UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C.K. Lee, individually, and Courtney McPhail, on behalf of herself and others similarly situated,

Plaintiffs,

-against-

UDR, Inc., et al.,

Defendants.

1:22-cv-00505 (PGG) (SDA)

REPORT AND RECOMMENDATION

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.

TO THE HONORABLE PAUL G. GARDEPHE, UNITED STATES DISTRICT JUDGE:

Plaintiffs C.K. Lee ("Lee"), individually, and Courtney McPhail ("McPhail"), on behalf of herself and others similarly situated (collectively, "Plaintiffs") bring this action against Defendants UDR, Inc. ("UDR"), Columbus Square 808, LLC ("Columbus 808"), Columbus Square 775, LLC ("Columbus 775"), Columbus Square 795, LLC ("Columbus 795"), Columbus Square 801, LLC ("Columbus 801") and Columbus Square 805, LLC ("Columbus 805") (collectively, "Defendants") alleging claims in their First Amended Complaint ("FAC") under Sections 349 and 350 of the New York General Business Law, as well as common law claims for fraud, breach of contract and unjust enrichment. (*See* FAC, ECF No. 28, ¶¶ 47-78.) Presently before the Court is Defendants' motion to dismiss the FAC. (Not. of Mot., ECF No. 33.)

For the reasons set forth below, the Court respectfully recommends that Defendants' motion to dismiss be GRANTED; that Plaintiffs be given leave to amend as set forth below; and that, if Plaintiffs choose to amend, the parties be required to promptly address whether the Court should exercise subject matter jurisdiction over this action.

FACTUAL BACKGROUND[1]

This action involves access to a swimming pool located in a luxury residential building on Manhattan's West Side. Lee and McPhail rent apartments at 808 Columbus Avenue, New York, New York. (FAC ¶¶ 8-9.) UDR, which is incorporated in Maryland and has its principal place of business in Colorado, is a multifamily real estate investment trust that owns and operates a diversified portfolio of apartment homes.[2] (*See id*. ¶ 11.) Columbus 808 is UDR's operating company for the building it owns at 808 Columbus Avenue; Columbus 775 is UDR's operating company for the building it owns at 775 Columbus Avenue; Columbus 795 is UDR's operating company for the building it owns at 795 Columbus Avenue; Columbus 801 is UDR's operating company for the building it owns at 801 Columbus Avenue; and Columbus 805 is UDR's operating company for the building it owns at 805 Columbus Avenue. (FAC ¶¶ 12-16.) Each of Columbus 808, Columbus 775, Columbus 795, Columbus 801 and Columbus 805 is incorporated in Delaware and has its principal place of business in New York. (*See id*.)

On April 30, 2018, Lee, as tenant, entered into a lease (the "Lee Lease") with Columbus 808 to rent an apartment in the building located at 808 Columbus Avenue, New York, New York (the "808 Building"). (Zourigui Aff., Ex. 3, ECF No. 34-3.) On May 26, 2020, McPhail, as tenant,

[1] For purposes of this motion to dismiss, the Court assumes that the well-pleaded allegations of the TAC are true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (when "well-pleaded factual allegations" are present, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief"). In addition, the Court considers as integral to the FAC the lease-related documents filed by Defendants. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (court may consider "any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in [the complaint] by reference").

[2] A description of UDR's business is contained in a recent proxy statement. (*See* 2022 Proxy Statement, available at https://s27.q4cdn.com/542031646/files/doc_financials/2021/ar/proxy/2022-Proxy-Statement.pdf (last visited Sep. 29, 2022).)

entered into a lease (the "McPhail Lease") with Columbus 808 to rent an apartment in the 808 Building. (*Id*., Ex. 2, ECF No. 34-2.) On November 17, 2021, Lee entered into a second lease (the "Second Lee Lease") with Columbus 808. (*Id*., Ex. 4, ECF No. 34-4.) The Lee Lease, the McPhail Lease and the Second Lee Lease collectively are referred to herein as the "808 Leases."

Each of the 808 Leases contains a Community Policies, Rules and Regulations Addendum (the "Lease Addendum"), pursuant to which tenants of the 808 Building were permitted to use certain amenities and recreational facilities. (Zourigui Aff., Exs. 2 and 4, at PDF p. 24, ¶ I, and Ex. 3, at PDF p. 18, ¶ I.) One of the amenities available to the 808 Building's residents was a seventy-foot, three lane lap swimming pool.[3] (FAC ¶ 19.)

The Lease Addendum in each of the 808 Leases provides:

> Tenant(s) permission for use of all common areas, Tenant amenities, and recreational facilities (together, "Amenities") located at the Dwelling Community is a privilege and license granted by Owner, and not a contractual right except as otherwise provided for in the Lease. Such permission is expressly conditioned upon Tenant's adherence to the terms of the Lease, this Addendum, and the Community rules and regulations ("Rules") in effect at any given time, and such permission may be revoked by Owner at any time for any lawful reason. In all cases, the most strict terms of either the Lease, this Addendum, or the Community Rules shall control. Owner reserves the right to set the days and hours of use for all Amenities and to change the character of or close any Amenity based upon the needs of Owner and in Owner's sole and absolute discretion, without notice, obligation or recompense of any nature to Tenant. Owner and management may make changes to the Rules for use of any Amenity at any time.

(Zourigui Aff., Exs. 2 and 4, at PDF p. 24, ¶ I, and Ex. 3, at PDF p. 18, ¶ I.) In addition, the Lease Addendum in each of the 808 Leases states that the "Pool hours are posted at the pool." (Zourigui Aff., Exs. 2 and 4, at PDF p. 24, ¶ II, and Ex. 3, at PDF p. 18, ¶ II.)

[3] The swimming pool was not available to residents of the apartment buildings located at 775, 795, 801 and 805 Columbus Avenue. (*See* Zourigui Aff., Lease Addenda, Exs. 5-9.)

Columbus 808 licensed the swimming pool to SwimJim, Inc. ("SwimJim"), which provides children's swimming lessons. (FAC ¶¶ 24, 26-27.) Prior to the COVID-19 pandemic, residents of the 808 Building were permitted to swim in at least one lane when SwimJim used the swimming pool. (*Id*. ¶ 25.) Sometime after the pandemic, Columbus 808 made the swimming pool exclusively available for SwimJim's use during certain hours of the day. (*See id*. ¶¶ 23-25.)

PROCEDURAL HISTORY

On May 27, 2022, Plaintiffs filed the FAC. (*See* FAC.) Pursuant to Judge Gardephe's bundling rule, on August 19, 2022, Defendants filed the instant motion to dismiss the FAC (s*ee* Not. of Mot.), Plaintiffs filed their opposition memorandum (*see* Pls.' Opp. Mem., ECF No. 36) and Defendants filed their reply memorandum. (*See* Defs.' Reply Mem., ECF No. 38.) On September 1, 2022, Judge Gardephe referred the motion to me for a Report and Recommendation. (Order of Reference, ECF No. 39.)

LEGAL STANDARDS

To survive a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. The Court "must accept as true all of the allegations contained in a complaint[,]" but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory

statements, do not suffice." *Id.* (citation omitted). Further, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.; see also Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013) ("we are not required to credit conclusory allegations or legal conclusions couched as factual allegations.") (citing *Twombly*, 550 U.S. at 555, 557).

DISCUSSION

I. N.Y. GBL §§ 349 And 350 Claims (Counts I And II)

Section 349 of the New York General Business Law prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state[.]" N.Y. Gen. Bus. Law § 349(a). Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." *Id*. § 350. "The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349." *New World Sols., Inc. v. NameMedia Inc*., 150 F. Supp. 3d 287, 330 (S.D.N.Y. 2015). Put simply, "[t]he statute seeks to secure 'an honest marketplace' where 'trust,' and not deception, prevails[.]" *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 N.Y.3d 169, 176 (2021) (quoting *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324, (2002)).

To establish a *prima facie* case under either Section 349 or 350, a plaintiff must allege that a defendant engaged in "(1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) (citing *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d

940, 941 (2012)). Defendants argue that Plaintiffs have failed to sufficiently allege any of these required elements. (Defs.' Mem., ECF No. 35, at 12.)

"A defendant engages in consumer-oriented activity if its actions cause any consumer injury or harm to the public interest." *Brown v. Kerry Inc.*, No. 20-CV-09730 (PGG) (JLC), 2021 WL 5446007, at *3 (S.D.N.Y. Nov. 22, 2021), *report and recommendation adopted*, 2022 WL 669880 (S.D.N.Y. Mar. 7, 2022) (internal quotation marks and alterations omitted). "By contrast, a 'single shot transaction' or 'private contract dispute . . . which is unique to the parties' is not consumer-oriented conduct." *Of A Feather, LLC v. Allegro Credit Servs., LLC*, No. 19-CV-09351 (DLC), 2020 WL 3972752, at *4 (S.D.N.Y. July 14, 2020) (quoting *Plavin v. Grp. Health Inc.*, 35 N.Y.3d 1, 10-11 (2020)); *see also Euchner-USA, Inc. v. Hartford Cas. Ins. Co.*, 754 F.3d 136, 143 (2d Cir. 2014). Nonetheless, conduct need not be "directed to all members of the public" to be "consumer oriented." *Himmelstein*, 37 N.Y.3d 169 at 178 (emphasis in original). "This requirement is liberally construed and 'may be satisfied by showing that the conduct at issue potentially affect[s] similarly situated consumers.'" *Brown*, 2021 WL 5446007, at *3 (quoting *Wilson v. Nw. Mut. Ins. Co.*, 625 F.3d 54, 64 (2d Cir. 2010)).

The Court finds that Plaintiffs adequately have alleged the first element. Defendants' conduct is not specific to the parties nor limited to a single transaction. Rather, the marketing of the apartments was directed to the public at large and the conduct at issue potentially affects similarly situated consumers. *See, e.g., Himmelstein*, 37 N.Y.3d at 178 (defendant's conduct in marketing and sale of legal book not limited to single transaction where defendants sold to a "robust consumer base" including through a subscription plan utilizing a form contract); *Bd. of Managers of 550 Grand St. Condo. v. Schlegel LLC*, 43 Misc. 3d 1211(A), 990 N.Y.S.2d 436 (N.Y.

Sup. Ct. 2014) (sale of space in building was not private in nature or single-shot transaction since marketing campaign directed to the public at large); *Sorrentino v. ASN Roosevelt Ctr. LLC*, 579 F. Supp. 2d 387, 391 (E.D.N.Y. 2008) (rejecting argument that landlord's alleged deception in not disclosing water-infiltration and mold-growth problems impacted only tenants when defendants continued to market and advertise apartments without disclosing problems to potential renters).[4]

However, as for the second element, the Court agrees with Defendants that Plaintiffs fail to adequately allege that Defendants' conduct was materially misleading. "A defendant's actions are materially misleading when they are likely to mislead a reasonable consumer acting reasonably under the circumstances." *Himmelstein*, 37 N.Y.3d at 178 (internal quotation marks omitted); *see also Bynum v. Fam. Dollar Stores, Inc.*, No. 20-CV-06878 (MKV), 2022 WL 837089, at *3 (S.D.N.Y. Mar. 21, 2022) ("The allegedly deceptive acts or representations must be misleading to 'a reasonable consumer.'") (quoting *Goshen,* 98 N.Y.2d at 324). "Although the question of whether a business practice or advertisement is misleading to the reasonable consumer is generally a question of fact . . . it is 'well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled

[4] The Court finds that the cases cited by Defendants (*see* Defs.' Mem. at 13) are distinguishable. In *Thompson v. Parkchester Apartments Co.*, 271 A.D.2d 311 (1st Dep't 2000), the "dispute[] involve[d] faulty plumbing and what the individual plaintiffs were told about the condition of the plumbing when they purchased their individual units." *Id*. at 311-12. Thus, there could not have been a broad impact on consumers at large. In *Devlin v. 645 First Ave. Manhattan Co.*, 229 A.D.2d 343 (1st Dep't 1996), an action "based on alleged defects in building and in individual unit[s] purchased by plaintiffs," the court found that the "requisite broad impact on consumers at large is not evident." *Id*. at 343. Here, by contrast, UDR advertised pool access on its website in connection with the marketing of apartments to the public.

a reasonable consumer[.]'" *Bynum*, 2022 WL 837089, at *3 (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013)).

Plaintiffs allege that the images of the swimming pool on UDR's website in conjunction with statements regarding the pool, suggest to the reasonable consumer that the pool is available for residents' use "during all hours when a swimming pool could reasonably be expected to remain open." (FAC ¶ 20.) Plaintiffs further allege that this expectation is corroborated by the statement on the website regarding the pool's hours, which stated that the pool was open year-round, Monday through Friday from 6:00 a.m. until 10:00 p.m. and Saturday and Sunday from 7:00 a.m. until 8:00 p.m. (*Id*. ¶ 21.) However, Defendants point to language in the 808 Leases giving Columbus Square 808 LLC the discretion to change the days and hours of use for all building amenities, including the swimming pool, and argue Plaintiffs received exactly what was represented to them, namely permission to use the swimming pool shown on the website during hours set by the landlord. (Defs.' Mem. at 14-16.)

"A disclaimer may not bar a GBL § 349 claim at the pleading stage unless it utterly refutes plaintiff's allegations, and thus establishes a defense as a matter of law." *Himmelstein*, 37 N.Y.3d at 180 (citing *Goshen*, 98 N.Y.2d at 326; Fink, 714 F.3d at 742). "[A] disclaimer must address the alleged deceptive conduct precisely, so as to eliminate any possibility that a reasonable consumer would be misled." *Id*. "[W]here the overall impression of the representations is misleading (notwithstanding the disclaimer), the disclaimer is not a defense as a matter of law." *Id*. Moreover, "[w]here a defendant fully disclosed the terms and conditions of an alleged deceptive transaction that caused harm to plaintiff, an action under GBL § 349 will not lie." *Dimond v.*

Darden Restaurants, Inc., No. 13-CV-05244 (KPF), 2014 WL 3377105, at *7 (S.D.N.Y. July 9, 2014) (internal quotation marks omitted).

Here, considering the representations on the UDR website in conjunction with the language in the 808 Leases cited by Defendants, in addition to the lease provision stating "Pool hours are posted at the pool[,]" *see, e.g., Himmelstein*, 37 N.Y.3d at 179 (considering whether purported misrepresentations were materially misleading "under all the circumstances, including defendant's disclaimer"), the Court finds that no reasonable consumer would be misled by the representations on the website about their access to the pool. The Court notes that, prior to March 2020, the hours on the website and the hours listed at the pool appear to have been the same. (*See* FAC ¶¶ 22, 25.) Moreover, after the hours changed, they still were posted at the pool. (*See* FAC ¶ 23.) Accordingly, I recommend that Defendants' motion to dismiss Counts I and II of the FAC be granted.

II. Fraud Claim (Count III)

To state a cause of action for fraud, a plaintiff must allege: (1) a representation of material fact, (2) the falsity of the representation, (3) knowledge by the party making the representation that it was false when made, (4) justifiable reliance by the plaintiff and (5) resulting injury. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 291 (2d Cir. 2006) (citing *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2003)). A fraud claim also is subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which "requires that the plaintiff (1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or

omissions) are fraudulent." *Pauwels v. Deloitte LLP*, No. 19-CV-02313 (RA), 2020 WL 818742, at *12 (S.D.N.Y. Feb. 19, 2020).

Plaintiffs allege that "Defendants intentionally ma[d]e materially false and misleading representations regarding the accessibility of the Columbus Square pool." (FAC ¶ 66.) Plaintiffs appear to base their claim on allegations that the publicly advertised pool hours do not correspond to the actual hours.[5] (FAC ¶¶ 21, 23; *see also* Pl.'s Mem. at 17.) Defendants argue that Plaintiffs' fraud claim should be dismissed because it is duplicative of their breach of contract claim and because Plaintiffs fail to allege the necessary elements of fraud with requisite particularity. (Defs.' Mem. at 19.)

"Under New York law . . . 'a fraud claim may not be used as a means of restating what is, in substance, a claim for breach of contract.'" *FPP, LLC v. Xaxis US, LLC*, 764 F. App'x 92, 94 (2d Cir. 2019) (quoting *Wall v. CSX Transp., Inc.*, 471 F.3d 410, 416 (2d Cir. 2006)). Thus, "[a] fraud claim is tenable only when the fraud alleged is 'collateral or extraneous to the contract.'" *Id*. (quoting *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir. 1996)). "A fraud claim may be considered collateral to a contract if the contract, including its representations and warranties, does not address the factual bases of the fraud claim." *Id*.

The Court agrees with Defendants that Plaintiffs' fraud claim is duplicative of their breach of contract claim. The 808 Leases address the same factual bases as the fraud claim, namely access to the pool and the pool hours. (Zourigui Aff., Exs. 2 and 4, at PDF p. 24, ¶¶ I, II, and Ex. 3, at PDF p. 18, ¶¶ I, II.) Plaintiffs argue that "[t]he deceptive posting of the publicly listed hours is

[5] As set forth above, the hours appear to have been the same prior to March 2020. (*See* FAC ¶¶ 22, 25.) Thus, Plaintiffs have not plausibly alleged that the hours were not as advertised prior to that date.

a separate act that is extraneous to the contract." (Pls.' Mem. at 17-18.) But, even if the website listing is separate, it addresses the same subject matter as the contract and, thus, is not extraneous or collateral.

Plaintiffs also have failed to allege the scienter needed to plead a fraud claim. Their conclusory allegations of intentional conduct are insufficient. *See Pauwels*, 2020 WL 818742, at *13 (quoting *Stern v. Leucadia Nat'l Corp.*, 844 F.2d 997, 1004 (2d Cir. 1988) ("Although '[m]alice, intent, knowledge, or other condition of mind' may be 'averred generally,' an inference of scienter must be based on 'a factual foundation for otherwise conclusory allegations of scienter.'")). Accordingly, Plaintiffs' FAC allegations do not support a claim for fraud. For these reasons, I recommend that Defendants' motion to dismiss Count III of the FAC should be granted.

III. Breach Of Contract Claim (Count IV) [6]

"To state a claim for breach of contract under New York law, a plaintiff must allege "(i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages." *Of A Feather*, 2020 WL 3972752, at *7 (citing *Orchard Hill Master Fund Ltd. v. SBA Commc'ns Corp.*, 830 F.3d 152, 156 (2d Cir. 2016)); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 806 (2d Dep't 2011)). "A sufficient pleading for breach of contract must, at a minimum, allege the terms of the contract, each element of the alleged breach and the resultant damages in a plain and simple fashion." *Deutsch v. JPMorgan Chase & Co.*, No. 18-CV-11655 (VSB), 2019 WL 4805689, at *7 (S.D.N.Y. Sept. 30, 2019). "New

[6] The parties to the contract here, *i.e.*, the lease agreements, are Plaintiffs and Columbus 808. (*See* Zourigui Aff., Exs. 2, 3 and 4.) Thus, Plaintiffs may bring their breach of contract claim only against Columbus 808. UDR is a separate corporate entity and Plaintiffs are not in privity of contract with UDR, and Plaintiffs have pled no basis to hold UDR liable for any breach by Columbus 808 of the express or implied obligations under the relevant lease agreements.

York courts require plaintiffs to plead the provisions of the contract upon which the claim is based—in other words, a complaint in a breach of contract action must set forth the terms of the agreement upon which liability is predicated." *Id*. (internal quotation marks and citations omitted).

In their breach of contract claim, Plaintiffs allege that, "[w]hen they signed leases with Defendants, Plaintiffs and Class members were promised that the Columbus Square pool would be accessible by them during all normal pool operating hours." (FAC ¶ 72.) However, Plaintiffs fail to plead the provisions of the lease agreements they contend Defendants breached. Rather, Defendants themselves affirmatively have shown that the lease agreements expressly permitted Columbus 808 to change the days and hours of use for the pool in its sole and absolute discretion. (Zourigui Aff., Exs. 2 and 4, at PDF p. 24, ¶ I, and Ex. 3, at PDF p. 18, ¶ I.) Further, the 808 Leases state that the "Pool hours are posted at the pool[,]" (Zourigui Aff., Exs. 2 and 4, at PDF p. 24, ¶ II, and Ex. 3, at PDF p. 18, ¶ II), and Plaintiffs do not allege otherwise. (*See* FAC ¶¶ 22, 23.) Thus, Plaintiffs have not adequately alleged a breach of contract claim.[7]

Plaintiffs also contend that Defendants breached the covenant of good faith and fair dealing that is implied in every contract in New York. *See InterDigital Commc'ns Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 536 (S.D.N.Y. 2005) ("An implied covenant of good faith and fair dealing inheres in every New York contract."). "The covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id*. at 536. Breach of the implied covenant is

[7] Because I find that Plaintiffs have not adequately alleged breach of contract and recommend dismissal of Plaintiffs' remaining claims on other grounds, I do not address Defendants' arguments regarding waiver. (*See* Defs.' Mem. at 7-8.)

considered a breach of the underlying contract. *See Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 80 (2d Cir. 2002).

Defendants argue that this claim should be dismissed because the covenant cannot alter the terms of the contract which, in this case, gives Defendants absolute discretion to control access to the pool. (Defs.' Mem. at 9-12.) It is true that Plaintiffs cannot use the covenant of good faith and fair dealing to alter the terms of a contract. *See Rapson Investments LLC v. 48 East 22nd Street Property LLC*, 2019 WL 1179438, *9 (Sup. Ct. New York County Mar. 11, 2019), *aff'd*, 180 A.D.3d 614 (1st Dep't 2020) ("[T]he covenant of good faith and fair dealing cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights") (citations omitted). However, Plaintiffs argue that, even when a contract confers decision-making power on a single party, the resulting discretion is nevertheless subject to an obligation that it be exercised in good faith. (Pls.' Opp. Mem. at 3-4.)

Whether the covenant includes a promise not to act arbitrarily or irrationally in exercising that discretion appears to depend on the precise contractual provision at issue. *Compare Paxi, LLC v. Shiseido Ams. Corp.,* 636 F. Supp. 2d 275, 286 (S.D.N.Y. 2009) ("[T]he obligation of good faith and fair dealing does not negate an expressly bargained-for clause that allows a party to exercise its discretion, unless that clause imposes a limit on the discretion to be exercised or explicitly states that the duty of good faith and fair dealing applies.") (citing *Moran v. Erk*, 11 N.Y.3d 452, 456-57 (2008)), *with In Touch Concepts, Inc. v. Cellco P'ship*, 949 F. Supp. 2d 447, 466 (S.D.N.Y. 2013) ("Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion.") (citing *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995)); *see also Sec. Plans, Inc. v. CUNA Mut.*

Ins. Soc., 769 F.3d 807, 819 (2d Cir. 2014) (considering whether defendant acted arbitrarily or irrationally in exercising discretion but noting that court need not decide "whether and to what extent a different contractual provision may constrict or obviate the protections of the implied covenant").

Here, the Court need not decide whether the contractual provision at issue "constrict[s] or obviate[s] the protections of the implied covenant[,]" *Sec. Plans, Inc.*, 769 F.3d at 819 n.11, because, even assuming it does not, Plaintiffs have failed to plausibly allege facts to show that Defendants acted arbitrarily, irrationally or in bad faith. *See Sveaas v. Christie's Inc.*, 452 F. App'x 63, 66 (2d Cir. 2011) (affirming dismissal when plaintiff failed to "allege any facts that would show that [the defendant] exercised [its] discretion arbitrarily, irrationally or in bad faith").

Plaintiffs allege that "Defendants' side hustle with SwimJim" has deprived them of the benefits of the contractual agreement the parties reached when they signed leases. (FAC ¶ 30.) However, Plaintiffs allege that, "[p]rior to the Pandemic in March 2020," they had access to at least one lane in the pool (FAC ¶ 25) and, thus, do not plausibly allege that they were deprived of access to the pool. Thereafter, Plaintiffs have not plausibly alleged that Columbus 808 acted arbitrarily, irrationally or in bad faith in restricting their access to the pool during certain hours, particularly given the onset of the pandemic and the attendant health risks that arose therefrom.

For these reasons, I recommend that Defendants' motion to dismiss Count IV be granted.

IV. Unjust Enrichment Claim (Count V)

"To prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution." *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J.,*

Inc., 448 F.3d 573, 586 (2d Cir. 2006) (quotation marks omitted). "The 'essence' of such a claim 'is that one party has received money or a benefit at the expense of another.'" *Shih v. Petal Card, Inc.*, No. 18-CV-05495 (JFK), 2020 WL 5659429, at *14 (S.D.N.Y. Sept. 23, 2020) (quoting *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000)). As set forth above, Plaintiffs allege that they were deprived of access to the pool during normal hours notwithstanding the substantial rents that they paid to Columbus 808, in favor of customers of a third-party company that runs swim lessons. In Plaintiffs' view, Columbus 808 has been unjustly enriched by receiving premium rents from Plaintiffs which have baked-in to them pool access privileges (while at the same time denying Plaintiffs pool access), and by receiving revenue from SwimJim for access to the same pool where Plaintiffs were not permitted to swim. Defendants argue that this claim is duplicative of Plaintiffs' breach of contract claim and, therefore, must be dismissed. (Defs.' Mem. at 22; Reply Mem. at 9.)

"Under New York law, a plaintiff may not recover under quasi-contract claims such as unjust enrichment where an enforceable contract governs the same subject matter." *Goldberg v. Pace Univ.*, 535 F. Supp. 3d 180, 198 (S.D.N.Y. 2021). Because the 808 Leases deal with the same subject matter as Plaintiffs' unjust enrichment claim, the Court agrees that such claim should be dismissed. Moreover, contrary to Plaintiffs' assertion (Pls.' Opp. Mem. at 18), where, as here, "the validity of a contract that governs the subject matter at issue is not in dispute, and the claimant alleges breach of the contract, the claimant cannot plead unjust enrichment in the alternative under New York law." *Stanley v. Direct Energy Servs., LLC*, 466 F. Supp. 3d 415, 430-31 (S.D.N.Y. 2020) (citing *Beth Isr. Med. Ctr.*, 448 F.3d at 586-87).

For these reasons, I recommend that Defendant's motion to dismiss Count V of the FAC be granted.

V. Claims Against Columbus 775, Columbus 795, Columbus 801 And Columbus 805

In their motion to dismiss, Defendants demonstrated that residents of the buildings operated by Columbus 775, Columbus 795, Columbus 801 and Columbus 805 were not entitled to access the swimming pool in the 808 Building. (*See* Defs.' Mem. at 22-25.) In opposition to the motion, Plaintiffs make no showing to the contrary. Indeed, Plaintiff state that they are "prepared to dismiss [their] claims against the Columbus Square 795, 775, 801, and 805 entities and pursue [their] class claims solely on behalf of residents and former residents of 808 Columbus Avenue." (*See* Pls.' Opp. Mem. at 20.)

There is no basis for any claims against Columbus 775, Columbus 795, Columbus 801 and Columbus 805, since residents in the buildings operated by these defendants did not have access to the pool in the 808 Building. Thus, I recommend that the motion to dismiss the claims against Columbus 775, Columbus 795, Columbus 801 and Columbus 805 be granted for this reason as well.

VI. Leave To Amend

"There is a strong preference for allowing plaintiffs to amend inadequate pleadings." *In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig*., No. 08-MDL-01963 (RWS), 2011 WL 4357166, at *2 (S.D.N.Y. Sept. 13, 2011). This particularly is true if plaintiffs have not had the benefit of a court ruling with respect to the deficiencies of their pleading. *See Loreley Fin. v. Wells Fargo Secs., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) ("Without the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible

means of curing specific deficiencies."). However, leave to amend need not be granted, if it would be futile. *See Medina v. Tremor Video, Inc.*, 640 F. App'x 45, 47 (2d Cir. 2016) (affirming district court's denial of leave to amend and noting that "a court need not grant such leave if the proposed amendment would still not state a claim, so that the amendment would be futile").

Here, I recommend that Plaintiffs be given leave to amend, except with respect to their claims for fraud and unjust enrichment, and their claims against Columbus 775, Columbus 795, Columbus 801 and Columbus 805. I find it would be futile for Plaintiffs to seek to assert any claim for fraud or unjust enrichment, given the existence of valid lease agreements that govern the subject matter at issue. *See Stanley*, 466 F. Supp. 3d at 430-31. It also would be futile for Plaintiffs to seek to assert any claim against Columbus 775, Columbus 795, Columbus 801 and Columbus 805, since residents in the buildings operated by these defendants did not have access to the pool in the 808 Building.

VII. Subject Matter Jurisdiction

In the event that my foregoing recommendations are adopted, and Plaintiffs choose to amend their pleading, I also recommend that, in order to conserve judicial resources, and in furtherance of the just, speedy, and inexpensive determination of this action, *see* Fed. R. Civ. P. 1, the subject matter jurisdiction of this Court promptly should be addressed before this action proceeds further, as explained below.

Plaintiffs allege that this Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005 ("CAFA"). (*See* FAC ¶ 4.) Generally, as set forth in 28 U.S.C. § 1332(d)(2), CAFA confers original federal jurisdiction over "any class action involving (1) 100 or more class members, (2) an aggregate amount in

controversy of at least $5,000,000, exclusive of interest and costs, and (3) minimal diversity, *i.e.*, where at least one plaintiff and one defendant are citizens of different states." *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir. 2006) (citing 28 U.S.C. §§ 1332(d)(2), (5)(b), (6)). A corporation is deemed to be a citizen of every State by which it has been incorporated and of the State where it has its principal place of business. 28 U.S.C. § 1332(c).

Although it appears that Plaintiffs adequately have alleged subject matter jurisdiction under CAFA, and Defendants have not argued otherwise, the Court is mindful that the statute carves out three exceptions to the general rule stated in Section 1332(d)(2) and requires district courts to decline jurisdiction when certain conditions are met. The three exceptions are (1) the "local controversy" exception; (2) the "home state" exception;[8] and (3) the "interest of justice" exception. *See Hart v. Rick's NY Cabaret Int'l, Inc*., 967 F. Supp. 2d 955, 962 (S.D.N.Y. 2014). "The 'local controversy' and 'home state' exceptions are mandatory." *Id.*; *see also Gold v. New York Life Ins. Co.*, 730 F.3d 137, 141–42 (2d Cir. 2013) (CAFA exceptions are not jurisdictional but district court must "actively decline" to exercise jurisdiction if certain requirements are met) (discussing home state exception); *Moore v. IOD Inc.*, No. 14-CV-08406 (VSB), 2016 WL 8941200, at *4 (S.D.N.Y. Mar. 24, 2016) (applying *Gold* to local controversy exception).

In the present case, it appears that one or more of the CAFA exceptions may apply. First, CAFA provides for a mandatory exception to jurisdiction for matters that are "local controversies." *See* 28 U.S.C. § 1332(d)(4)(A). Under this section, a "district court shall decline to exercise jurisdiction" over a class action in which these conditions are met:

[8] This exception also is sometimes referred to as the "home state controversy" exception. *See Brook v. UnitedHealth Grp. Inc.*, No. 06 CV 12954 (GBD), 2007 WL 2827808, at *3 (S.D.N.Y. Sept. 27, 2007).

> (i)(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
>
> (II) at least 1 defendant is a defendant—
>
> (aa) from whom significant relief is sought by members of the plaintiff class;
>
> (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
>
> (cc) who is a citizen of the State in which the action was originally filed; and
>
> (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
>
> (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

Id.

Second, under the "home state controversy" exception, as set forth in § 1332(d)(4)(B), district courts must decline jurisdiction when "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." *See Brook*, 2007 WL 2827808, at *3 n.6. This provision is "designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state." *Id*. (internal quotation marks and citation omitted). In other words, the provision is "intended to keep purely local matters and issues of particular state concern in the state courts." *Id*. (internal quotation marks and citation omitted).

This case was filed in New York. Plaintiffs and the proposed class members are persons who signed lease agreements with Columbus 808 and thus resided in New York. Moreover, Columbus 808, the primary defendant, is a New York citizen, *i.e*., a corporation having its principal place of business in New York. (FAC ¶ 12.) In addition, there is no mention in the record of other class actions asserting the same or similar claims having been filed. Thus, this dispute, which involves the use of a swimming pool in a residential building in New York City, appears to the Court to be a local and/or home state controversy and not a dispute that belongs in federal court.

Accordingly, given CAFA's requirement that the Court decline jurisdiction if one of these exceptions applies,[9] I recommend that, if Plaintiffs choose to amend their pleading, the parties

[9] Even if the local and home state controversy exceptions do not apply, the Court could decline to exercise discretion in the interests of justice, as set forth in 28 U.S.C. § 1332(d)(3):

> A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—
>
> (A) whether the claims asserted involve matters of national or interstate interest;
>
> (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
>
> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
>
> (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
>
> (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
>
> (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 U.S.C. § 1332(d)(3).

be required to promptly address whether the Court should exercise subject matter jurisdiction over this action.

CONCLUSION

For the foregoing reasons, the Court respectfully recommends that Defendants' motion to dismiss be GRANTED; that Plaintiffs be given leave to amend as set forth above; and that, if Plaintiffs choose to amend, the parties be required to promptly address whether the Court should exercise subject matter jurisdiction over this action.

Dated: September 30, 2022
New York, New York

STEWART D. AARON
United States Magistrate Judge

* * *

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Gardephe.

THE FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn,* 474 U.S. 140 (1985).