IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TERESA SERRANO SEGOVIA and GRUPO EMPRESARIAL SESER, S.A. DE C.V.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 06C-09-149-JRS
EQUITIES FIRST HOLDINGS, LLC,	)	
Defendant.	)	

Date Submitted: April 3, 2008
Date Decided: May 30, 2008

MEMORANDUM OPINION

Upon Consideration of Plaintiffs' Motion for Summary Judgment
***GRANTED** in Part and **DENIED** in Part.*
Upon Consideration of Defendant's Motion for Summary Judgment
***GRANTED** in Part and **DENIED** in Part.*

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SLIGHTS, J.

I.

Two seemingly straightforward secured loan transactions have given rise to claims of lender fraud, wrongful conversion of collateral, unjust enrichment, and breach of contract after the lender, Equities First Holdings, LLC ("EFH"), sold shares of stock pledged as loan collateral allegedly without the authorization of the borrower, Grupo Empresarial Seser, S.A. De C.V., ("Empresarial"), or the pledgor, Teresa Serrano Segovia ("Mrs. Segovia"). At its core, this dispute presents a fundamental disagreement as to the nature of the transactions at issue. Empresarial and Mrs. Segovia view the transactions as standard secured loans pursuant to which the pledged stock was to be preserved as security by the lender to ensure that the borrower met its obligation to repay the loans. EFH, on the other hand, views the transactions as ones in which it preserved the right to hedge its risk (reflected in lower interest rates and favorable repayment terms) by making full use of the pledged collateral as it saw fit during the term of the loan. There is no dispute that EFH sold the stock shortly after the transactions closed and in the absence of any default by the borrower. Whether *vel non* the sale of stock was authorized by the governing loan documents is the central issue of the case.

The parties have filed cross motions for summary judgement. Pursuant to Superior Court Civil Rule 56(h), when parties file cross motions for summary

judgment and have not argued that issues of material fact exist, the Court treats such motions as a stipulation of facts upon which a final decision may be rendered.

For the reasons that follow, the Court has determined that the clear and unambiguous terms of the operative contracts reflect secured loan transactions pursuant to which EFH was to preserve the pledged collateral until the borrower either defaulted or repaid the loans. By selling the stock before it had authority to do so, and then failing to apply the proceeds to the loan balances, EFH breached its contracts with both Empresarial and Mrs. Segovia and wrongfully converted Mrs. Segovia's stock. Accordingly, Plaintiffs' motion for summary judgment must be **GRANTED** and EFH's motion for summary judgment must be **DENIED** as to counts I (breach of contract) and II (conversion) of the complaint. Because a valid contract exists between Plaintiffs and EFH, Plaintiffs may not recover for unjust enrichment. They also cannot prevail on their fraud claim because the undisputed facts of record do not demonstrate a knowingly false representation, concealment of facts in the face of a duty to speak, or reliance by the Plaintiffs. Nor does the evidence justify an award of punitive damages. Accordingly, EFH's motion for summary judgment must be **GRANTED** and Plaintiffs' motion for summary judgment must be **DENIED** as to counts III (fraud), IV (unjust enrichment), and V (punitive damages) of the complaint.

II.

A. The Parties

Plaintiff, Empresarial, is a Mexican corporation engaged in the manufacture and sale of automobile steering wheels.[1] Formed in 1991, the company is owned by siblings in the Segovia family: Maria (who serves as its president), Gabriella, Orlando, Romualdo, Julio and Javier Segovia.[2] Plaintiff, Teresa Serrano Segovia, is the mother of the six sibling-owners of Empresarial.[3] Mrs. Segovia pledged shares of stock she owned in Grupo TMM S.A. de C.V. ("TMM") as collateral for the loan transactions between Empresarial and EFH that are at issue in this litigation.[4] TMM (not a party to this litigation) is the largest transportation and logistics company in Mexico. Its stock is traded on the New York Stock Exchange.[5] Javier Segovia, one of the owners of Empresarial, is also the president of TMM.[6] Aside from this commonality, Empresarial and TMM are separate, unaffiliated companies that

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[1] Transaction Identification Number ("Trans. I.D. No.") 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. B at 4.

[2] *Id.* at 1.

[3] *Id.*

[4] Trans. I.D. No. 16317953, Stipulation Regarding Teresa Serrano Segovia, at 1.

[5] Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. B at 4.

[6] *Id.*

maintain separate operations.[7]

Defendant, EFH, is a lending company that specializes in extending loans to individuals and companies that possess valuable stock holdings but face short or medium term cash flow problems.[8] EFH made two loans to Empresarial in 2006. Both loan transactions are at issue here.

B. The January Loan

On January 26, 2006, Empresarial borrowed $6,376,270.27 from EFH at an interest rate of 3.5%[9] to be repaid over a 24 month term.[10] As security for the loan, Empresarial offered 1,808,871 shares of TMM stock pledged by Mrs. Segovia pursuant to a separate agreement with EFH.[11] The parties agreed on a strike price of $4.70 for the TMM stock.[12] At this strike price, the value of the pledged stock was $8,501,693.70 ($2,125,423.43 greater than the value of the loan).[13] A loan agreement and nonrecourse promissory note, signed by EFH and Empresarial, and a pledge

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[7] *Id.*

[8] Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. A at 39.

[9] Trans. I.D. No. 12364417, Pls.' Complaint, Ex. B.

[10] *See* Trans. I.D. No. 12364417, Ex. C, Loan Agreement at § 2.3.

[11] Trans. I.D. No. 12364417, Pls.' Complaint, Ex. B.

[12] *Id.*

[13] *Id.*

agreement and irrevocable proxy, signed by EFH and Mrs. Segovia, memorialized the terms of this transaction.[14] All of these documents were drafted by EFH or its attorneys.[15]

C. The February Loan

On February 24, 2006, Empresarial borrowed an additional $3,384,000 from EFH at an interest rate of 3.5%[16] to be repaid over a 24 month term.[17] This loan was secured by 960,000 shares of Mrs. Segovia's TMM stock.[18] The strike price was again set at $4.70 per share, valuing the collateral at $4,512,000 ($1,128,000 greater than the value of the loan).[19] Once again, this transaction was memorialized in a loan agreement and nonrecourse promissory note signed by Empresarial and EFH, and a pledge agreement and irrevocable proxy signed by Mrs. Segovia and EFH.[20] And,

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[14] *Id.* at Ex. A.

[15] Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. A at 73-74.

[16] Trans. I.D. No. 12364417, Pls.' Complaint, Ex. D.

[17] *See* Trans. I.D. No. 12364417, Ex. C, Loan Agreement at § 2.3.

[18] Trans. I.D. No. 12364417, Pls.' Complaint, Ex. D.

[19] *Id.*

[20] Trans. I.D. No. 12364417, Pls.' Complaint, Ex. C.

once again, the loan documents were drafted by EFH or its attorneys.[21]

D. The Sale of Pledged Stock

Within weeks of the closing of the February loan, during February and March of 2006, EFH sold approximately 98% of the TMM stock pledged by Mrs. Segovia on the open market.[22] It appears that EFH sold the remaining 2% in various transactions through the spring and summer of 2006.[23] EFH did not notify Mrs. Segovia or Empresarial of its intention to sell the pledged stock, nor did it provide notice of the sale after-the-fact.[24] At the time of the sale, the value of the TMM stock was 25% higher than the combined value of the loans EFH had extended to Empresarial, yielding a profit to EFH in excess of $3,000,000.[25] EFH used the proceeds of the sale for its own business purposes; it did not apply any of the

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[21] Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. A at 73-74. The Court notes that the relevant terms of the loan agreements and pledge agreements for the January and February loans are identical. For the remainder of this opinion, therefore, "loan documents" will refer to all documents signed to effectuate both loans; "loan agreements" will indicate the individual loan agreements signed by EFH and Empresarial on January 26, 2006 and February 24, 2006; "pledge agreements" will refer to the individual pledge agreements signed by EFH and Mrs. Segovia on January 26, 2006 and February 24, 2006; and "pledged stock" will refer to the TMM stock securing both loans.

[22] Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. A at 95. At oral argument, EFH's counsel asserted that "many months" went by before EFH liquidated the TMM shares. The record, however, says otherwise. Trans. I.D. No. 18631069, Hr'g. Tr., at 80-81.

[23] Trans. I.D. No. 12364417, Pls.' Complaint, Ex. F.

[24] Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 9.

[25] Trans. I.D. No. 16719220, Ex. A, Pls.' Resp. to Def.'s Mot. for Summ. J., at 96-98.

proceeds of the sale to the outstanding loan balances or towards interest due on the loans.[26] Not knowing that a sale of collateral had occurred, Empresarial made two interest payments on the full amount of the outstanding loans, one in June, 2006, in the amount of $85,402.36, and one in August, 2006, in the amount of $55,792.36.[27]

On August 9, 2006, EFH sent a letter to Mrs. Segovia informing her that Empresarial was in default of the loan agreement because the value of her TMM stock had dropped to less than 80% of the value of the loans.[28] The letter stated that Mrs. Segovia must tender additional cash or stock to EFH in order to cure the default or "the underlying collateral [would] be confiscated."[29] EFH sent a subsequent letter to Mrs. Segovia on August 25, 2006, informing her that her TMM stock had been confiscated because she had failed to take any curative action.[30] Neither of these letters informed Mrs. Segovia that almost all of her pledged stock had been sold months ago.[31]

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[26]Trans. I.D. No. 16342337, Def.'s Mem. of Law in Supp. of Its Mot. for Summ. J., at 19.

[27]Trans. I.D. 16342675, Ex. M, Aff. of Suzanne Hill in Supp. of Pls.' Mot. for Summ. J.

[28]Trans. I.D. No. 12364417, Pls.' Complaint, Ex. E.

[29]*Id.*

[30]*Id*. at Ex. F.

[31]*Id*. at Ex. E and F.

On September 14, 2006, Plaintiffs filed a complaint in this Court alleging breach of contract, conversion, unjust enrichment and fraud. The complaint seeks compensatory and punitive damages.[32] EFH answered by denying the allegations and raising several affirmative defenses. The parties filed cross motions for summary judgment on September 17, 2007. A hearing was held on the cross motions on November 30, 2007. Supplemental briefing followed. By letter dated April 3, 2008, the Court advised the parties that it would render a final decision based on the record submitted with the cross motions for summary judgment and that trial would not be necessary.[33]

III.

As stated, Plaintiffs seek relief on four claims: (1) breach of contract; (2) conversion; (3) fraud; and (4) unjust enrichment.[34] In addition to a declaration from the Court that Plaintiffs are excused from further performance because EFH breached various provisions of the loan documents, Plaintiffs seek damages in the amount of profit realized by EFH in connection with the sale of the collateral, the amount of interest paid on the loans after the sale of the pledged collateral, all fees and expenses

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[32]Trans. I.D. No. 12364417, Pls.' Complaint at 11-12.

[33]Trans. I.D. No. 19254542, Ltr. To Counsel.

[34]Trans. I.D. No. 12364417, Pls.' Complaint at 8-11.

resulting from the transaction, conversion damages and interest.[35] Plaintiffs also seek attorney's fees and punitive damages for EFH's alleged "willful and wanton disregard for the rights of Plaintiffs."[36] EFH denies liability under all theories. The Court will summarize the contentions of the parties *seriatim*.[37]

A. Breach of Contract

Plaintiffs' primary contention is that the explicit language of the loan documents did not confer upon EFH any additional rights in the pledged collateral than a traditional secured lender would have received, and certainly did not convey a right to sell the collateral before the occurrence of a contractually agreed upon event of default.[38] In support of their argument, Plaintiffs look primarily to Section 15 of the pledge agreement in which EFH disclaims all duties with respect to the collateral it has taken as security except the duty to maintain "safe custody" of the pledged

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[35] *Id*. at 11-12.

[36] *Id*. at 12.

[37] The cross motions for summary judgment yielded eight briefs and a voluminous factual record. Oral argument on the cross motions lasted nearly three hours. Throughout this process, the contentions of the parties evolved in order to meet the new theories or defenses offered by the opponent. In many instances, arguments were raised and then abandoned in apparent recognition that the opponent had delivered a winning shot. The Court will not attempt to recreate the seemingly endless (but necessary) volley here, although it certainly followed the ping pong match as it unfolded in the comprehensive briefing. The recitation of the contentions in this opinion captures the essential aspects of the controversy in order to frame the issues for disposition.

[38] Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 20.

stock. Plaintiffs argue that this clear and unambiguous provision is consistent with the duty imposed upon the lender by Delaware's Uniform Commercial Code to maintain safe custody of collateral during the term of the loan.[39] According to Plaintiffs, EFH breached this express statutory and contractual duty when it sold the collateral without their consent shortly after the loan transactions closed.[40]

Plaintiffs contend that other clear and unambiguous provisions of the loan documents make sense only when read against the backdrop of EFH's duty safely to preserve the pledged collateral. They point to several provisions of the loan documents that are consistent with their characterization of the transaction as a secured loan transaction, with the attendant duty of the lender to maintain "safe custody" of the collateral, and are inconsistent with EFH's argument that it acquired ownership rights in the pledged collateral. These provisions include: (i) several provisions that characterize EFH's interest in the pledged stock as a "security interest" and the absence of any provision that even remotely suggests an "ownership (or absolute) interest;" (ii) provisions that characterize Mrs. Segovia as a "pledgor" (as opposed to "grantor" or "seller"); (iii) provisions that recognize Mrs. Segovia's right to vote her shares during the term of the loan; and (iv) provisions that allow

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[39]Trans. I.D. No. 12364417, Pls.' Complaint at 8 (citing 6 *Del. C.* § 9-207(a)).

[40]*Id.*

EFH to "take whole possession" of the pledged stock, but only in the event of a default. If the Court determines that EFH breached the loan agreements by selling the pledged stock without authorization, then Plaintiffs seek compensatory damages and a declaration that both Plaintiffs are excused from further performance of their contractual commitments to EFH.[41]

EFH challenges, as a predicate matter, whether Mrs. Segovia and Empresarial have standing to proceed in this action.[42] EFH contends that Empresarial had no rights to or interest in the TMM stock that Mrs. Segovia pledged to secure the loan and, therefore, Empresarial may not pursue a claim that EFH breached the pledge agreement.[43] With respect to Mrs. Segovia, EFH recognizes her ownership interest in the TMM shares and her signature on the pledge agreement, but argues that because Mrs. Segovia denied having any personal knowledge regarding the contents of the loan documents or representations made by EFH about the loan documents, she is not entitled to proceed in an action based upon alleged breaches of contracts

[41]Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 29.

[42]Trans. I.D. No. 16342337, Def.'s Mem. of Law in Supp. of Its Mot. for Summ. J., at 9.

[43]*Id.* at 10.

relating to a transaction she knows nothing about.[44] EFH argues that the Court need not reach the merits of the controversy; the case should be decided on the standing issue alone.[45]

In response to Plaintiffs' breach of contract claim, EFH denies that its actions were in violation of the terms of the loan documents. According to EFH, the specific language of the documents authorized EFH both to sell the collateral and to retain the proceeds.[46] Central to EFH's argument is Section 2 of the pledge agreement in which Mrs. Segovia "grants to [EFH] a security interest in and all right, title and interest in and to [the pledged stock]."[47] EFH argues that this section, and particularly the grant of "all right, title and interest in [the pledged stock]," constituted "an absolute and complete assignment of property interests" that divested Mrs. Segovia of all of her interest in the pledged stock.[48]

According to EFH, the phrase "all right, title and interest" is a contractual term of art that has been construed by Delaware courts and courts of other jurisdictions to mean the conveyance of absolute rights to the property in question. EFH argues that

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 12.

[48] *Id.*

its construction of Section 2 of the pledge agreement is consistent with the generally accepted meaning of the provision's operative terms.

Like Plaintiffs, EFH refers to several other provisions of the loan documents that it contends either directly support its characterization of the transaction, and particularly its construction of Section 2 of the pledge agreement, or would be rendered superfluous if the Court accepted Plaintiffs' characterization. These provisions include: (i) a provision that recognizes EFH's right to use the pledged stock "as collateral in hedging transactions;" (ii) a provision that allows EFH to "alter[] or revise[] the owner of record of the beneficial interest;" (iii) a provision that allows EFH to "take control of any proceeds" of the pledged stock; (iv) a related provision in which EFH disclaims any duty to Mrs. Segovia to preserve any income derived from the pledged stock; and (v) default provisions that allow EFH to seize the stock in the event of a default but do not expressly prohibit EFH from selling the stock during the term of the loan to hedge the risks it incurred by offering a loan at a favorable (below market) rate with favorable terms.

With respect to the Delaware UCC, EFH acknowledges that it governs the transaction *sub judice*, and that it imposes certain responsibilities upon the lender to maintain safe custody of collateral. It argues, however, that the parties may, by agreement, define the scope of the lender's obligation and the manner in which the

obligation is satisfied. According to EFH, this is precisely what the parties did here by allowing the pledged stock to be utilized by EFH as it saw fit during the term of the loan so long as it returned the stock to Mrs. Segovia after Empresarial complied with its obligations under the loan agreements.[49]

Even if the Court finds that a breach occurred, EFH argues that neither plaintiff has suffered compensable damages. EFH contends that because Mrs. Segovia forfeited all of her interest in the collateral and the income derived from it by signing the pledge agreements, she cannot seek damages for a violation of rights that she voluntarily surrendered.[50] Damages must be determined, EFH insists, by examining whether the sale of the pledged stock deprived Plaintiffs of the benefit of their bargain, as that bargain was understood by the parties at the time they entered into the loan documents at issue.[51] According to EFH's interpretation of the loan documents, Mrs. Segovia was not entitled to receive any of the income generated by the pledged stock for the duration of the loan, so the premature sale of the stock caused Mrs. Segovia no harm.[52] Further, Empresarial had no rights or ownership interest that

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[49]Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 18.

[50]*Id.* at 19.

[51]*Id.* at 21.

[52]*Id.* at 22.

could have been impaired by EFH's sale of the stock.[53]

EFH also argues that the Court must take a practical view of breach damages here. EFH observes that the value of the pledged TMM stock eventually declined to a value that triggered the default provisions of the loan agreement. At the time EFH declared a default, the value of the pledged stock was $2.3 million shy of satisfying the outstanding loan. Thus, Mrs. Segovia would have received nothing had EFH waited to sell the stock upon an event of default.[54] In EFH's view, an expectancy theory of recovery would yield no damages because the value of the stock had dropped below the loan value by the time the sale of the stock was discovered.[55]

B. Conversion

Plaintiffs argue that the pledged stock was and remained Mrs. Segovia's personal property throughout the term of the loan and that EFH exercised wrongful dominion and control over the TMM stock by selling it without her authority.[56] This unauthorized sale injured Mrs. Segovia, Plaintiffs argue, thereby entitling her to recover the highest market value of the stock between the time of conversion and a

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[53] *Id.* at 22.

[54] *Id.* at 22-23.

[55] Trans. I.D. No. 17822484, Def.'s Supplemental Br., at 8.

[56] Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 24-25.

reasonable time thereafter.[57]

EFH challenges Plaintiffs' ability to bring a conversion claim, or any claim in tort, because the factual bases of their claim rests in the language of the contracts.[58] In order to succeed in tort when a valid contract existed between the parties, EFH argues that Plaintiffs must establish an independent legal duty over and above the contractual duty imposed by the loan documents.[59] EFH asserts that Plaintiffs have failed to carry that burden because their entire conversion claim is predicated upon terms of the contracts they claim EFH has breached.[60] Without more, EFH argues, Plaintiffs' damages, if any, are limited to those based in contract.[61]

C. Fraud

Plaintiffs claim that EFH represented in the loan documents that it would maintain safe custody of the TMM stock for the term of the loan and would not sell the stock unless one of the contractually agreed upon events of default occurred.[62] Plaintiffs do not point to any extra-contractual affirmative misrepresentations by

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[57]Trans. I.D. No. 16718800, Def.'s Mem. in Resp. to Pls.' Mot. for Summ. J., at 25.

[58]Trans. I.D. No. 17822484, Def.'s Supplemental Br., at 9.

[59]*Id.*

[60]*Id.*

[61]*Id.*

[62]Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 27.

EFH, but base their complaint on the fact that EFH never mentioned its intention to sell the collateral.[63] Plaintiffs look no further than the loan documents for affirmative misrepresentations made by EFH.[64] According to Plaintiffs, EFH's own president acknowledged that EFH's contracts deliberately do not inform EFH customers that EFH intends to sell the collateral during the term of the loan and use the proceeds for its own benefit. According to Plaintiffs, this testimony reflects EFH's knowledge of the illusory nature of its contractual commitments.[65] Plaintiffs contend that they relied upon the false (fraudulent) representations made in the loan documents and would never have agreed to the transaction had they known EFH would sell the pledged stock whenever it felt like doing so.[66]

EFH counters that Plaintiffs may not recover on their fraud claim because EFH clearly communicated to Plaintiffs both its right and intent to sell the pledged collateral in the clear and unambiguous terms of the loan documents.[67] In addition to the loan documents themselves, EFH points to its marketing materials to refute Plaintiffs' claim of fraud. According to EFH, it explicitly stated in its marketing

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[63]Trans. I.D. No. 16889564, Pls.' Reply Br., at 15.

[64]*Id.*

[65]Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 27.

[66]*Id.*

[67]Trans. I.D. No. 16718800, Def.'s Mem. in Resp. to Pls.' Mot. for Summ. J., at 6.

materials that the primary risk of stock loans is that the lender would not be able to return the pledged stock after the loan was repaid.[68] EFH argues that the only plausible reading of the "risk" referred to in the marketing materials is that a sale of pledged stock for hedging purposes might occur during the loan term, and the stock may not be available to return to the borrower/pledgor upon repayment of the loan.[69] This warning, EFH alleges, gave notice to Plaintiffs of the possibility that Mrs. Segovia's stock could be sold during the term of the loan.[70]

Additionally, EFH challenges Plaintiffs' fraud claims on the same grounds it challenges the conversion claim.[71] EFH argues that Plaintiffs have failed to establish an independent legal duty aside from the contractual duty that arose when the documents were signed.[72] Further, EFH contends that a plaintiff may not recover for fraud on a breach of contract claim simply by alleging that the defendant never intended to perform the contract.[73] For these reasons, EFH argues, Plaintiffs' claim

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[68]Trans. I.D. No. 16342337, Def.'s Mem. of Law in Supp. of Its Mot. for Summ. J., at 17.

[69]*Id.*

[70]*Id.*

[71]Trans. I.D. No. 17822484, Def.'s Supplemental Br., at 8-9.

[72]*Id.*

[73]*Id.*

for fraud must fail.[74]

D. Unjust Enrichment

Plaintiffs claim that EFH's unauthorized sale of the TMM stock and retention of the proceeds caused them harm and, therefore, they are entitled to the proceeds of EFH's unjust enrichment.[75] EFH counters that Plaintiffs may not proceed on a claim of unjust enrichment because valid and enforceable contracts between the parties define their rights and remedies.[76] Because Plaintiffs have not challenged the enforceability of the loan documents, Plaintiffs are precluded from recovering on a theory of unjust enrichment.[77]

IV.

A. Standard of Review

Superior Court Civil Rule 56(h) states that when parties have filed cross motions for summary judgment and have agreed that no genuine issues of material fact exist, "the Court shall deem the motions to be the equivalent of a stipulation for

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[74] *Id.*

[75] Trans. I.D. No. 12364417, Pls.' Complaint at 10-11.

[76] Trans. I.D. No. 16342337, Def.'s Mem. of Law in Supp. of Its Mot. for Summ. J., at 20.

[77] *Id.*

decision on the merits based on the record submitted with the motions."[78] Under such circumstances, a final decision on the merits is encouraged even when the parties dispute the import of the undisputed record, particularly when the parties have requested a bench trial.[79] "Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court."[80]

The parties do not contest the facts giving rise to this litigation.[81] They entered into binding contracts that governed their rights and remedies. EFH sold the pledged collateral believing it had the right to do so. Plaintiffs challenge whether that right was conveyed in the loan documents - a legal controversy arising from settled facts. The case is ripe for final disposition of all claims.

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[78]Super. Ct. Civ. R. 56(h). *See also Scottsdale Ins. Co. v. Lankford*, 2007 Del. Super. LEXIS 338, *11 ("Upon cross motions for summary judgment, this Court will grant summary judgment to one of the moving parties.").

[79]10A Charles Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*: Civil 3d. § 2720.

[80]*Fox v. Johnson & Wimsatt, Inc.*, 127 F.2d 729, 737 (D.C. Cir. 1942).

[81]Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 13, Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., at 10, Trans. I.D. No. 16889564, Pls.' Reply Br., at 14. Trans. I.D. No. 16342337, Def.'s Mem. of Law in Supp. of Its Mot. for Summ. J., Def.'s Mem. of Law in Supp. of Its Mot. for Summ. J., at 5, Trans. I.D. No. 16886261 at 5.

B. Standing

Plaintiffs allege that EFH breached the pledge agreement in a manner that deprived Mrs. Segovia of her ownership interest in the pledged stock. Although EFH contends that Mrs. Segovia's lack of familiarity with the specifics of her contractual arrangement with EFH somehow deprives her of a right to enforce the terms of the pledge agreement, it has cited no authority for this novel proposition and the Court has found none. She may enforce her rights under the pledge agreement, just as EFH could enforce its rights had it contended that Mrs. Empresarial failed to perform under the contracts.

For its part, Empresarial paid fees and made two substantial interest payments on an outstanding loan that it alleges should have been satisfied (or, at least, reduced) by the proceeds from the sale of the pledged stock. If supported by the record, Empresarial's allegations amount to a breach of the loan agreement. To the extent a material breach of the loan agreement has occurred, Empresarial also has a right to declaratory relief that would excuse it from future performance of the contracts.

Plaintiffs also are entitled to proceed in this action under the rules of civil procedure of this Court. Rule 17(a) states that "a party with whom or in whose name a contract has been made for the benefit of another" is a real party in interest and may

sue in that person's own name.[82] According to this rule, Empresarial and Mrs. Segovia are real parties in interest who may seek redress against EFH because each party signed, and was bound by, a written contract with EFH.

C. Breach of Contract

To prevail on a breach of contract claim, "the plaintiff must demonstrate: first, the existence of a contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff."[83] In this case, the first element is not in controversy - all parties agree that the loan agreements and pledge agreements are valid, enforceable contracts. The second and third elements, however, are contested - Plaintiffs both allege that various breaches of the agreements have caused them damages. EFH maintains that it has complied with all aspects of the loan documents and, even if it has not, Plaintiffs have suffered no compensable injury from any breach that may have occurred. As noted above, to resolve the breach claim, the Court first must determine what the loan documents say and what they mean. Did the parties enter into a typical secured loan transaction, as Plaintiffs allege, or did they enter into a transaction that granted more rights to the secured lender, as EFH alleges? The resolution of this fundamental contract

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[82] Del. Super. Ct. Civ. R. 17(a).

[83] *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

interpretation issue will inform the disposition of the breach of contract claims.

1. The Applicable Rules of Contract Construction

Before the Court launches its analysis of the breach of contract claims, it is appropriate first to identify certain legal principles and predicate factual findings that will guide the analysis of the breach claims. They will be stated in general terms here and reiterated, when necessary, in the discussion of the specific contentions of the parties.

The construction of a written instrument is a matter of law for the Court.[84] As stated, both parties have agreed that the contracts at issue are not ambiguous. Not surprisingly, however, both parties have offered extrinsic evidence as further support for their competing interpretations of the contract terms just in case the Court finds ambiguity. Accordingly, the Court must first determine if the contracts are ambiguous before endeavoring to construe their terms.

a. The Parol Evidence Rule

The parol evidence rule requires that "[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of

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[84] *See Hudson v. State Farm Mut. Ins. Co.,* 569 A.2d 1168, 1170 (Del. 1990).

varying or contradicting the writing."[85] Thus, the court must first determine whether the contract clearly and accurately reflects the agreement of the parties.[86] A contract is not rendered ambiguous simply because the parties disagree as to the meaning of its terms.[87] Ambiguity does arise, however, when the contract provisions in controversy "are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[88] If, after careful consideration, the court determines that the contract is an accurate reflection of the parties' agreement, the interpretation is limited to the four corners of the contract.[89] "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."[90]

After carefully reviewing each of the loan documents, the Court concurs with the parties - the contracts are not ambiguous. As explained below, when considered from the perspective of a "reasonable person's" interpretation of the terms, guided by

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[85]26 CORBIN ON CONTRACTS § 573 (1960).

[86]*Interim Healthcare, Inc. v. Spherion Corporation*, 884 A.2d 513, 546 (Del. Super. Ct. 2005)(citations omitted), *aff'd*, 886 A.2d 1278 (Del. 2005)(table).

[87]*Id*. at 547.

[88]*Id.* (citing *Rhone-Poulenc Basic Chem. Co. v. American Motorists, Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

[89]*Id.*

[90]*Lorillard Tobacco Co. v. American Legacy Found.*, 903 A.2d 728, 740 (Del. 2006)(citations omitted).

settled principles of contract construction, the loan documents clearly define the rights, obligations and remedies of the parties. Accordingly, the Court will not consider the extrinsic evidence that has been offered. When construing the contracts, the review will be limited to the "four corners" of the documents.[91]

b. "Four Corners" Rules of Contract Construction

Once the Court has determined that the operative contracts are not ambiguous, the Court must, as a matter of law, "determine[] the legal operation of the contract - its effect upon the rights and duties of the parties."[92] The rights and obligations imposed by the loan documents are those that a "reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the instrument, other than oral statements by the parties" would ascribe to the contract.[93] Settled rules of contract construction will lead the Court to the loan documents' true and intended meaning.

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[91]For this reason, the Court must grant the Plaintiffs' motion *in limine* in which they seek an order striking the testimony of EFH's expert, Joseph R. Mason. Dr. Mason purports to explain the meaning and purpose of the various loan documents and, consequently, his opinions must be regarded as inadmissible parol evidence. A separate order will be entered granting the motion.

[92]24 CORBIN ON CONTRACTS § 24.3 (1998).

[93]*Interim Healthcare, Inc.*, 884 A.2d at 546.

Primarily, the Court must view the contracts as a whole and interpret them in a manner that gives "a reasonable, lawful, and effective meaning to all the terms."[94] This is preferred over an interpretation which "leaves a part unreasonable, unlawful, or of no effect."[95] In this regard, Delaware courts will not allow "sloppy grammatical arrangement of the clauses or mistakes in punctuation to vitiate the manifest intent of the parties as gathered from the language of the contract."[96] "Moreover, the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's scheme or plan."[97] When terms are not defined, Delaware courts will not hesitate to look to dictionaries for help in defining those terms.[98] Finally, the contract will be construed *contra proferentem* - against the party who drafted the contract.[99] The rationale for this rule of interpretation rests in the assumption that the drafting party is more likely to provide for his own protection in the language utilized.[100] The

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[94]RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981).

[95]24 CORBIN ON CONTRACTS § 24.22 (1998)(citations omitted).

[96]*Interim Healthcare, Inc.,* 884 A.2d at 555 (internal quotations omitted)(citing 17A AM. JUR.2d *Contracts* §§ 337, 365, 366 (2d ed. 2004)).

[97]*Id.* at 556.

[98]*Lorillard Tobacco Co.*, 903 A.2d at 738.

[99]24 CORBIN ON CONTRACTS § 24.27 (1998).

[100]*Id*. (citing RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a. (1981)).

author may also "leave meaning deliberately obscure, intending to decide at a later date what meaning to assert."[101]

Not only must contracts be construed as whole documents, but multiple documents evidencing the same transaction must be construed together. When the parties have executed separate documents on the same day covering the same period of time and intend these documents to "operate as two halves of the same business transaction," then the Court must treat them as one contract.[102] This approach remains true even if the documents are "executed by a single party or by two or more parties, and even when some of the documents are executed by parties who have no part in executing the others."[103]

2. The Unambiguous Loan Documents Evince Secured Loan Transactions, Nothing More and Nothing Less

At Section 15 of the pledge agreement, EFH acknowledged its obligation to maintain "safe custody" of the pledged stock over the life of the loans.[104] According

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[101] *Id*.

[102] *E.I. duPont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1115 (Del. 1985). *See also* 24 CORBIN ON CONTRACTS § 24.21 (1998).

[103] 24 CORBIN ON CONTRACTS § 24.21 (1998).

[104] Section 15 provides: "Beyond the safe custody thereof, the Lender shall not have any duty as to any Pledged Collateral in its possession or control or in the possession or control of any agent or nominee of the Lender or any income thereon or as to the preservation of rights against prior parties or any other rights pertaining thereto."

to Plaintiffs, this acknowledgment clearly reflects the parties' understanding that the pledged stock was offered only as collateral for the loans, and confirms their expectation that EFH would preserve the collateral until either the loans were repaid or Empresarial defaulted on its obligations under the loan agreements. The language to which Plaintiffs refer is clear and unambiguous and reflects EFH's obligation to maintain "safe custody" of the pledged stock. The Court need not consider Section 15 in isolation, however, because the balance of the provisions of the loan documents support the conclusion that the loan documents gave EFH the rights and obligations of a secured lender, but nothing more.

At this point, the Court must pause for a moment to consider how EFH, the scrivener of the loan documents, elected to describe its own interest in the pledged stock. "[W]hen one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party."[105] The document EFH titled "Pledge Agreement" governed the relationship between Mrs. Segovia and EFH regarding the pledged stock. Black's Law Dictionary defines "pledge" as "a bailment or other deposit of personal property to a creditor as security for a debt or obligation."[106] Black's distinguishes a bailment situation from other

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[105] 24 CORBIN ON CONTRACTS 24.27 (1998)(citations omitted).

[106] BLACK'S LAW DICTIONARY 1175 (7th ed. 1999).

transactions, commenting that "[u]nlike a sale or gift of personal property, a bailment involves a change in possession but not in title."[107] The plain meaning of the term utilized by EFH to describe its transaction with Mrs. Segovia reflected that it would receive less than ownership interest in the "pledged" collateral.

Additionally, the words EFH used to describe the TMM stock, and its interest in it, reflect an agreement that created nothing more than a security interest. EFH referred to the TMM stock throughout the loan documents as "collateral."[108] Black's Law Dictionary defines "collateral" as "property that is pledged as security against a debt; the property subject to a security interest."[109] The Delaware UCC defines "collateral" as "property subject to a security interest or agricultural lien."[110] The use of the words "property subject to" in each definition contemplates circumstances in which title to the property remains vested in the owner. Moreover, EFH repeatedly referred to its own interest in the pledged stock as a "security interest."[111] The UCC defines a "security interest" as "*an interest* in personal property or fixtures which

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[107]*Id*. at 137 (defining "bailment").

[108]Trans. I.D. No. 12364417, Ex. C, Loan Agreement, at § 1.1, Ex. A, Pledge Agreement at § 2(a).

[109]BLACK'S LAW DICTIONARY 255 (7th ed. 1999).

[110]6 *Del. C.* § 9-102(12).

[111]Trans. I.D. No. 12364417, Ex. C, Loan Agreement at §§ 7.1(i), Ex. A, Pledge Agreement at §§ 2, 5(b) and (c).

secures payment or performance of an obligation."[112]

As drafter of the loan documents, EFH had the opportunity to create a document that guaranteed the rights and interests it now maintains it sought to create in the pledged stock. When read in light of the assumption that the drafter of the document sought to protect its own interests with the language utilized, and the rule of construction that directs the Court to consider the agreement's "scheme or plan" as evidenced by the entire document, the Court must conclude that EFH's loan documents memorialized Mrs. Segovia's "pledge" of stock as "collateral"and that EFH took nothing more than a "security interest" in that stock "subject to" Mrs. Segovia's ownership interests.

Next, the Court turns to the loan document's treatment of a most fundamental right of stock ownership - the right to vote the stock. Section 7 of the pledge agreement leaves Mrs. Segovia with the right to vote her stock until an event of default occurs.[113] According to EFH, the only plausible interpretation of this section is that Mrs. Segovia did retain voting rights up until the time EFH decided to sell the

[112]6 *Del. C.* § 1-201(b)(35)(emphasis added).

[113]Trans. I.D. No. 12364417, Ex. A, Pledge Agreement at §7 ("So long as no Event of Default has occurred and is continuing, the Pledgor shall be entitled to exercise any and all voting rights ....").

stock.[114] EFH's argument fails, however, because the plain language of Section 7 conditions Mrs. Segovia's loss of her voting rights on Empresarial's default, not EFH's sale of the collateral. Default is defined as "[t]he omission or failure to perform a legal or contractual duty."[115] According to the plain language of the pledge agreement, Mrs. Segovia was entitled to vote her shares unless and until Empresarial defaulted on its underlying obligations.

Further, the notion that the loan documents would authorize EFH to sell Mrs. Segovia's TMM stock, and thereby deprive her of the right to vote the stock, in the absence of clear contractual language stating as much, does not comport with Delaware law regarding stockholder voting rights. In Delaware, the stockholder's right to vote is "critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own."[116] Given the importance of the stockholder's right to vote, Delaware courts "will not allow the wrongful subversion of corporate democracy by manipulation."[117] The laws of Delaware are also clear regarding a pledgee's right to vote her stock while it is pledged as collateral. This right exists unless the stockholder "has expressly

[114]Trans. I.D. No. 16718800, Def.'s Mem. in Resp. to Pls.' Mot. for Summ. J., at 12.

[115]BLACK'S LAW DICTIONARY 428 (7th ed. 1997).

[116]*Blasius Indus. Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988).

[117]*MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003).

empowered the pledgee to vote thereon."[118] EFH's interpretation that the voting rights afforded Mrs. Segovia in Section 7 were only in effect when EFH was in possession of the collateral is not consistent with settled Delaware law and the express language of the loan documents themselves.

Plaintiffs also point to Mrs. Segovia's recognized right, under certain circumstances, to encumber the pledged stock during the life of the loan as further evidence that she retained ownership rights in the stock.[119] Section 6 of the loan agreement states that "Borrower shall not without Lender's express written consent, create, assume, or suffer to exist any Lien of any kind upon any of the Collateral."[120] This provision indicates a reservation of ownership interest by Mrs. Segovia because she would not have the ability to place a lien on the stock if she had conveyed all of her interest to EFH at the outset of the loan term. Additionally, Section 5(a)(i) of the pledge agreement imposes a duty upon Mrs. Segovia to "defend title to the Pledged Collateral."[121] If EFH had acquired title to the pledged stock as a result of the pledge agreement, as it now contends, then there would have been no title left for Mrs. Segovia to defend.

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[118] 8 *Del. C.* § 217(a).

[119] Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., at 29.

[120] Trans. I.D. No. 12364417, Ex. A, Loan Agreement at §6.

[121] *Id*. at Ex. C.

Section 7.2 of the loan agreement further supports Plaintiffs' construction of the loan documents. This section requires EFH to "look to the property encumbered by the Pledge Agreement...for any deficiency remaining after collection upon the Collateral."[122] The only reasonable interpretation of this language is that the pledged stock was merely "encumbered," not transferred outright to EFH, as a result of the pledge agreement.

Consistent with Plaintiffs' position that EFH acquired a security interest in the pledged collateral, and nothing more, the loan agreement recognizes that the only instance whereby EFH is authorized to "take whole possession" of the pledged stock is upon an event of default:

> Section 2.2(d). [U]pon the occurrence of any Event of Default...this agreement will terminate at the option of the Lender and Lender may take whole possession of the securities.[123]
>
> Section 7.2. Upon the occurrence of an Event of Default, the Note, together with any accrued and unpaid interest thereon, shall be immediately due and payable without notice or demand, presentment, or protest, all of which are hereby expressly waived.
>
> At anytime after the date first above written, Lender shall thereupon have the rights, benefits, and remedies afforded to it under any of the Loan Documents with respect to the Collateral and may take, use, sell or otherwise, encumber or dispose of the Collateral as if it were the Lender's own property.

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[122]Trans. I.D. No. 12364417, Ex. A, Pledge Agreement at §7.2.

[123]Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., at 15-16.

These default provisions would be rendered meaningless if EFH was permitted to sell the TMM stock even without an event of default.[124] The rights to "take whole possession" of the pledged stock, or to "take, use, [or] sell" the pledged stock, are clearly and unambiguously conditioned upon Empresarial's default of its obligations under the loan agreement.

Finally, the Court must take note of the legal platform upon which the loan documents rest - Delaware's UCC.[125] According to Section 9-207(a), the secured party "shall use reasonable care in the custody and preservation of collateral in the secured party's possession."[126] Section 9-207(b)(4)(C) sets forth an important qualification regarding this duty by allowing the secured party to use the collateral "in the manner and to the extent agreed by the debtor."[127] The official comment to the model UCC notes that the parties may agree to a certain standard that will define "reasonable care," but the UCC prohibits the parties from making an agreement that is manifestly unreasonable.[128] Although the parties may negotiate a meaning of

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[124]Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 18.

[125]*See Koval v. Peoples,* 431 A.2d 1284, 1285 (Del. Super. Ct. 1981)("The rule is well established that the laws in force at the time and place of making the contract enter into, and form a part of it as if they had been expressly referred to, or incorporated in, its terms.")(citations omitted).

[126]6 *Del. C.* § 9-207(a).

[127]6 *Del. C.* § 9-207(b)(4)(C).

[128][Rev] UCC 9-207 cmt. 2.

"reasonable care," the secured party may not disclaim its duty to maintain "safe custody" of the collateral. When EFH sold the collateral outright, it violated its statutory (and contractual) obligation to keep the collateral as security during the term of the loan.[129]

The Delaware UCC also regulates the disposition of pledged collateral upon a pledgor's default. Section 9-615(a) dictates the order by which proceeds from the sale of pledged collateral are to be utilized by the secured party. This section mandates that the proceeds must first be applied to cover the expenses incurred in selling the collateral and must then be applied to "the satisfaction of obligations secured by the security interest."[130] Further, Section 9-615(d) requires that the secured party "shall account to and pay a debtor for any surplus."[131] Section 9-602 makes clear that the rules regarding the order of distribution of sale proceeds to the debtor, as set forth in Section 9-615(d), are not waivable.[132] The provisions regarding

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[129]EFH's argument that it complied with its statutory and contractual duty to exercise reasonable care in the custody of the pledge stock by keeping it safe during the weeks after closing and before it sold the collateral finds no support in the loan documents or the UCC. Suffice it to say that selling collateral outright on the open market can never be "reasonable care in the custody and preservation of [the] collateral" even under the most tortured definition of the term "reasonable care." Trans. I.D. No. 16342337, Def.'s Mem. of Law in Supp. of Its Mot. for Summ. J., at 18.

[130]6 *Del. C.* § 9-615(a).

[131]6 *Del. C.* § 9-615(d).

[132]6 *Del. C.* § 9-602(5).

the mandated application of proceeds from the sale of collateral, of course, assume that an event of default has occurred.[133] In this case, EFH sold the stock long before it declared a default of the loans. And then, when it sold the pledged stock, it utterly ignored its statutory obligations to apply the proceeds of the sale to the outstanding loan balances.

The actions taken by EFH also interfered with Mrs. Segovia's right of redemption under Section 9-623.[134] While EFH enjoyed the right to create a security interest in the pledged stock, this right cannot interfere with Mrs. Segovia's right to redeem the collateral.[135] At the moment EFH sold Mrs. Segovia's TMM stock, its ability to reacquire the stock at the conclusion of the loan term was uncertain. Any number of contingencies could have interfered with EFH's ability to repurchase the TMM stock when the time came for it to do so, including a substantial increase in stock price, or a substantial downturn in EFH's financial fitness. This risk - - shifted to Mrs. Segovia upon EFH's sale of the pledged stock - - constituted an unlawful interference with her ability to redeem the collateral.[136]

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[133]Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 21.

[134]6 *Del. C.* § 9-623.

[135]12A William Meade Fletcher et al. FLETCHERS CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5648 (perm. ed. 2001)("[T]he secured party, unless otherwise agreed, may repledge the collateral upon terms which do not impair the debtor's right to redeem it...").

[136]*Id.*

In addition to the breach of the pledge agreement that occurred upon sale of the pledged stock, the undisputed record reveals that EFH also breached its loan agreement with Empresarial. According to Section 2.2(b) of this agreement, Empresarial was required to "pay to the Lender interest on the unpaid principle amount of the Loan, for the period commencing on the date hereof until such Loan is paid..."[137] This section required Empresarial to make such interest payments on the balance of the loan as long as the loan remained outstanding. EFH was required, however, to apply the proceeds received as a result of its sale of the pledged stock to the outstanding loan balance.[138] EFH breached this provision of the loan agreement when it continued to charge Empresarial interest loans it was required to extinguish upon receipt of the proceeds of the sale (albeit unauthorized) of the pledged stock. Empresarial made two interest payments on the loans after the sale and is entitled to recover those payments as breach damages.

Based on a review of the entirety of the loan documents, from the perspective of a reasonable person in the parties' position, the Court concludes that the parties entered into a secured loan transaction whereby EFH agreed to loan Empresarial stated sums of money in exchange for repayment, with stated interest, on a schedule

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[137]Trans. I.D. No. 12364417, Ex. B, Pls.' Complaint.

[138]6 *Del. C.* § 9-615.

agreed to by the parties. To secure the loan, Empresarial offered TMM stock pledged by Mrs. Segovia and valued in excess of the amount of the loans. EFH was to maintain "safe custody" of the pledged stock for the life of the loan or until an event of default occurred, in which case EFH reserved the right to confiscate the collateral. By selling the pledged stock before it had a right to do so, EFH breached the pledge agreement. By failing to apply proceeds of the sale to the outstanding loan balances, and by accepting interest payments from Empresarial on the full amount of the loans, EFH breached the loan agreement. This is what the clear and unambiguous terms of the contracts reveal. As discussed below, EFH's contentions to the contrary do not correspond to the clear terms of the loan documents it drafted.

3. EFH's Construction of the Loan Documents Is Not Supported By Their Clear Terms

In support of its contention that it acquired a right to sell the pledged stock, EFH relies principally upon Section 2 of the pledge agreement, which states: "The Pledgor hereby pledges, hypothecates, and assigns to the Lender, and hereby grants to the Lender a security interest in and all right title and interest in and to [the pledged collateral]."[139] Both parties agree that the provision is not ambiguous, but they disagree as to its meaning. EFH contends that this provision conveyed an absolute

[139]Trans. I.D. No. 12364417, Ex. A, Pledge Agreement.

ownership interest in the TMM stock; Plaintiffs contend that it conveyed no more than a security interest.

EFH has offered two justifications for its proffered interpretation of Section 2. First, it claims that "under Delaware law" the phrase "all right title, and interest" conveys an absolute interest, leaving nothing left for the grantor.[140] In support of this construction, EFH points to *Bowl-Mor Co. Inc. v. Brunswick Corp.*, a case addressing the viability of Bowl-Mor's claim for tortious interference of leases that it maintained with certain of its customers.[141] The court determined that the plaintiff could not seek relief based on interference with contracts that the plaintiff had *sold* to credit agencies.[142] The court held: "[t]he short of it is, Bowl-Mor retained no such interest. The *sales* were complete, the assignments were absolute (all right, title, and interest in the account and in the equipment were '*sold*'), and therefore Bowl-Mor did not have 'contracts' with operators within the meaning of [the applicable section of the RESTATEMENT (SECOND) OF TORTS]."[143]

EFH's reliance upon *Bowl-Mor* is misplaced for the simple but significant reason that the *undisputed* facts in *Bowl-Mor* revealed that Bowl-Mor had *sold* its

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[140]Trans. I.D. No. 16342337, Def.'s Mem. of Law in Supp. of Its Mot. for Summ. J., at 12.

[141]297 A.2d 61 (Del. Ch. 1972).

[142]*Id.*

[143]*Id.* at 65 (emphasis supplied).

interest in the leases that formed the basis of its tortious interference with contract claim. No such evidence exists in this record. Indeed, the word "sale" (or any derivation thereof) in reference to the pledged stock appears nowhere in Section 2, nor in any of the other provisions of either the pledge agreement or the loan agreement. EFH's case law is not helpful here.[144]

Second, EFH argues that a "grant [of] all right, title and interest" must reflect a conveyance of an absolute right in the stock because to conclude otherwise would ignore the substantial risks that it undertook when it engaged in this transaction (e.g., offering a below market interest rate and other favorable loan terms). Yet, EFH has never endeavored to explain why, if its right to exploit the pledged stock as it saw fit was so critical to the overall structure of the transaction, it did not ensure that its "substantial risks" were identified (as recitals or otherwise), and its right to sell the pledged collateral clearly preserved, in the loan documents it drafted. The "risks" to which EFH refers, and upon which it bases its construction of Section 2, are nowhere

[144]EFH's reliance upon other case law is similarly misplaced. In *McIngvale v. Commissioner of Internal Revenue,* the court considered whether, under the Internal Revenue Code, the plaintiff retained certain rights in a franchise when he sold or otherwise transferred his interest in the franchise "*in toto*" to a third party. 936 F.2d 833, 838 (5th Cir. 1991)(emphasis added). The court was not asked to, and did not consider, the distinction between a security interest and an ownership or other absolute interest in property. The language EFH cites in *Buckeye Cellulose Corp. v. Sutton Const. Co.*, discusses the differences between a "transfer," which it defined as "an absolute, unconditional, and completed transfer of all right, title, and interest in the property that is the subject of the assignment," and a "lien," which is "a charge against property." 907 F.2d 1090, 1094 (11th Cir. 1990). This discussion of terms that do not appear in Section 2 or elsewhere in the loan documents offers little to explain the "pledge" of stock that Mrs. Segovia made to EFH.

mentioned in the "four corners" of the loan documents. Any reference to these so-called "risks" violates the parol evidence rule. The Court cannot, therefore, as a matter of law, consider this extrinsic evidence as it construes the parties' agreements.

With respect to the failure clearly to preserve the right to sell the stock during the life of the loans, EFH's only attempt to justify this omission came at oral argument. When asked why the possibility of a sale was not written expressly into the loan documents, counsel explained that EFH's staff economist does not, in every instance, advise EFH that a sale of the collateral is the most economically advantageous means by which EFH can hedge its risk.[145] According to EFH, in many of the loan transactions in which it participates, it never sells the stock collateral because it does not have to sell in order to contain its risk.[146] This explanation ignores the rule of contract construction, to wit "when one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party."[147]

A "reasonable person in the parties' position" would have to conclude that EFH's right to sell the pledged stock during the term of the loans was not as

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[145]Trans. I.D. No. 18631069, Hr'g. Tr. at 73-77.

[146]*Id*. at 76-77.

[147]24 CORBIN ON CONTRACTS 24.27 (1998)(citations omitted).

economically critical to EFH as it now claims because it did not clearly preserve this right in the loan documents. Rights that are critical to one party but potentially detrimental to another party, and that run contrary to the prevailing legal framework governing the parties' relationship, must be set forth in "crystal clear" and "unequivocal" language within the text of the parties' contract and cannot be left for inference after an alleged breach has occurred.[148]

Section 6 of the pledge agreement does not save EFH. EFH points to three provisions of Section 6 as support for its construction of Section 2: (1) EFH's right to change the owner of record of the beneficial interest; (2) Mrs. Segovia's disclaimer of all economic interest in her TMM stock during the loan period and EFH's attendant disclaimer of any duty to account for any income generated by the pledged stock during the loan term; and (3) EFH's right to utilize the collateral in hedging transactions. These rights and benefits are not unique to this transaction, however. They are routinely granted to any secured party in a secured loan transaction.

A secured party's right to "change the owner of record of the beneficial interest" is a feature of many secured lending transactions involving stock collateral. According to 8 *Del. C.* § 217(a),

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[148] *State v. Interstate Amiesite Corp.*, 297 A.2d 41, 44 (Del. 1972).

> Persons holding stock in a fiduciary capacity shall be entitled to vote the shares so held. Persons whose stock is pledged shall be entitled to vote, unless in the transfer by the pledgor on the books of the corporation such person has expressly empowered the pledgee to vote thereon, in which case only the pledgee, or such pledgee's proxy, may represent such stock and vote thereon.

The pledgor of securities may transfer record ownership of pledged stock on the books of the corporation to the pledgee.[149] Under such an arrangement, however, the pledgor is entitled to retain the right to vote the shares. This right may only be granted to the pledgee expressly on the books of the corporation.[150]

EFH's rights, as a secured party, to retain proceeds and utilize the collateral for hedging transactions are also recognized in Delaware's UCC. According to Section 9-207, when a secured party controls the collateral, as EFH did here, that party "may hold as additional security any proceeds, except money or funds, received from the collateral" and "may create a security interest in the collateral."[151] This would include "the right to receive dividends afterwards declared, to be applied on the debt or held in trust for the pledgor."[152] The UCC allows the pledgor to forfeit certain economic

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[149] 8 *Del. C.* § 217(a). *See also Nycal Corp. v. Angelicchio*, 1993 WL 401874, at *6 (Del. Ch. Aug. 13, 1993).

[150] *Id.*

[151] 6 *Del. C.* §§ 9-207(c)(1) and (c)(2).

[152] 12A William Meade Fletcher et al., FLETCHERS CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5656 (perm. ed. 2001).

rights in the collateral for the duration of the loan term, but this is not the equivalent of an outright sale of the collateral.[153]

The pledge agreement does allow EFH to use the pledged stock as collateral for "hedging transactions" (undefined in the contract), but so does Section 9-207(c)(3) of Delaware's UCC. "Hedging" is defined as "safeguarding one's self from loss on a bet or speculation by making compensatory arrangements on the other side."[154] While this definition encompasses many actions, the terms of the pledge agreement contemplate a specific type of hedging transaction - one in which the pledged collateral would simply be repledged.[155] At oral argument, EFH's counsel argued that selling the collateral was "functionally equivalent" to and "indistinguishable" from a repledge of the collateral, as if EFH had specified its right to engage in a collar hedge that involved selling calls and buying puts.[156] The pledge agreement makes no such provision, and EFH cannot create that right after-the-fact.

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[153] *See id.* ("In the absence of an agreement to the contrary, a pledge of shares of stock as collateral security carries with it, as an incident of the pledgee's special ownership, the right to receive dividends afterwards declared, to be applied on the debt or held in trust for the pledgor.")

[154] BLACK'S LAW DICTIONARY 650 (5th ed. 1979)(citations omitted).

[155] Trans. I.D. No. 12364417, Ex. A, Pledge Agreement at § 6 ("Lender may take any and all action with respect to the Pledged Collateral...including, without limitation, *utilizing the Pledge Collateral as collateral for hedging transactions*.")(emphasis added).

[156] Trans. I.D. No. 18631069, Hr'g Tr. at 84-85 (The call option requires a person to sell the stock at a certain price, while the put option allows the holder to force another person to buy the stock at a certain price.).

At the end of the day, the fundamental flaw in EFH's construction of Section 2 is that it assumes a pledgor could (and would) at once grant a security interest and an ownership in pledged collateral. This construction tortures the express language of the loan documents and simply makes no sense from the perspective of a reasonable person viewing the transaction as a whole. In explaining the distinction between a sale and pledge, Professor Fletcher observes:

> If a debtor turns over shares of stock to a creditor, the presumption is, in the absence of any evidence of a contrary intention, that the transfer is a pledge of the stock as collateral security for payment of the debt, and not a sale or a payment of the debt. Generally, in doubtful cases the transaction will be deemed to be a pledge rather than a sale.[157]

The transactions *sub judice* with respect to Mrs. Segovia's TMM stock effected either a sale of the stock or a pledge of the stock, not both.[158] Although any doubt would be resolved in favor of finding a pledge rather than a sale, for the reasons stated above, there is no doubt here. The clear and unambiguous terms of the loan documents reflect that Mrs. Segovia pledged her TMM stock as collateral for Empresarial's loans, and that EFH was obliged to maintain "safe custody" of the pledged stock for the life of the loans. EFH may well have intended otherwise, but

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[157] 12A William Meade Fletcher et al., FLETCHERS CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5639 (perm. ed. 2001)(citations omitted).

[158] *See Active Asset Recovery, Inc. v. Real Esate Asset Recovery Servs, Inc.*, 1999 WL 743479 (Del. Ch. Sept. 10, 1999)(applying the "rule of *expressio unius est exclusio alteris*"- the expression of one thing is exclusion of another thing).

its loan documents did not reflect this intent.

In keeping with its obligation to give "a reasonable, lawful, and effective meaning to all [] terms [of the loan documents]," the Court must conclude that Mrs. Segovia conveyed to EFH in Section 2 "a security interest in [] all right, title and interest [in the pledged stock]."[159] To construe the pledge agreement otherwise would be to allow "sloppy grammatical arrangement of the clauses or mistakes in punctuation to vitiate the manifest intent of the parties as gathered from the language of the contract."[160] Moreover, under the well-established canons of interpretation *noscitur a socilis* and *ejusdem generis*, where general words follow specific words, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[161] Given the Court's conclusion that the pledge agreement did not convey both a security and ownership interest in the pledged stock, the Court must conclude that "all right, title and interest" refers to the preceding mention of the "security interest" Mrs. Segovia had

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[159] RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981). *See also Haft v. Haft,* 671 A.2d 413, 417 (Del. Ch. 1995)(discussing generally a security interest in the "right, title and interest" of stock offered as collateral for a loan).

[160] *Interim Healthcare, Inc.,* 884 A.2d at 555 (internal quotations omitted)(citing 17A AM. JUR.2d *Contracts* §§ 337, 365, 366 (2d Ed. 2004)).

[161] *Washington State Dep't of Soc. & Health Servs v. Guardianship Estate of Keffeler*, 537 U.S. 105, 114-15 (2001). *See also Washington State Dep't of Soc. & Health Servs v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)(explaining that contractual terms are to be "known by their companions").

conveyed to EFH. EFH breached the pledge agreement when it sold the pledged stock in the absence of a default by Empresarial as if it owned the stock.

4. The Consideration of Parol Evidence Would Not Alter The Proper Construction of the Loan Documents

The Court has determined as a matter of law that the loan documents are not ambiguous and, therefore, parol evidence may not be considered as the Court construes the agreements. Even if the Court determined that the loan documents were ambiguous, however, the parol evidence submitted by the parties would not lead to a different result.

The parol evidence in the record most likely to alter the Court's "four corners" construction consists of deposition testimony from EFH's President, Alexander Christy ("Mr. Christy"), EFH's marketing materials, and an expert report prepared on behalf of EFH by an economist. The Court will discuss this parol evidence in turn.

Surprisingly, Plaintiffs, not EFH, rely most heavily upon Mr. Christy's testimony to support their interpretation of the loan documents. For instance, when asked at his deposition to describe his understanding of a "security interest," as that term is used in the loan documents, Mr. Christy responded "[it means] [t]hat I have an interest in that property when they send it to me."[162] Plaintiffs' counsel followed

[162]Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. A, at 158.

up, asking "Do you own the property?" to which Mr. Christy responded "No."[163] Mr. Christy was later asked if EFH had a "security interest" in the pledged stock, to which Mr. Christy responded "correct." He was then asked if Mrs. Segovia still owned the stock to which he replied "correct."[164] This testimony directly contradicts EFH's central argument that Mrs. Segovia granted more to EFH than a traditional security interest in the pledged collateral. EFH's President acknowledges that the loan documents reflect what EFH now steadfastly maintains did not occur - Mrs. Segovia remained the owner of the pledged stock while EFH was granted a security interest in it.

Mr. Christy's deposition testimony also undercuts EFH's proffered interpretation of Section 6 of the pledge agreement. When asked at his deposition if he read the word "sale" anywhere in the provisions of Section 6, Mr. Christy responded "No."[165] Mr. Christy was then asked to explain his understanding of the phrase "[Lender may] take control of any proceeds of any of the Pledged Collateral" as set forth in Section 6.[166] He responded that this sentence was referring to the proceeds from the sale of the collateral and admitted that while the word "sale" was

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[163] *Id.* at 185

[164] *Id.*

[165] *Id.* at 191.

[166] *Id.*

not written in the provision to modify "proceeds" or "pledged collateral," that was what the provision "meant to [him]."[167]

EFH has asked this Court to interpret the loan documents as imposing upon it the obligations of a secured lender only for the duration of time between execution of the loan documents and EFH's decision to sell the collateral. When asked to explain his understanding of the phrase "safe custody thereof" (referring to the pledged stock) in Section 15 of the pledge agreement, Mr. Christy responded that he did not know what that phrase meant, but did know that "custody" means "holding."[168] Mr. Christy was then asked what it meant to "exercise reasonable care in the custody and preservation of the Pledged Collateral," as found in Section 12 of the pledge agreement, and he responded "to take care of the collateral the best way I know how."[169] Significantly, Mr. Christy makes no attempt to explain that he understood this obligation to apply only as long as EFH maintained possession of the pledged stock.

This explanation is also absent from his interpretation of Section 7 of the pledge agreement regarding Mrs. Segovia's voting rights. When asked what he

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[167] *Id.*

[168] *Id.* at 215.

[169] *Id.* at 219-20.

understood that provision to mean, he responded "as long as there's not a default, they can still vote the stock in the way that they would like to be voting the stock."[170] He did not say, however, that Mrs. Segovia's voting rights were limited in time only to the duration that EFH decided to keep the pledged stock. Mr. Christy's interpretation of these provisions is, again, consistent with Plaintiffs' theory that EFH acquired nothing more than a secured interest in Mrs. Segovia's TMM stock.

Mr. Christy's explanation of the consequences of an event of default further supports Plaintiffs' interpretation of the loan documents. He was asked how it was possible that the "Lender may take whole possession of the securities" upon an event of default if 98% of the stock had already been sold shortly after the loan closed.[171] In response, Mr. Christy explained that the default provisions applied only to the remaining 2% of the stock left in EFH's possession.[172] Mr. Christy did not mention EFH's current contention that EFH's right to "take whole possession" upon an event of default was in addition to the ownership rights it purportedly had already received in Section 2 of the pledge agreement.

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[170] *Id.* at 205.

[171] *Id.* at 145-147.

[172] *Id.*

The EFH marketing materials, to the extent they are helpful at all, support the Court's interpretation of the loan documents. The majority of the materials contain basic marketing information, touting why EFH is better at what it does than competitors, including statistics and charts, and providing general biographical information for the EFH's employees. Most of this "evidence" is not relevant to this litigation. There is one section, however, entitled "FAQ's," that might be relevant if parol evidence was deemed admissible. Three questions and answers, or FAQ's, are significant. One asks "[w]hat happens to stocks that are currently paying dividends?" to which EFH responds "[t]he dividends are sent to EFH and are applied to the loan interest payment."[173] Another question asks "[w]hat happens to the stock?" to which EFH responds "[t]he stock is held as collateral and transferred in street name to EFH."[174] The next question asks "[i]s there any possibility of losing the security?" to which EFH responds "[n]o, the only way to lose stock would be in the case of the default by the borrower."[175] The answers to these questions would indicate to a reasonable person that EFH took nothing more than a traditional security interest in the pledged stock. As stated, a secured party may retain the proceeds generated by

[173]Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. A at Ex. 10.

[174]*Id.*

[175] *Id.*

the pledged collateral,[176] transfer the stock into the name of the secured party,[177] and take full possession of the stock upon the borrower's default.[178] Significantly, the marketing materials say nothing of EFH's right or intention to sell the pledged collateral in the absence of an event of default even though EFH now maintains that this was an essential feature of the transaction.

By separate order, this Court has granted Plaintiffs' motion *in limine* to exclude the proposed expert testimony of Joseph R. Mason. Even if the Court allowed the testimony, however, it would not change the outcome. In his declaration, Dr. Mason purports to analyze the economic implications of this loan transaction from EFH's perspective, but does little to explain the express language of the loan documents. Indeed, even though he never once suggests that the language EFH used to express the rights and obligations of the parties is ambiguous, he nevertheless *infers* contractual terms whenever he sees the need to justify his interpretation of the transaction with contractual language.

For instance, at one point, Dr. Mason concludes "that the *implied put option* that Grupo [Empresarial] conferred to Equities First was worth approximately

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[176] 6 *Del. C.* § 9-207(c)(1).

[177] 6 *Del. C.* § 9-106 (citing 6 *Del. C.* § 8-106).

[178] 6 *Del. C.* § 9-610.

$281,002.12."[179] He further declares that "[a]s this *implied option* had value to Equities First and came at no cost to Grupo, economic theory indicates that Grupo would be willing to sell the option to secure more favorable loan terms."[180] In his concluding paragraph, Dr. Mason states that "the transaction between Grupo [Empresarial] and Equities First suggests that the agreement could only have been understood as having the economic characteristics of a repurchase agreement" and "Grupo [Empresarial] was the clear beneficiary from the agreement as the sale of the option imposed no cost on the Plaintiff."[181]

As these excerpts from Dr. Mason's declaration indicate, he attempts to ascribe a meaning to the loan documents that is not based upon any language in the contracts themselves (ambiguous or otherwise), but rather based upon his own view of the economic benefits and risks inherent in the transaction - - benefits and risks that are not even remotely referred to in the documents EFH itself drafted. Dr. Mason does not attempt to add clarity to ambiguous provisions. Instead, he attempts to rewrite the loan documents from scratch to accomplish his view of EFH's purpose in entering into these transactions. To the extent Delaware courts will refer to parol evidence at

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[179]Trans. I.D. No. 16342675, Ex. C, Aff. of Suzanne Hill in Supp. of Pls.' Mot. in Limine to Exclude Proposed Expert Test. of Joseph R. Mason, at 13 (emphasis added).

[180]*Id*.

[181]*Id*.

all, they will do so only when necessary to interpret ambiguous terms.[182] To receive Dr. Mason's "expert" analysis as parol evidence would be to admit parol evidence for the purpose of creating contracts between the parties that currently do not exist.

The loan documents are not ambiguous and parol evidence is not admissible. But, even if the Court considered parol evidence, the parol evidence submitted by the parties in this "complete" summary judgment record supports the meaning of the loan documents that the Court has gleaned from the documents' four corners. EFH has breached its contracts with Plaintiffs, as determined above, and Plaintiffs are entitled to damages.

D. Conversion

To prove unauthorized conversion of stock, Mrs. Segovia[183] must establish that: "(a) [she] held a property interest in the stock; (b) [she] had a right to possession of the stock; and (c) [EFH] converted [her pledged] stock."[184] A conversion results from "any distinct act of dominion wrongfully exerted over the property of another, in

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[182] *See Conner v. Phoenix Steel Corp.*, 249 A.2d 866, 868 (Del. 1969)("A court may not, in the guise of construing a contract, in effect rewrite it to supply an omission in its provisions.").

[183] Plaintiffs have conceded that only Mrs. Segovia may pursue a claim for conversion of the pledged stock. Trans. I.D. No. 16342675 at 25, Trans. I.D. No. 18631069, Hr'g Tr. at 55.

[184] *Arnold v. Soc'y for Savings Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996)(citations omitted).

denial of his right, or inconsistent with it."[185] Conversion need not be accompanied by "a subjectively wrongful intent" to be actionable.[186] A person who mistakenly believes that his or her conduct is legal may nonetheless commit conversion.[187]

Generally, when a dispute arises solely from a contract, the plaintiff is barred from seeking tort damages and is limited to recovery for breach of contract.[188] A plaintiff may, however, seek relief in tort based on the same facts as a breach of contract claim when the defendant has breached a duty imposed by law that exists outside the agreement binding the parties.[189] In situations where stock is pledged as collateral for a debt, the premature sale of the stock will implicate the secured lender's statutory and common law duties beyond those imposed by contract, and will give rise to causes of action for both breach of contract and conversion:

> If the pledgee of stock wrongfully sells or otherwise disposes of it before the debt is due, or sells it after maturity of the debt without necessary demand or notice, or at an unauthorized private sale, he or she is guilty of conversion of the stock, and also of a breach of the contract

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[185] *Drug v. Hunt*, 168 A. 87, 93 (Del. 1933).

[186] *IBM Corp. v. Comdisco, Inc.,* 1993 Del. Super. LEXIS 183, at *12.

[187] 18 AM. JUR. 2d *Conversion* § 3 (2004).

[188] *Pinkert v. Olivieri*, 2001 WL 641737, *5 (D. Del. May 24, 2001)(citations omitted).

[189] *Garber v. Whittaker*, 174 A. 34, 36 (Del. Super Ct. 1934) ("In order to constitute a tort there must always be a violation of some duty owed to the plaintiff; but generally speaking such a duty must arise by operation of law and not by the mere agreement of the parties.")(citations omitted).

of bailment.[190]

For an action in conversion to stand, "it is necessary that there be a repudiation of the trust and use of the stock evidencing intent to permanently deprive the owner."[191] The degree of control maintained by the pledgee over the stock is a factor in determining whether an intent permanently to deprive the owner of the stock exists. If it is apparent that the stock is no longer in the possession or under the control of the pledgee, then the act constitutes a conversion.[192] Needless to say, when publicly traded stock is sold on the open market, it is no longer in the possession or control of the seller.[193]

Mrs. Segovia owned the TMM stock she pledged to EFH, as evidenced by the warranties of title she made in the pledge agreement.[194] Additionally, although the

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[190]12A William Meade Fletcher et al., FLETCHERS CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5679 (perm. ed. 2001).

[191]*Id.*

[192]*Id.* ("If the pledgee still has the pledged stock under his or her control, so that he or she can return it to the pledgor upon demand being made, a sale, though unauthorized, does not constitute a conversion. It is, however, if the pledged stock cannot be returned to the pledgor upon demand.")

[193]*See IBM Corp. v. Comdisco, Inc.,* 1993 Del. Super. LEXIS 183, *41 (holding that after-the-fact attempt to return converted property cannot "cure" the conversion); *Mastellone v. Argo Oil Corp.*, 82 A.2d 379, 383 (Del. 1951)(holding for statute of limitations purposes that conversion of stock occurred at the time the stock was sold); 18 AM. JUR. 2d *Conversion* § 75, at 209 (2004)(citing *Mastellone* for the proposition that demand for return of property is not required to establish conversion when property has been sold because the sale itself evidences the conversion).

[194]Trans. I.D. No. 12364417, Pls.' Complaint, Ex. A, Pledge Agreement at § 4(e).

collateral was pledged to EFH, Mrs. Segovia maintained her ownership interest in the stock.[195] EFH converted the pledged stock through its premature sale, which resulted in a breach of the loan documents and an interference with Mrs. Segovia's ownership interest in the TMM stock. EFH engaged in an outright sale on the open market and, not surprisingly, there is no evidence in the record to suggest that EFH maintained any control over the stock after it was sold. This reflects EFH's intent permanently to deprive Mrs. Segovia of her stock. And, even though the record is devoid of evidence that would allow a reasonable fact finder to conclude that EFH acted with malice or bad faith when it sold the pledged stock, this does not excuse the fact that the sale deprived Mrs. Segovia of her ownership interest in the stock without her consent.

For these actions, EFH is liable to Mrs. Segovia for both the tort of conversion and for breach of the pledge agreement.[196] Mrs. Segovia, however, may recover only under one theory.[197] While she has demonstrated that summary judgment is appropriate for both breach of contract and conversion, these claims arise from one

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[195] 12A William Meade Fletcher et al., FLETCHERS CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5644 (perm. ed. 2001).

[196] *Id*. at § 5679.

[197] *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 218 (3rd Cir. 1992)(requiring a plaintiff to "elect[ ] damages" as between a breach of contract or tort recovery because damages arose from "a single course of conduct" and a "single injury"); *Waite Hill Services, Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998)(discussing the "one satisfaction rule").

action (an unauthorized sale of pledged stock) that resulted in one injury. Allowing her to recover twice "would yield an unwarranted windfall recovery."[198] She must elect her damages.

E. Unjust Enrichment

Unjust enrichment occurs in the event of "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[199] To succeed on a claim of unjust enrichment, the plaintiff must prove: "(1) an enrichment; (2) an impoverishment, (3) a relation between the enrichment and the impoverishment; (4) the absence of justification and; (5) the absence of a remedy provided by law."[200] The existence of an express contract governing the relationship between the parties precludes a party from seeking restitution through unjust enrichment.[201]

The relationship between Plaintiffs and EFH was controlled by valid and enforceable contracts. Consequently, as a matter of law, Plaintiffs may not recover on a claim of unjust enrichment. Their proper recourse is to pursue a claim at law for

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[198] *Fineman,* 980 F.2d at 218.

[199] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1056 (Del. Super. Ct. 2001)(citing *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del.1988)).

[200] *Id.*

[201] 66 AM. JUR. 2d *Restitution and Implied Contracts* § 24 (2001)("No agreement can be implied where there is an express one existing.").

breach of contract, which they have done.[202] EFH is entitled to summary judgment on Plaintiffs' unjust enrichment claim.

F. Fraud

To prevail on a fraud claim, a plaintiff must prove that: (1) defendant made a false representation; (2) with knowledge or belief of its falsity or with reckless disregard for the truth; (3) with an intent to induce the plaintiff into acting or refraining from acting; (4) plaintiff reasonably relied upon the misrepresentation; and (5) plaintiff was damaged as a result of the reliance.[203] A deliberate concealment of material facts may also give rise to fraud.[204] Generally, there is no duty to speak unless a special relationship exists between the parties.[205] In the absence of a "special relationship," one party to a contract is under no duty to disclose "facts of which he knows the other is ignorant and which he further knows the other, if he knew of them, would regard as material in determining his course of action in the transaction in

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[202]Plaintiffs appear to have abandoned their unjust enrichment claim as briefing on the cross motions for summary judgment progressed. Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J.

[203]*Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

[204]*Id*.

[205]*Property Assoc. 14 v. CHR Holding Corp.*, 2008 WL 963048, at *6 (Del. Ch. April 10, 2008).

question."[206]

To survive summary judgment, Plaintiffs were obliged to present competent evidence to suggest that EFH either knowingly misrepresented material facts, or concealed material facts from Plaintiffs in the face of a duty to speak. Plaintiffs do not point to any affirmative extra-contractual statements made by EFH upon which they relied. Instead, they base their fraud allegations solely on the language of the contract.[207] Javier Segovia admitted in his affidavit that he did not look to EFH's marketing materials (or other extrinsic information) prior to signing the loan documents.[208] Likewise, Mrs. Segovia disclaimed any knowledge of the contract terms much less the content of any marketing materials.[209] Additionally, Plaintiffs have failed to present any facts upon which the Court could find that a special relationship existed between the parties such that EFH was duty bound to disclose to the Plaintiffs that EFH might eventually sell the collateral. The only Restatement

[206] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 551 cmt. a (1977)).

[207] Trans. I.D. No. 16889564, Pls.' Reply Br., at 15.

[208] *See* Trans. I.D. No. 16719220, Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. B.

[209] Trans. I.D. No. 16317953, Stipulation Regarding Teresa Serrano Segovia, at 2.

provision that may be applicable here is §551(e).[210] To find a relationship under this provision, however, the Court would have to identify some evidence that EFH knew that Plaintiffs did not know that EFH might sell the pledged stock when it did.[211] Although the loan documents did not convey this right to EFH, the undisputed record does not contain any evidence that EFH knew that Plaintiffs were mistaken on this point. Without more, Plaintiffs cannot sustain their fraud claim as a matter of law.

G. The Remedies

Considering Mrs. Segovia's damages first, it is generally recognized that the measure of damages for conversion is the value of the chattel at the time of the conversion.[212] The measure of damages for the conversion of stock, however, is the highest value of the stock for a reasonable time after the conversion occurs.[213] This damages model is premised upon the idea that "the risk of fluctuations in the market

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[210] *See* RESTATEMENT (SECOND) OF TORTS § 551(e) (1977)("One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, ... (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.")

[211] The Court considered the other special relationships that give rise to a duty to disclose, as set forth in The Restatement, but determined they were not applicable here.

[212] *Wyndham v. Wilmington Trust Co.*, 59 A.2d 456, 459 (Del. Super. Ct. 1948).

[213] *Id*. *See also DuPont v. Delaware Trust Co.*, 364 A.2d 157, 161 (Del. Ch. 1975).

should be borne by the wrongdoer."[214] What constitutes a reasonable period of time is a question of law for the court to determine.[215] When the property converted is subject to a security interest, the measure of damages is the highest value of the stock, minus the amount of the loan extended by the defendant.[216]

The evidence relating to Mrs. Segovia's damages is not disputed.[217] Mrs. Segovia pledged a total of 2,768,871 shares of her TMM stock, all of which have now been liquidated by EFH.[218] Between the time of conversion and May 31, 2006 (a "reasonable time" after the conversion), Mrs. Segovia's stock reached its highest value of $5.60 on May 8, 2006.[219] On that day, the value of the TMM stock pledged as collateral was $15,505,677. After subtracting the $9,082,260.70 due on the loans to EFH, Mrs. Segovia is entitled to the balance of $6,423,417 as conversion

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[214] *Wyndham*, 59 A.2d at 459.

[215] 11 William Meade Fletcher et al., FLETCHERS CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5118 (perm. ed. 2001).

[216] *Id.* (noting that a pledgor's interest in pledge collateral is "qualified," and that the damages for conversion must reflect the qualified interest). "Thus, where shares are converted by one to whom they were pledged as security for a debt, the measure of damages is the value of the shares less the amount due the defendant on the debt." *Id.* The Court notes that Plaintiffs acknowledge that a deduction of the loan balance is appropriate. Trans. I.D. No. 16719220, at 32.

[217] Trans. I.D. No. 17822484, Def.'s Supp. Br., at 8-10 (EFH has challenged Plaintiffs' claim that they were damaged and their right to receive damages, but has not challenged the competency of Plaintiffs' evidence in support of their claims for damages.).

[218] Trans. I.D. No. 12364417, Pls.' Complaint, Ex. F.

[219] Trans. I.D. No. 16342675, Ex. O.

damages.[220] As this amount is substantially greater than the amount she would be entitled to receive for breach of contract, the Court will assume that Mrs. Segovia would elect to recover conversion damages and will structure its judgment accordingly.[221]

As for Empresarial, the damages determination is more complicated. Unfortunately, Plaintiffs offer little guidance by way of legal authority for the damages models they have proposed for Empresarial. Indeed, in the briefing, it was not at all clear to which party Plaintiffs were referring when discussing breach damages, leaving the Court to determine who is entitled to what on its own.[222] Fortunately, the *evidence* related to damages is not disputed. What is left for determination is the legal framework upon which Empresarial's damages should be calculated.

The Court is satisfied that Empresarial is entitled to damages for EFH's breach of the loan agreement. Empresarial seeks to recoup the interest it paid to EFH on the

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[220] 12A William Meade Fletcher et al., FLETCHERS CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5679 (perm. ed. 2001)("If the pledgee converts the pledge, the debt is discharged to the extent of the pledge's value."). The $9,082,260.70 figure reflects a deduction for interest paid on the loans by Empresarial and the loan origination fee. *See* Hill Aff., Exs. J, M.

[221] Plaintiffs seek $3,931,433 in breach damages for Mrs. Segovia. They arrive at this figure by multiplying the stock's strike price at the time it was pledged, $4.70, by the total number of shares pledged, 2,768,871, and then subtracting the amount EFH loaned to Empresarial. Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 29.

[222] *See e.g.* Trans. I.D. No. 16342675, Pls.' Br. in Supp. of Their Mot. for Summ. J., at 28-29.

full balance of the loans after EFH sold the pledged stock and applied the proceeds to its own uses. It also seeks to recover the loan origination fees it paid to EFH. Because the Court has determined that EFH engaged in a material breach of the loan agreement, as discussed below, and that Empresarial is entitled to a declaration that it is excused from future performance of the loan agreement, it is appropriate to award breach damages on a restitution or "restoration" theory of recovery.[223] Empresarial is entitled to be returned to the position *vis a vis* EFH that it occupied before it entered into the loan transactions at issue. The undisputed evidence reveals these damages to be $678,009.59.[224]

Empresarial also seeks damages for the amount it claims to be indebted to Mrs. Segovia for "the value of [her converted] stock."[225] Here again, it offers no guidance as to why, as a matter of law, it is entitled to these damages. To compound the confusion, at oral argument, when summarizing Empresarial's damages, Plaintiffs made no mention of this aspect of Empresarial's damages claim and, instead, referred

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[223]*See* DOBBS REMEDIES, §§ 1.5, 4.1 (West 1973)(explaining restitution "as a measure of recovery for breach of contract" and noting that restitution is appropriate when the court declares that future performance is excused as a result of a material breach of contract); *Norton v. Poplos,* 443 A.2d 1, 4-5 (Del. 1982)(explaining restitution in the context of rescission).

[224]*See* Hill Aff., Exs. J & M ($536,814.87 origination fees; $85,402.36 and $55,402.36 interest payments).

[225]Trans. I.D. No. 16719220, Pls. Resp. to EFH Mot. for Summ. J., at 32-33.

only to the interest payments and loan origination fees it paid to EFH.[226] The Court has searched the record and has found no bases (in law or in fact) upon which to hold EFH liable for any debt or liability that Empresarial may owe to Mrs. Segovia, including the value of her pledged stock. Mrs. Segovia has already been awarded conversion damages that reflect the highest value of her TMM stock within a reasonable time after conversion, less the amount of the loan (in recognition of the limited interest she had in the stock after the pledge). The stock value used to calculate conversion damages is greater than the stock's value at the time of the loan transactions. The Court is not inclined, *sua sponte*, to award more than this in the absence of any proffered reason why it should do so.

Pre and post judgment interest must be awarded here. Mrs. Segovia is entitled to prejudgment interest at the "legal rate" on her conversion damages.[227] This interest shall be calculated from the dates EFH sold the pledged stock on the open market to the date of final judgment.[228] Empresarial is entitled to prejudgment interest on its

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[226] *See* Trans. I.D. No. 18631069, Hr'g Tr. at 52-58.

[227] *See Rollins Env. Services, Inc. v. WSMW Indus., Inc.,* 426 A.2d 1363, 1366 (Del. Super. Ct. 1980)(noting that prejudgment "interest can be recovered as part of damages for . . . conversion of property").

[228] *Id.* at 1368 (interest runs not from the date damages are calculated but from the date plaintiff was first "entitled to its damages.").

breach of contract damages at the "legal rate."[229] Interest shall be calculated from the dates Empresarial paid the origination fees (as to those amounts) and made its interest payments on the loans after the sale of the pledged stock (as to those amounts) to the date of final judgment. As to post-judgment interest,[230] this shall begin to accrue when the final judgment is entered[231] and will be assessed at the "legal rate."[232]

Both Plaintiffs seek a declaration from the Court that they are excused from further performance of the various loan documents as a result of EFH's material breach of the agreements. The concept of cancelling contracts upon a material breach is well-settled in Delaware law:

> [A] party may terminate or rescind a contract because of substantial nonperformance or breach by the other party. Not all breaches will authorize the other party to abandon or refuse further performance. To justify termination it is necessary that the failure of performance on the

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[229] *Id.* at 1365-66. The Court notes that the applicable loan documents do not set a prejudgment interest rate.

[230] *Wilmington Country Club v. Cowee*, 797 A.2d 1087, 1097 (Del. 2000)("Delaware law provides that Post-Judgment Interest is a right belonging to the prevailing plaintiff and is not dependent upon the trial court's discretion.").

[231] *Id.*

[232] 6 *Del. C.* § 2301. Within 14 days the parties shall submit a form of order (agreed as to form only) that sets forth the "final" judgment by specifying the total amount of compensatory damages and pre- and post-judgment interest due both Plaintiffs pursuant to this opinion. This order shall also set forth the amount of prevailing party costs permitted under Del. Super. Ct. Civ. R. 54 (if any). In the absence of an agreement on costs, the parties shall file motions for costs within 14 days.

part of the other go to the substance of the contract.[233]

Under this standard, the undisputed facts reveal that EFH's breach of both the pledge agreement (as to Mrs. Segovia) and the loan agreement (as to Empresarial) were material breaches that would justify termination of the contracts. EFH's unauthorized sale of the pledged stock went to the "substance of the [pledge agreement]."[234] EFH's failure to apply the proceeds of the unauthorized sale to the outstanding loan balance, and its acceptance of interest payments after selling the pledged collateral, were breaches of the "substance of the loan agreement." As a result of EFH's material breaches of the pledge agreement, Mrs. Segovia is entitled to a declaratory judgment that she is no longer required to perform under the pledge agreement and irrevocable proxies. As a result of EFH's material breaches of the loan agreement, Empresarial is entitled to declaratory judgment that it is no longer required to perform under the loan agreement and the nonrecourse notes. There is no "election of remedies quandary" here because Mrs. Segovia has been awarded only conversion damages (not breach damages), and Empresarial has been awarded only

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[233] *Demarie v. Neff*, 2005 Del. Ch. LEXIS 5, **14-15 (citations and internal quotations omitted). *See also Dickinson Med. Group, P.A. v. Foote*, 1989 Del. Super. LEXIS 156, at *20 (finding a material breach upon concluding that breach damages were not "*de minimis*" and that the breach went "to the essence" of the contract at issue).

[234] *Id.*

restitution damages.[235]

Because Plaintiffs cannot survive summary judgment on their fraud claim, and have presented no evidence of malicious conversion, they cannot sustain their claim for punitive damages or attorney's fees. With respect to attorney's fees, Delaware courts follow the American Rule which holds that the prevailing party is responsible for its own attorney's fees.[236] There are two exceptions to this general rule: (1) when a party has prevailed pursuant to a statute that allows for fee shifting; and (2) when an equitable doctrine is implicated.[237] In this litigation, Plaintiffs have prevailed on claims of breach of contract and conversion. Neither cause of action implicates a statute that provides for fee shifting or an equitable doctrine that would justify an award of attorneys fees.

As to punitive damages, the Court already has determined that Plaintiffs cannot prevail on their fraud claim as a matter of law. On the breach of contract claim, the law is settled that punitive damages are not available unless the breach also amounts

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[235]*See Prestancia Mgt. Group v. Heritage Found., II LLC,* 2005 Del. Ch. LEXIS 80, *18 (explaining that a party, in most instances, cannot seek to cancel a contract and receive damages for breach of contract; he must elect his remedy); DOBBS REMEDIES, §§ 1.5, 4.1 (West 1973)(restitution can be awarded after cancellation of contract without violating election of remedies doctrine).

[236]*Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996).

[237]*Id.*

to a tort.[238] The result is the same even if the defendant intentionally breached the contract.[239] Punitive damages are only awarded in situations of "willful and outrageous" conduct that flows from "evil motive or reckless indifference to the rights of others."[240] While EFH did breach the loan documents and wrongfully converted the pledged stock, there is no evidence that would allow a reasonable fact finder to conclude that this conduct resulted from an "evil motive or reckless indifference to the rights of others." Accordingly, Plaintiffs may not recover punitive damages.

V.

Based on the foregoing, Plaintiffs' motion for summary judgment must be **GRANTED** and EFH's motion for summary judgment must be **DENIED** as to counts I and II of the complaint. EFH's motion for summary judgment must be **GRANTED** and Plaintiffs' motion for summary judgment must be **DENIED** as to counts III, IV, and V of the complaint.

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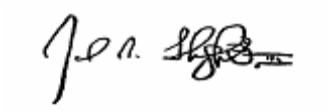
[238] *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996).

[239] *Id*. (["N]o matter how reprehensible the breach, damages that are punitive, in the sense of being in excess of those required to compensate the injured party for lost expectation, are not ordinarily awarded for breach of contract.")(citations and internal quotations omitted).

[240] *Jardel Co. v. Hughes*, 523 A.2d 518, 529 (Del. 1987).

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary