a nominal fee.

original and then-current balances of Plaintiffs' mortgage loan, the name of the original mortgage lender and the loan master servicer, and information on revenue, leasing commissions, tenant improvement expenditures, and capital expenditures. [*See e.g.,* Trial Tr. 1510:14-1513:4 (Bloomberg report contains much of the same information regarding Regions Center as in the Provided Materials.); Trial Ex. J-982 (Bloomberg Report].

Taconic also had access to subscription services, including without limitation Bloomberg, Argus, CoStar, RCA, Green Street, and TREPP, all of which would have included portions of the Provided Information. [*See e.g.,* Lam Dep. at 42:20–25, 43:2–14].

Plaintiffs cite the *Sit-Up Ltd*. case for the premise that unless something becomes public through a press release or other active public disclosure, it "[does] not meet this threshold of being placed into the general public's domain." [Adv. D.I. 720 at 89-90] (citing *Sit-Up Ltd.* 2008 WL 463884). However, the *Sit-Up* case does not limit how something "became generally available to the public" to a press release or other active public disclosure. *Id.* at *16. ("Because this information 'bec[a]me[] generally available to the public other than as a result of the breach of this Agreement by the Receiving Party or its Representatives,' it falls within the first enumerated exception to the definition of 'Evaluation Material' and was not covered by the NDA."). Other cases have found that information published in services similar to the instant paid subscription services are "publicly available." *See e.g., Town Sports Intern., LLC v. Zakharyayev*, No. 651064/2010, 2012 WL 10007868, at *4 (N.Y. Sup. Ct. Jul. 16, 2012) (finding no protection for customer lists where the source of the information in the list was derived from a publicly available service and was also available through non-confidential sources such as company directories) and *Murray Energy Corp. v. Reorg Research, Inc.*, 152 A.D.3d 445, 446, (N.Y. App. Div. 2017) (finding that an investment subscription service costing $30,000 to $120,000 per year is a

"professional medium or agency which has as one of its main functions the dissemination of news to the public" and that its audience is "comprised of the people who are most interested in this information and most able to use and benefit from it."). Since the Provided Materials were publicly available, they are not "Confidential Information" pursuant to the Somera/Plaintiff MCA.

Materials Obtained from LNR were Available from a Source other than Provider or its Respective Representatives

The proof at trial confirmed that Taconic had a source other than Somera from whom it received information identical to the Provided Information. Between May 15, 2017 and the purchase of the Note on June 13, 2017, Taconic received a "data dump" on the Regions Center from LNR containing "north of 100 documents," including without limitation "original loan docs, historical property financials, expense reconciliation statements, property condition reports, updated property condition reports, updated leasing reports, updated asset management reports, updated property management agreements, updated -- a TIC agreement . . . everything you'd want to know on an asset from the time of original, which was back in [2006]". [*See* Trial Ex. J-732; Trial Tr. at 788:19–789:19]. This "data dump" from LNR also included copies of bankruptcy records and the same Settlement Offer Letter that Somera forwarded to Taconic in late-March to evaluate the Proposed Transaction among Plaintiffs, Somera and Taconic. [Compare Trial Ex. J-772, J-127]. Taconic employees likewise confirmed that the information they received was available from other sources, including certain payoff statements that were "freely available" to CMBS bondholders by requesting them from a loan's master servicer. [*See e.g.*, Jordan Dep. at 193:16–24].

Plaintiffs failed to show that any item it provided to Somera was not available from some other source. Since all the Provided Information falls into the categories of "is or becomes

generally available to the public" and/or "is or becomes available to Recipient from a source (other than Provider or its respective Representatives) . . .," the Provided Information was not "Confidential Information" under the MCA, and thus not protected under the agreement.

ii. Plaintiffs did not prove that Somera used the Provided Materials to circumvent a business relationship with plaintiffs.

Definition of Proposed Transaction is Insufficiently Precise to Find that Somera Breached the Somera/Plaintiff MCA

The Somera/Plaintiff MCA does not define the parameters of what a "Proposed Transaction" would look like to find that the deal as it occurred, e.g., the purchase of the Note by Taconic, was within the contemplation of the parties. The Somera/Plaintiff MCA contains virtually no information on the specific structure that a Proposed Transaction would take in order to determine if Somera's actions with Taconic were not "for evaluating the Proposed Transaction and providing advice in connection therewith" or if Somera's actions would "otherwise circumvent or undermine the Provider's opportunity with respect to the Proposed Transaction." [Trial Ex. J-355 §§ 3, 7(c)]. Further, Somera and Taconic worked with Plaintiffs after the note purchase to try to complete a deal to refinance the Note through the TPA. [Trial Ex. J-104; Ross Dep. at 194-212 (generally discussing Somera's role in trying to facilitate a deal through the TPA); Rubin Dep. at 323:17-21 (describing the TPA as an agreement between Somera, Taconic, and the Debtors concerning settlement negotiations)].[16]

Plaintiffs did not prove that Somera and Taconic worked together in a joint venture to acquire the Note. There is no evidence in the record that Somera profited when Taconic purchased the Note. [Ross Dep. at 169:14–15 (confirming the only way that Somera could get compensated

[16] The SAC contains no allegations that Somera or Taconic violated the TPA.

was through a deal involving the TICs, and that Somera has still not been compensated to this day); Trial Tr. at 789:20-23 (Jordan confirming that Somera was paid "not a penny" in connection with the sale of the Note)]. Taconic made the decision to acquire the Note, and Somera had no influence over that decision. [*Id.*; Trial Tr. at 814:5–13]. In fact, Ross also confirmed that Somera did not participate in the purchase of the Note. [Ross Dep. at 168:21–23 ("[W]e weren't involved at all in their acquisition of the note."); Trial Tr. at 779:1-24, 814:8-13]. There was no agreement between Somera and Taconic with respect to the sale of the Note. [Ross Dep. at 168:21-23, 170:7-9].

Plaintiffs offer no proof that Somera contacted the TICs or their lender directly *prior* to the purchase of the Note, as prohibited by Section 8 of the Somera/Plaintiff MCA.

Somera's Disclosure of Provided Information to Taconic was permissible under the Somera/Plaintiff MCA as communications with a "financing source" and Somera is not responsible for the actions of Taconic/LR-400

Somera was authorized to disclose the materials to a financing source, in this case, Taconic. [Trial Ex. J-355, §§ 1(i); Ross Dep. at 36:16-22; Trial Tr. at 757:20-759:3]. Somera was only responsible to make Taconic aware of the confidential nature of the materials provided and could only be held responsible for "breach of the permitted methods of disclosure under this Agreement." [Trial Ex. J-355, § 3(b)]. On April 24, 2017, Somera added the Regions Center loan to the Schedule to the Somera/Taconic MCA , indicating that it informed its Representative (financing source) of the nature of the Provided Materials, as required under the Somera/Plaintiff MCA. [Trial Ex. J-706]. There is no mechanism in the Somera/Plaintiff MCA for Somera to be held responsible for the actions of Taconic, absent proof of a joint effort to buy the Note.

iii. **Plaintiffs cannot prove they were damaged by any alleged breach by Somera**:

Some amount of quantifiable harm from the breach must be shown to support a breach of contract claim under New York Law. Although the issue of damages has been reserved for a separate trial, if needed, the evidence submitted at trial confirmed that it would be impossible for Plaintiffs to establish that they were harmed by any alleged breach of the MCA. *See Correspondent Servs. Corp. v. J.V.W. Invs. Ltd.*, 173 F. Supp. 2d 171, 178 (S.D.N.Y. 2001) (citing *Am. Home Prods. Corp. v. CAMBR Co., Inc.*, 2001 WL 79903, at *4 (S.D.N.Y. Jan. 30, 2001) (under New York law, plaintiff must establish, *inter alia*, "damages suffered as a result of the breach").

Damages Claim is speculative:

Any potential savings to Plaintiffs by working out a deal to purchase the Note with the original lenders is speculative at best, and insufficient to support a damage claim. *Lexington 360 Associates v. First Union Nat. Bank of North Carolina*, 651 N.Y.S.2d 490, 494 (App. Div. 1996) (finding that plaintiff's damages claim was too speculative when it was based on prospective loan terms and cost savings it might have obtained but for the conduct of defendant); *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.*, No. CGC-10-496887, 2013 WL 2948068, at *13 (Cal. Super. March 25, 2013) (citing and relying on *Lexington* in similarly dismissing plaintiff's claims as too speculative because plaintiff's damages theory was based on the premise that "but for" defendants' breaches of contract, plaintiffs would have been able to refinance the property on better terms.). Plaintiffs assert that they were denied an opportunity to profit from the split of any delta between the purchase price and par value, and that there was an "agreement in principle" as to the framework of a deal with Somera to accomplish such a deal. [Trial Tr. at 1201-1203]. However, the "opportunity" for the parties to purchase the note below par did not exist, and there is no supporting evidence in the record as to the existence of such an agreement with Somera. It is

undisputed that Taconic did not purchase the note for an amount below par. [*See* Trial Tr. at 824:18-825:3; Trial. Ex. J-277 (showing the Note's "Purchase Price" was $32,841,378.76, while the loan balance remained $30,060.292.79)]. It is also undisputed that Taconic was not able to purchase below par despite agreeing to indemnify the lender against Plaintiffs' claims. [*See* Trial Ex. J-277 at 19, § 7.3 – "Buyer's Indemnity")]. Plaintiffs' argument that they were denied an opportunity to profit from the split of any delta between the purchase price and par value based on indemnifying the lender, therefore, is not credible. [Trial Tr. at 1203].

Nothing prevented Plaintiffs from refinancing the Note without Somera's involvement. The Somera/Plaintiff MCA does not include an exclusivity provision. [Trial Ex. J-355]. In the period between the signing of the Somera/Plaintiff MCA and the note purchase (March 6, 2017-June 13, 2017) the Plaintiffs, through Rubin, were searching for and in negotiation with other potential lenders and had a term sheet with Ladder Capital. [Trial Tr. at 912:9-15, 1147-48].

In the end, the Plaintiffs were left in virtually the same position, with the same contractual rights, as they were prior to entering into the Somera/Plaintiff MCA . LR-400's purchase of the Note did not change the terms of the loan, it merely changed the identity of the creditor.

G. Count VII – Unjust Enrichment (Taconic and LR-400)

Plaintiffs failed to satisfy their burden with respect to their unjust enrichment claim. As a threshold matter, "an action for unjust enrichment cannot lie in the face of an express contract." 66 Am. Jur. 2d Restitution and Implied Contracts § 22; *Burtch v. Seaport Capital Partners (In re Direct Response Media, Inc.),* 446 B.R. 626, 661 (Bankr. D. Del. 2012) (Dismissing an unjust enrichment count because the "exercise of contractual rights is not an impoverishment or an unjust enrichment.); *Air Products & Chemicals, Inc. v. Wiesemann,* 237 F.Supp.3d 192, 216 (D. Del.

2017) (Delaware courts ... have consistently refused to permit a claim for unjust enrichment when the alleged wrong arises from a relationship governed by contract.). Plaintiffs and LR-400 have a valid contract that governs their relationship—the Loan Agreement. Therefore, as a matter of law, Plaintiffs unjust enrichment claim cannot stand.

Even if there was no valid contract between the parties, Plaintiffs failed to satisfy their burden with respect to their unjust enrichment claim. To establish an unjust enrichment, a plaintiff must prove that there was an enrichment, and impoverishment, a relationship between the enrichment and impoverishment, an absence of justification, and the absence of a remedy provided by law. *WJB Mortgage Services, LLC v. ASD Merchant Partners LLC* (*In re W.J. Bradley Mortgage Capital, LLC*), 598 B.R. 150, 177 (Bankr. D. Del. 2019). As discussed above, Plaintiffs failed to prove that but for any action taken by LR-400, they would have benefited from the delta between what it could have obtained the note for and the remaining balance. At the end of the day, Plaintiffs were left in the same position they were in before Taconic's purchase of the Note. They were still in default. Plaintiffs were still free to attempt to refinance the Loan with third parties. And Plaintiffs failed to prove that Taconic engaged in any conduct that prevented a refinancing. Plaintiffs, therefore, failed to prove any enrichment by Taconic or LR-400 at the expense of the Plaintiffs.

H. Count VIII – Breach of Master Confidentiality Agreement (Taconic)

The essential elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" *Canzona v. Atanasio, 118 A.D.3d 837, 838–39 (N.Y. App. Div. 2014) (citing Dee v. Rakower, 112 A.D.3d 204, 208–209 (N.Y. App. Div. 2013)); see Elisa Dreier Reporting Corp. v. Global NAPs Networks, Inc., 84 A.D.3d 122, 127*

(N.Y. App. Div. 2011); JP Morgan Chase v. J.H. Elec. of N.Y., Inc., 69 A.D.3d 802, 803 (N.Y. App. Div. 2010).

As a preliminary matter, Plaintiffs failed to prove the existence of any contract between Taconic and Plaintiffs.

Plaintiffs attempt to overcome the lack of any contract with Taconic by arguing that Somera acted as the agent of Taconic, or that there was a joint venture between Somera and Taconic. Plaintiffs failed to prove their theory that Somera acted as an agent of Taconic. An agency relationship exists only where there is an agreement, between a principal and agent, for the agent to act on behalf of the principal. *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 74 (S.D.N.Y. 2009). Plaintiffs failed to prove the existence of any such agreement.

Plaintiffs also failed to prove the existence of a joint venture agreement between Somera and Taconic. To establish the existence of a joint venture, a plaintiff must show that there was an agreement between the parties manifesting their intent to associate as joint venturers, mutual contributions to the alleged joint venture, a degree of control over the alleged joint venture, and a mechanism for the sharing of profits and losses. *Clarke v. Sky Exp., Inc.*, 118 A.D.3d 395, 935 (N.Y. App. Div. 2014). Plaintiffs did not prove the existence of any agreement between Somera and Taconic in which they manifested an intent to associate as joint ventures. Furthermore, Plaintiffs failed to prove the existence of any mechanism for the sharing of profits and losses between Somera and Taconic. While there was some evidence of discussions between Somera and Taconic regarding a potential split of profits, the record shows that no such agreement was ever reached.

I. Count IX – Breach of Contract (LR-400)

To prevail on their breach of contract claim, Plaintiffs had to show that 1) Plaintiffs and LR-400 had a valid contract; 2) LR-400 breached a provision of that contract; and 3) Plaintiffs suffered resulting damages. *Foreman School Dist. No. 25 v. Steele*, 347 Ark. 193, 202 (Ark. 2001). Under Arkansas law, contracts are enforced according their plain language, as written. *Norris v. State Farm Fire & Cas. Co*., 16 S.W.3d 242, 246 (Ark. 2000).

Plaintiffs did not meet their burden with respect to their breach of contract claim against LR-400. This claim arises only after Taconic, though LR-400, purchased the Note. Nowhere in the SAC do Plaintiffs point to a specific contractual provision that they allege was breached. Instead, Plaintiffs allege that LR-400 had a duty to cooperate with the Plaintiffs in the performance of their obligations under the Loan Documents, as well as a duty not to hinder, delay, or impede Plaintiffs performance of those obligations. Plaintiffs also allege a duty of good faith and fair dealing. Plaintiffs do not allege how these duties were breached, nor did they prove a breach under the Loan Documents. Furthermore, there is no evidence in the record that shows conduct that would amount to a breach of the Loan Agreement by LR-400.

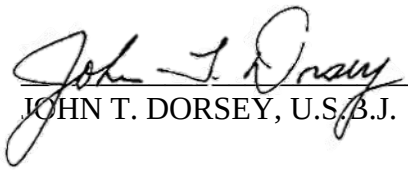
III. CONCLUSION

The parties having consented to a final order of this Court, it is ordered, adjudged, and decreed that, for the reasons stated herein, the Plaintiffs failed to meet their burden of proof with respect to their allegations in the SAC. The Court, therefore, finds in favor of the Defendants on Counts I, II, III, IV, VI, VII, VII, and IX. The Court finds that Count V is moot.

For the reasons stated herein, Debtors' objection to the late charges, legal fees, and expenses is sustained. Debtors' objections to the secured claim and default interest rate are overruled.

SO ORDERED.

Dated: August 10, 2020



JOHN T. DORSEY, U.S.B.J.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
NNN 400 CAPITAL CENTER 16, LLC, *et al.*,	)	Case No. 16-12728 (JTD)
	)	(Jointly Administered)
Debtor(s).	)	
	)	**Re: D.I. 278**
NNN 400 CAPITAL CENTER, LLC, *et al.*,	)	
	)	
Plaintiff(s),	)	
v.	)	Adv. Proc. No. 18-50384 (JTD)
	)	
WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF COMM 2006-C8 COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES; LNR PARTNERS, LLC, a Florida Limited Liability Company; BERKADIA COMMERCIAL MORTGAGE, LLC, a Delaware Limited Liability Corporation; LITTLE ROCK - 400 WEST CAPITAL TRUST, a Delaware Statutory Trust; SOMERA ROAD, INC., a New York Corporation; and TACONIC CAPITAL ADVISORS, LP, a Delaware Limited Partnership,	)	
	)	
Defendant(s).	)	**Re: Adv. D.I. 268**

FINAL JUDGMENT[1]

For the reasons set forth in the Court's Findings of Fact and Conclusions of Law dated August 10, 2020 (D.I. 602, Adv. D.I. 785), the Court enters final judgment in favor of the Defendants on all Counts of the Second Amended Complaint.

Dated: August 10, 2020

JOHN T. DORSEY, U.S.B.J.

[1] The parties have consented to the entry of a final judgment of this Court. Bankruptcy Courts may enter final judgments on non-core matters where parties knowingly and voluntarily consent. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
NNN 400 CAPITAL CENTER 16, LLC, *et al.*,	)	Case No. 16-12728 (JTD)
	)	(Jointly Administered)
	)	
Debtors.	)	**Re: D.I. 278**

ORDER

For the reasons set forth in the Court's Findings of Fact and Conclusions of Law dated August 10, 2020 (D.I. 602), the Court sustains Debtors' objection to the late charges, legal fees, and expenses asserted in LR-400 Capital LLC's proof of claim (D.I. 278). Debtors' objections to the secured claim and default interest rate are overruled.

Dated: August 10, 2020

JOHN T. DORSEY, U.S.B.J.