IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ISRAEL DISCOUNT BANK OF NEW YORK,	:	
Plaintiff,	:	
	:	Civil Action No. 7237-VCP
v.	:	
FIRST STATE DEPOSITORY COMPANY, LLC and CERTIFIED ASSETS MANAGEMENT, INC.,	:	
Defendants.	:	

MEMORANDUM OPINION

Submitted: March 7, 2013
Decided: May 29, 2013

Paul D. Brown, Esq., Joseph B. Cicero, Esq., Stephanie S. Habelow, Esq., COUSINS CHIPMAN & BROWN, LLP, Wilmington, Delaware; *Attorneys for Plaintiff.*

Beth Moskow-Schnoll, Esq., David A. Felice, Esq., BALLARD SPAHR LLP, Wilmington, Delaware; *Attorneys for Defendants.*

PARSONS, Vice Chancellor.

This action arises out of a dispute over the handling of collateral for a $10 million loan consisting of rare coins and bullion. The primary lender, a New York bank, lent money to its client as part of a revolving credit agreement. The client, in turn, issued loans to various entities and took an interest in collateral for those loans. The New York bank had an interest in this collateral as a result of its security interest in its client's assets. Ultimately, the New York bank's client requested that the collateral be transferred to a specific depository that offered better pricing. The New York bank, its client, and the depository signed an agreement requiring that, upon receiving written notice from the New York bank, the depository thereafter would refrain from releasing the collateral without the written authorization of the New York bank. The depository also agreed to allow the New York bank to inspect and remove the collateral on demand.

Despite adequate notice of the New York bank's exercise of its right to approve any transfers by the depository, the depository continued, without consulting the bank, to release the collateral to a debtor company with the same owner as the depository. A large amount of the collateral was not returned to the depository, and the New York bank claims to have suffered damages due to its resulting under-securitization. The New York bank now seeks damages based on the unauthorized release of collateral by the depository and the conversion of collateral by the related company. The depository and related company have asserted a legion of defenses. They include that the New York bank's claims are barred by laches, the doctrine of election of remedies, and the invocation of an indemnification and hold harmless provision in a separate agreement.

Both sides also contend that they are entitled to an award of attorneys' fees as a result of their adversary's bad faith and vexatious litigation conduct.

This Memorandum Opinion represents the Court's post-trial findings of fact and conclusions of law. Having reviewed carefully the full record and the parties' extensive post-trial briefs and oral argument, I find that the depository breached the agreement by releasing collateral and interfering with the New York bank's consent, inspection, and removal rights. I also find that the affiliated debtor converted collateral by impermissibly possessing and disposing of collateral as if it were its own. Finally, I find that the depository and affiliated company's conduct both before and during the litigation was sufficiently egregious to justify an award against them of the plaintiff's reasonable attorneys' fees and expenses.

I. BACKGROUND

A. The Parties

Plaintiff, Israel Discount Bank of New York ("IDB" or "Plaintiff"), is a bank organized under the laws of the State of New York.

Defendant First State Depository, LLC ("FSD"), a limited liability company organized under the laws of Delaware, is a private depository that provides specialized precious metals custody, shipping, and accounting services. Defendant Certified Assets Management, Inc. ("CAMI" and, together with FSD, "Defendants") is a Delaware corporation that offers wholesale rare coin and marketing services.

Robert Higgins,[1] a non-party, owns both FSD and CAMI. He is FSD's sole member and CAMI's president and sole stockholder. Eric Higgins ("Eric"), also a non-party and Higgins's son, is the head of customer service at FSD. Another of Higgins's sons, Steven Higgins ("Steven"), worked at CAMI and served as CAMI's corporate designee.

B. Facts[2]

1. The 2006 Revolver

On December 27, 2004, IDB loaned money to Republic National Business Credit LLC ("Republic") as part of a revolving credit agreement.[3] Republic is a limited liability company organized under the laws of California that provides secured financing to help facilitate the acquisition and distribution of precious metals for the coin and jewelry industry.[4] Ned Fenton is the managing director of Republic. On June 29, 2006, IDB and Republic entered into an Amended and Restated Loan and Security Agreement (the

---

1 Because a few of the relevant actors share the surname Higgins, I refer to Robert Higgins as "Higgins," and his family members by their first names, for clarity.

2 Because this case involves businesses that, by their nature, should keep accurate and up-to-date records, the recitation of facts should be simple. Unfortunately, that is not the case. A major reason is that the central figure in this dispute, Higgins, is an unscrupulous businessman who used his businesses, FSD and CAMI, to move around assets in the equivalent of a three-card monte scheme to serve Defendants' ends and without regard to IDB's rights.

3 Stip. ¶ 8. Citations in the form "Stip." refer to the parties' stipulated facts from the Joint Pre-Trial Order (Nov. 14, 2012).

4 Stip. ¶ 5.

"2006 Revolver"), which increased the revolving loan to $10 million.[5] The lending limit could not exceed 85% of Republic's loan receivables minus reserves, which meant that the loan-to-value ratio or "LTV" of the 2006 Revolver was approximately 85%.[6] For any one client, however, the eligible receivables could not exceed $5,000,000.[7] That is, the 2006 Revolver contained a concentration cap that prevented Republic from borrowing against a loan in excess of $5,000,000.[8]

The 2006 Revolver also granted IDB a first priority security interest in Republic's "Collateral,"[9] which the 2006 Revolver defined broadly to include Republic's "Client Collateral" and "Client Loan Documents."[10] "Client Collateral" means "property pledged to [Republic] . . . to secure loans made by [Republic]."[11] "Client Loan Documents" are "[a]ll agreements, contracts, documents and instruments . . . evidencing, pertaining or otherwise securing at any time any extensions of credit by [Republic] to

---

5 JX 6 § 1.1(k), (ww).

6 *Id.* § 1.1(k)(ii), (bb); Black's Law Dictionary 1022 (9th ed. 2009); Trial Transcript ("Tr.") 13–14 (Landerer). Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically after the cited page of the transcript. Neil Landerer is an account executive and first vice president at IDB.

7 JX 6 § 1.1(bb)(xi).

8 Tr. 13 (Landerer).

9 For purposes of this Memorandum Opinion, "Republic's Collateral" refers to all collateral pledged to Republic as security for Republic's loans or extensions of credit.

10 JX 6 §§ 1.1(v), 3.1–3.4.

11 *Id.* § 1.1(s).

Clients."[12] IDB monitored Republic's LTV by requiring Republic to provide borrowing base certificates that disclosed Republic's borrowers, their collateral, and their LTV.[13]

2. The loan to CAMI

On May 10, 2005, CAMI entered into a Revolving Loan and Security Agreement with Republic (the "CAMI Loan Agreement"), which was undertaken "[i]n connection with financing [CAMI]'s Numismatic Coins in the normal course of [CAMI]'s business."[14] The CAMI Loan Agreement granted Republic a first priority interest in and lien on Republic's Collateral.[15] Moreover, Republic had a right to set a "Collateral Ratio," which reflects the amount of collateral in proportion to outstanding advances.[16] The CAMI Loan Agreement also provided that:

> [Republic] may, in its sole discretion, transfer all or any part of the obligations secured hereby and all or any part of the Collateral or any interest in the obligations secured hereby or in the Collateral, and shall be fully discharged thereafter from all liability and responsibility with respect to such Collateral so transferred, and the transferee shall be vested with all the rights and powers of [Republic] hereunder with respect to

---

12 *Id.* § 1.1(t).

13 *See* Tr. 15 (Landerer); JX 103.

14 JX 3 at 1. Numismatic coins are rare coins, which are valuable as a result of their scarcity rather than the value of their precious metal content. Tr. 6–7 (Landerer), 196–97 (Imhof). Todd Imhof is IDB's valuation expert and a vice president of Heritage Numismatic Auctions, Inc.

15 JX3 §§ 3, 4.

16 *Id.* at 1 ("'Collateral Ratio' shall mean the proportion, expressed as a percentage that the dollar value of the Collateral held in the Collateral Account bears to the outstanding Advances."), § 4.B.

> such Collateral so transferred; with respect to any Collateral not so transferred [Republic] shall retain all rights and powers hereby given.[17]

In other words, Republic had the authority to transfer obligations and interests in its collateral, including its right to set the Collateral Ratio.

3. Bailment Agreement and Collateral Custody Account Agreements

Republic's loans to clients were collateralized primarily with numismatic coins that were deposited with IDB or Delaware State Depository Company.[18] In 2006, Fenton approached IDB and requested that certain collateral be transferred to FSD because FSD offered better pricing.[19] FSD, Republic, and three of Republic's "clients," CAMI, Vicki Lott Reid ("Lott"), who is Higgins's sister, and Donald Ketterling, a former business partner of Higgins and former employee of CAMI, entered into Collateral Custody Account Agreements ("CCAAs"). The CCAAs governed the deposit of assets stored at FSD. Those assets were deposited into four separate FSD accounts: (1) CAMI Collateral One, Acct. No. COLC000900; (2) CAMI Collateral Two, Acct. No. COLC000901; (3) Ketterling, Acct. No. COLI000902; and (4) Lott, Acct. No. COLI000919[20] (collectively, the "Accounts").[21]

---

17 *Id.* § 12.

18 Tr. 24–25 (Landerer).

19 *Id.* at 25.

20 These CCAAs appear in the record at JX 7, 8, 12, 20, respectively.

21 The collateral linked with the Accounts is referred to hereinafter as the "Collateral" or the "Property."

FSD, Republic, and IDB entered into a separate bailment agreement (the "Bailment Agreement") that protects IDB's rights in Republic's Collateral stored at FSD.[22] As part of that agreement, the parties acknowledged that IDB has a security interest in Republic's assets

> including, but not limited to, [Republic's] present and future interest in property presently held by [FSD] and which may be shipped to and stored with [FSD] from time to time in the future . . . pursuant to separate agreements between [FSD], [Republic,] and [Republic]'s clients.[23]

The Bailment Agreement further provides:

> Upon written notice from an officer of [IDB], [FSD] agrees that it will hold all such Property subject only to [IDB]'s written instructions, and that [FSD] will release same to [IDB] on demand, provided that [IDB] tenders to [FSD] payment of any accrued charges on the Property being released. [FSD] agrees that [FSD] will not hinder or delay [IDB] in enforcing [IDB]'s right in and to said Property.[24]

The Bailment Agreement also granted IDB other rights, including the right to examine Republic's Collateral stored at FSD and discuss matters relating to FSD's performance under the Bailment Agreement with FSD's officers.[25]

---

22 Tr. at 30–31 (Landerer); JX 9.

23 JX 9 § 1.

24 *Id.* § 6.

25 *Id.* § 2.

4. FSD's operations

FSD is a depository that stores precious metals on behalf of its clients.[26] According to Eric, FSD "almost gives [its clients] instant access. . . . You can real easily get your metal from our facility to the person that you sold it to, or to the person you want it to [go to] or to yourself with ease."[27] FSD also has agreements regarding a number of collateral accounts, which Eric described as

> a three-party agreement where you have [FSD] as the place where the metal is stored, you have a borrower and a lender, and those three people entered into an agreement for the purpose of . . . metal being stored at our facilities for the benefit of where the borrower can use his metal to get funds for whatever purpose he needs them for. The metal stays at our facility until whatever deal is done and the metals are authorized for release.[28]

Any collateral stored pursuant to a collateral account would only be released upon authorization from the lender.[29] Frequently, the borrower, in this case CAMI, then would remove the coins to take them to trade shows.[30] The borrower "would do what they

---

26 Tr. 481 (Eric).

27 *Id.* at 481–82.

28 *Id.* at 490–91.

29 *Id.* at 492.

30 Tr. 500 (Eric) ("The coins were constantly coming in and out based on the trade shows.").

need[ed] to do to prepare for the show, and we wouldn't see [the collateral] again until they came back . . . ."[31]

5. Republic increases its loan to sham borrowers

In May 2007, Republic requested an increase in its credit facility with IDB from $10 million to $20 million.[32] IDB granted that request, in part, based on Republic's representation that it was seeking to diversify its portfolio.[33] Shortly thereafter, Republic used its enlarged facility to increase a loan to Ketterling from $250,000 to $5,000,000.[34] Ketterling is a crony of Higgins. He had assisted in the formation of CAMI and was a former vice president of CAMI.[35] Although Ketterling signed the loan documents, Ketterling never owned the underlying collateral, never received the proceeds from the loan, and never made principal or interest payments on the loan.[36] Instead, CAMI pledged the underlying collateral and made all the payments on the loan.[37] I find, therefore, that CAMI used Ketterling as a sham borrower to avoid IDB's $5,000,000 concentration cap and obtain loans that it otherwise could not have.

---

31 *Id.*; *see also id.* at 537–38.

32 JX 14.

33 Tr. 20–22 (Landerer); JX 14 at 0258529.

34 JX 13.

35 JX 298, Ketterling Dep., at 11–13.

36 *Id.* at 29, 45, 64–65.

37 *Id.* at 45, 64–65; Tr. 611 (Steven Higgins).

Higgins's sister, Lott, an employee of FSD and former employee of CAMI, entered into a similar arrangement in 2008.[38] Although Lott's name was on the related document, CAMI received the loan proceeds, provided the loan collateral, and paid the loan.[39] Republic increased its loan to Lott from $350,000 to $1,550,000.[40]

6. IDB becomes concerned, tightens its controls, and sends notice to FSD not to release Republic's Collateral stored at FSD without IDB's consent

On July 24, 2009, National Gold Exchange, Inc. ("NGE") filed a voluntary petition for relief under Chapter 11 of Title 1 of the United States Bankruptcy Code.[41] NGE was one of Republic's significant borrowers. In fact, NGE itself owed approximately $3,000,000 to Republic and its principal, Mark Yaffe, owed $2,773,000.[42] After one of NGE's lenders discovered that there was insufficient collateral to support NGE's position, that lender seized all of NGE's collateral, including gold coins securing Republic's loans to Yaffe, which had been released by FSD to be displayed at a coin show.[43]

---

38 JX 298 at 45; Tr. 611 (Steven).

39 JX 299 at 39–42, 50–51, 72, 85–86.

40 JX 21.

41 For the factual and procedural history of NGE's bankruptcy, see *In re Nat'l Gold Exch., Inc.*, No. 08:09-bk-15972-MGW (Bankr. M.D. Fl.).

42 JX 25 at 031153.

43 *Id.* at 031153–54.

The seizure of collateral related to NGE led to a $4,816,000 overadvance from IDB to Republic, *i.e.*, Republic was under-collateralized by that amount.[44] To ameliorate that problem, Fred Weinberg, a friend of Fenton, agreed to assign to IDB 9,000 numismatic "missing edge error coins" (the "Error Coins") as additional collateral.[45] An internal IDB letter, dated July 30, 2009, noted that the Error Coins had an aggregate value of $9,000,000.[46]

As a further result of the seizure of NGE's collateral, IDB began tightening its controls and reducing its exposure to Republic. Ultimately, on December 23, 2009, IDB sent a letter instructing FSD not to release Republic's Collateral stored at FSD without IDB's consent (the "December 2009 Notice").[47] Landerer, an account executive and first vice president at IDB, previously had communicated to Fenton that IDB would be giving notice to FSD that IDB's consent would be required before FSD could release any of Republic's Collateral stored at FSD.[48] Although IDB's recent interactions with FSD had been with Eric Higgins, the December 2009 Notice was addressed to FSD to the attention

---

44 *Id.* at 031154.

45 *Id.* at 031145; JX 29; Tr. 38 (Landerer).

46 JX 25 at 031154.

47 JX 38.

48 JX 37.

of Michael B. Clark, who had signed the Bailment Agreement and CCAAs as FSD's President in August 2006.[49]

At trial, Landerer testified that he remembered sending the December 2009 Notice because Michael Kerneklian, a first vice president at IDB who was taking over Landerer's duties, had been on vacation that week.[50] Landerer testified that he sent the December 2009 Notice in accordance with his typical procedures and that he had never had a problem with addressees receiving his correspondence. Those typical procedures included "print[ing] the letter out," "hav[ing] it cosigned," and "giv[ing] it to [his] assistant to mail out."[51] IDB did not provide any additional documentary evidence, such as a return receipt.

Eric, on the other hand, denied receiving the letter.[52] He stated that he and FSD would have changed the way they handled the Accounts had they received the December 2009 Notice.[53] Further questioning about FSD's handling procedures, however, revealed

---

49 Tr. 106–07, 121 (Landerer); JX 38. Unbeknownst to IDB, Clark reportedly ceased to be employed by FSD around 2006 or 2007. Tr. 478, 547 (Eric).

50 Tr. 49 (Landerer).

51 *Id.* at 50.

52 *Id.* at 546–47, 568 (IDB's Counsel: "You testified that you did not receive a copy of a December 23rd, 2009 letter at that time?" Eric: "I did not.").

53 *Id.* at 550–51 (Eric).

that Eric did not know who would have processed the letter had it been received by FSD or whether a piece of mail addressed to Clark would have been returned to the sender.[54]

Despite Eric's testimony that he did not receive the December 2009 Notice, FSD subsequently conformed its conduct to the notice. On May 7, 2010, Landerer provided authorization to release certain collateral, and Eric acknowledged receipt of that authorization.[55] Similarly, on May 31, 2011, Kerneklian sent a letter to Eric stating, "As with all of the Republic related items at [FSD], IDB's consent is required prior to any release—including new coins that are being processed."[56]

In sum, Landerer provided credible testimony that he sent the December 2009 Notice. FSD, on the other hand, did not adduce convincing evidence that FSD did not receive the notice in or around December 2009. Moreover, on at least one occasion, IDB conformed its conduct to the December 2009 Notice, and Eric did not express surprise over that conduct. For these reasons and those stated in Part II.A.2.a *infra*, the weight of the evidence shows that the December 2009 Notice was sent by IDB in accordance with its normal procedures. The validity and enforceability of that notice is addressed further in Part II.A.2.a.

---

54 *Id.* at 569–73.

55 JX 48 ("This message is authorization to release the collateral held for Encore Gold.").

56 JX 65.

7. FSD releases the Collateral without IDB's consent

On September 12, 2011, FSD released the Collateral[57] without IDB's consent so CAMI could display the Collateral at a coin collectibles show in Philadelphia, Pennsylvania (the "Philadelphia Show.").[58] The Collateral was valued by FSD at the time of the release at $18,266,776.38.[59] The Collateral evidently was not returned to FSD after the Philadelphia Show, and was displayed for sale at a November 2011 show in Baltimore, Maryland (the "Baltimore Show").[60] Indeed, Higgins did not return the Collateral to FSD after September 12, 2011; instead, he deposited it into CAMI's safes.[61]

In September 2011, IDB vice president Kerneklian discovered an article about error coins stolen from the United States Mint that "seemed very similar to the" Error

---

57 The Error Coins were not released. *See* JX 80, 81; Tr. 501 (Defendants' Counsel: "I mentioned. . . the error coins . . . . Did those coins go in and out?" Eric: "No. Those coins basically stayed in a corner. We referenced that as the secret inventory. Those went into a corner of the vault and did not move.").

58 JX 80, 81, 139; Tr. 534 (Eric), 613–14 (Steven).

59 *See* JX 76 ($5,097,535.11 in CAMI Collateral One Account); JX 77 ($3,771,885.75 in CAMI Collateral Two Account); JX 78 ($2,079,655.00 in Lott Account); JX 79 ($7,317,700.52 in Ketterling Account); Stip. ¶ 11 ("The daily Collateral Detail Reports generated by FSD on September 9, 2012 for the CAMI One, CAMI Two, Ketterling and Lott accounts accurately reflect the assets maintained in those accounts and located at the depository at that time.").

60 JX 139, 305; Tr. 614–15 (Steven).

61 Tr. 556, 558, 583, 584 (Eric); 614–15 (Steven). As previously noted, Higgins is the sole stockholder of both FSD and CAMI. In addition, I note that although FSD and CAMI were located in the same building, they maintained separate offices.

Coins stored at FSD.[62] Around the same time, IDB was becoming more apprehensive about Republic's ability to repay its loan.[63] As a result, on September 21, 2011, IDB notified CAMI, Lott, and Ketterling that IDB was exercising its right to have all amounts owed to Republic made payable directly to IDB.[64]

In addition to its own payments, CAMI also made payments for Lott's and Ketterling's accounts.[65] According to Kerneklian of IDB, this "immediately raised concerns that [Lott and Ketterling], indeed, were not separate borrowers," which would have put the aggregate loan to CAMI at $11,550,000, in direct violation of the $5,000,000 cap on receivables from a single client.[66] IDB therefore began speaking with Republic's Fenton daily about this issue, and Fenton ultimately sought to reduce Republic's loan portfolio to below $10,000,000.[67]

On or about October 31, 2011, Fenton advised Higgins that IDB is "now aware that [CAMI] is managing [the Lott] and Ketterling accounts because the interest checks

---

62 Tr. 308–09 (Kerneklian); JX 72 at 007303–04.

63 Tr. 311–12 (Kerneklian).

64 *Id.* at 312; JX 88.

65 Tr. 316 (Kerneklian).

66 *Id.* at 316–17.

67 JX 95 at 007260.

are all coming from [CAMI]. I explained that your role is similar to being a money manager for these borrowers."[68] Fenton also told Higgins that IDB

> ha[s] asked specifically about the relationship between you and Eric. I explained that [FSD] is a completely separate company and there is a china [sic] wall separating the depository from [CAMI] activities. [IDB is] now very concerned about the overlapping family ties and are going to [its] lawyers to insure [sic] that nothing leaves the depository without their authorization.[69]

In response, Higgins emailed Fenton that:

> Obviously there was nothing to be done when you assigned the loans to them and payment had to be paid directly to them, they were bound to find out the rest. Whether they received wire's [sic] or checks it all came from [CAMI] and they would have discovered [t]he secrets that were being kept from them. Let's hope for everyone's sake that this all works out. There is nothing more to say than what has already been said. They are NOT [m]y Bank, they are yours. I have no desire to talk to them about the fund or anything else, I have told you what is needed and they need to allow the time for this to happen, period! . . .
>
> [FSD] is no longer involved with this and not answerable to your bank. . . . I would not put [FSD] in the middle of this. YOU need to handle this and give me the time to cure OR we all will be unhappy of the outcome. I am not a monkey, I don't do tricks, I am attempting to do the deal of a lifetime, and it will be good for all of us. They [IDB] NEED to layback NOW and see this thru. THEY NEED TO DO THIS!!!!! If they do anything to screw this up as I said before I will do all that is possible to make them regret it. I know what I need to do, let me do it.

---

68 JX 102 at 007120.

69 *Id.* at 007120–21.

> I am done, I am going to do what I need to do, wish me luck.[70]

Fenton informed IDB that CAMI was seeking to create a new fund, Certified Asset Management International, LLC ("CAM International"), with the hope that the funds it raised could be used to repay the loans to IDB.[71] Fenton sent Kerneklian a draft press release announcing the formation of CAM International. The draft stated that Higgins was the president of the parent, CAMI, and that the assets of the fund would be stored at FSD.[72] Predictably, IDB became even more concerned that there was a direct relationship between CAMI and FSD and that the Collateral was not being stored in an independent depository.[73]

8. IDB attempts to inspect the Collateral

On November 3, 2011, Kerneklian and Jeff Ackerman (Kerneklian's manager) traveled to Delaware to review the Accounts at FSD.[74] Ackerman and Kerneklian called Eric Higgins to see if they could access the Collateral, but Eric stated that FSD did not have the staff or ability to accommodate their request.[75] Ackerman and Kerneklian then

---

70 *Id.* at 007120.

71 JX 106; Tr. 320 (Kerneklian).

72 Tr. 320–22 (Kerneklian); JX 304 at 007182–83.

73 Tr. 322 (Kerneklian).

74 *Id.* at 327.

75 *Id.* at 327–29.

called Fenton, who convinced Eric to give them a tour of the depository.[76] Eric did not permit Ackerman and Kerneklian to review specific accounts or sample the Collateral, however, claiming that IDB had not provided FSD proper notice.[77] When Eric stated that he was not familiar with IDB's right to inspect the Accounts under Republic's authorization, Kerneklian assured him that IDB did have such rights.[78] At no point during the tour did Eric disclose that the Collateral had been released and was no longer in the FSD depository.[79] Indeed, it was Kerneklian's impression that the Collateral was there, but that FSD just "didn't have the staff to . . . allow [him] to inspect it."[80]

The next day, IDB sent formal notice to Eric reiterating IDB's rights under the Bailment Agreement to inspect the Collateral and reaffirming that FSD could not release the Collateral without IDB's written consent.[81] Thereafter, IDB continued to make requests to inspect and appraise the Collateral.[82] In response, Fenton advised IDB that he

---

76 *Id.*

77 *Id.* at 329.

78 *Id.* at 329–30.

79 Tr. 330 (Kerneklian).

80 *Id.*

81 *Id.* at 335–36; JX 303.

82 Tr. 336–37 (Kerneklian).

was trying to obtain an inspection date from FSD, but could not coordinate that date due to holidays and vacation.[83]

In reality, Higgins had no intention of allowing IDB to inspect the Collateral. Higgins wrote to Fenton on December 14, 2011 that:

> I have told you there will be no audit this month [*i.e.*, December 2011], I will not subject the depository to having to cover for the information that they have never been made aware of. . . . If I deposit Inventory and they lock it up I am screwed[.] So I guess this is all over and there is no reason to deliver the monies tomorrow[.] Yes get the attorney's [sic] out. There is no reason for them to come to [Delaware] there will be nothing to audit, I give you my word.[84]

After continued back and forth between Fenton and IDB, on December 23, 2011, IDB demanded access to inspect the Collateral.[85] Ultimately, Fenton agreed to an early January 2012 date for the inspection.[86] Yet, despite a flurry of emails between Fenton and IDB's representatives, the parties were unable to arrange for that inspection.[87] In a January 12, 2012 letter, IDB again demanded that FSD comply with IDB's right to inspect the Collateral.[88] Although Fenton then informed IDB that they could conduct their inspection on January 20, Eric could not confirm the inspection and stated: "I have

---

83 *Id.* at 337.

84 JX 134.

85 JX 141.

86 Tr. 337 (Kerneklian).

87 JX 150, 152–156.

88 JX 157.

forwarded this email to [FSD]'s Director as this is not for me to authorize."[89] Because Higgins did not provide that consent, the January 20 inspection did not occur.[90]

On January 20, 2012, IDB sent formal notice to FSD that "[a]s a result of your failure and refusal to comply with the terms of the Agreements by providing us access to inspect and examine the [Collateral,] we have made a decision to exercise our right to remove the [Collateral] from your facilities."[91] On January 23, FSD, Republic, and CAMI discussed the possibility of entering into an agreement whereby IDB would be repaid by February 9, 2012.[92] Based on that offer, IDB deferred its plan to remove the Collateral on January 24, but reserved its right to do so if the parties were unable to enter into an acceptable agreement.[93] When the parties failed to come to an agreement, IDB again demanded, on January 26 and 27, 2012, that it be permitted to inspect and remove the Collateral.[94]

The parties had come to another agreement that called for IDB to inspect the Collateral on February 10, 2012.[95] On January 27, however, IDB informed FSD that it

---

89 JX 158, 161.

90 JX 165; Tr. 342–43 (Kerneklian).

91 JX 166.

92 JX 167.

93 JX 170.

94 Stip. ¶ 21; JX 173.

95 JX 171.

intended to remove the Collateral on February 3, 2012.[96] IDB then changed its position again, and on January 31, informed FSD that on February 3 it simply would inspect the Collateral, rather than removing it.[97] Higgins responded that February 3 was unavailable due to scheduling conflicts and staffing shortages, but that February 10 was still available.[98] In this context, I consider it important that throughout the entire time period from October 2011 until early February 2012, Defendants and their principal, Higgins, knew that the Collateral was not at FSD, but intentionally led IDB to believe otherwise.

On February 2, IDB again notified FSD that it would be exercising its right to remove the Collateral.[99] Higgins forwarded that email to Fenton stating "[y]ou need to stop this or I have to spill the beans."[100] Higgins also rejected IDB's demand stating that FSD had been notified of a "conflict of interest" and would not grant entrance to FSD until that conflict was resolved.[101]

In any event, on February 3, when Richard Miller, a first vice president in the managed assets department of IDB, visited FSD, Eric informed him that Higgins had

---

96 JX 173.

97 JX 174, 176.

98 JX 179.

99 JX 184.

100 JX 182 at 000479.

101 JX 184. There is no evidence that Higgins, in fact, believed there might have been such a conflict of interest.

directed him to not let IDB into the facility.[102] On February 6, 2012, IDB notified FSD that it intended to visit FSD again on February 10 to remove the Collateral.[103] On February 9, however, FSD's counsel advised IDB that it needed time to review the Bailment Agreement to determine IDB's rights under that agreement and that, in the interim, IDB would not be permitted to access the Collateral.[104] IDB responded by demanding that FSD honor its contractual obligations.[105] On the morning of February 10, FSD's counsel notified IDB again that it would not be allowed to access the Collateral and warned that he had instructed FSD to call the police to prevent IDB's "goon squad" from breaching the peace.[106] IDB still proceeded to visit the facility and again was turned away by Eric.[107]

9. Plaintiff seeks a temporary restraining order

On February 13, 2012, IDB commenced this action by filing a complaint (the "Complaint") and a contemporaneous motion for a temporary restraining order (the "TRO Motion"). FSD opposed that motion and argued that the CCAAs, as opposed to the Bailment Agreement, governed the accounts at issue and that IDB had no legal right

---

102 Tr. 429, 431, 439–41 (Miller).

103 JX 190.

104 JX 196.

105 JX 200 at 028541.

106 *Id.* at 028539.

107 Tr. 442–44 (Miller).

to a TRO over the Collateral under those agreements.[108] FSD also argued that three of the accounts in dispute, including Lott's, no longer existed for the benefit of Republic and had been repaid in full.[109]

On February 21, 2012, I entered a TRO enjoining FSD, its directors, officers, employees, agents, and representatives, from removing from FSD's depository facility "any property in which IDB possesses a security interest related in any way to" the Accounts.[110] Although FSD knew that most, if not all, of the Collateral had been removed from FSD months earlier, they requested that IDB post a bond of $7,000,000. Ultimately, I required that IDB post a secured bond of only $25,000.[111] That same day, February 21, CAMI sold Collateral in the form of gold bullion worth $368,095.30.[112] One day later, CAMI sold more gold bullion for a price $5,001,247.60.[113] Based on FSD's collateral reports of September 9, 2011, FSD then held in the Accounts bullion having values in this range.[114] We now know that Higgins, through CAMI, removed the Collateral from FSD on or about September 12, 2011 and did not return it.

---

108 Def. First State Depository LLC's Br. in Opp'n to Pl.'s TRO Mot. ("Def.'s TRO Opp'n Br.") 10–13.

109 *Id.* at 10–11.

110 JX 216 ¶ 2.

111 *See* JX 209, 216 ¶ 3.

112 JX 222 at 065721–22, 065733–34.

113 *Id.* at 065745–46.

114 *See supra* note 59 and accompanying text.

On February 21, 2012, IDB also moved for a preliminary injunction and formally requested to enter FSD's premise and inspect the Collateral.[115] By February 28, the parties had negotiated and signed a stipulated preliminary injunction order (the "PI Order") whereby Defendants, among other things, agreed to allow IDB to inspect the Collateral on March 2, 2012 and represented that "the Property," which was defined as property contained in or related in any way to the Accounts, was worth at least $12.5 million.[116]

On March 2, 2012, IDB representatives traveled to FSD to inspect the Collateral and the Error Coins. The IDB representatives counted, bagged, and moved the Error Coins to Diamond State Depository ("Diamond State").[117] Before the representatives left the depository, Eric gave them a tour of the FSD facility.[118] During the tour, the IDB representatives discovered for the first time that the shelves where the Collateral should have been stored were empty.[119]

On March 5, 2012, Plaintiff moved for contempt, seeking, among other things, an order by this Court finding that FSD and CAMI had violated the PI Order, requiring that the Collateral be returned to FSD, and sanctioning Defendants $10,000 a day for failing

---

115 *See* Mot. for Prelim. Injunction (Feb. 21, 2012); Pl.'s Notice of Service of Pl.'s Req. for Entry upon Land and Inspection of Property (Feb. 21, 2012).

116 JX 221.

117 Tr. 445–48.

118 *Id.* at 446–50.

119 *Id.*

to return the Collateral.[120] On March 16, after full briefing and a hearing on that motion, I entered an order (the "Contempt Order") granting IDB's requests and imposing a monetary sanction of $5,000 per day.[121]

On March 21, 2012, the United States District Court for the Southern District of New York issued a warrant for the seizure of coins stored at FSD.[122] The next day, Federal Bureau of Investigation ("FBI") agents raided both FSD and a CAMI booth at a coin show in Baltimore.[123]

As previously discussed, the Collateral had been removed from FSD in September 2011 for use at the Philadelphia Show and the Baltimore Show, and thereafter was stored in CAMI's offices within the same building that housed FSD.[124] Consequently, when FBI agents visited FSD on March 22, they did not seize any Collateral because the Collateral was not there.[125]

During February and March 2012, despite this Court's orders, CAMI sold millions of dollars of Collateral.[126] Finally, beginning on March 27, 2012, CAMI returned some

---

120 Pl.'s Mot. for Contempt.

121 Order (Mar. 16, 2012), the Contempt Order.

122 JX 244.

123 JX 245, 246; Tr. 615–16 (Steven).

124 Tr. 612–15 (Steven).

125 *Id.* at 616–17.

126 *See supra* notes 112–113; JX 255, 270.

of the Collateral to IDB.[127] As of 4:23 p.m. on March 28, FSD still was scanning in coins that were part of that Collateral.[128] By the end of the day, Defendants had provided IDB with partial depository reports for two of the four disputed Accounts.[129]

On March 29, 2012, IDB representatives, including Miller, visited FSD to inspect and appraise the coins.[130] While they were there, however, FBI agents arrived, asked IDB's representatives to leave, and seized some of the Collateral stored at FSD.[131] On April 4, 2012, FSD provided to IDB collateral reports on the Collateral that had not been seized, which included some items that had not been listed on any previous collateral report.[132] The next day, IDB and its representatives conducted an inventory and appraisal of the Collateral that remained at FSD. The results of that effort are memorialized on a copy of a "holdings detail report."[133] The FBI seized additional Collateral from FSD on or around May 8, 2012.[134]

---

127 JX 273 at 058300–29; Tr. 599–600 (Eric).

128 JX 252 (Higgins stated in an email to Fenton, "I am in my 3rd tow truck of the day headed to [Delaware], Eric & co are still scanning[.] I don't know the value.").

129 JX 253.

130 Tr. 453–55 (Miller).

131 *Id.* at 455–56 (Miller), 594–96 (Eric); JX 273 at 058335–70.

132 JX 259.

133 Tr. 353–55 (Kerneklian), 456–59 (Miller); JX 259, 260, 262.

134 Stip. ¶ 25; Tr. 563 (Eric).

10. IDB files a lawsuit against Republic, Fenton, and others

On March 27, 2012, IDB filed a lawsuit against Republic, Fenton, and others in the United States District Court for the Southern District of New York (the "New York Action"),[135] for "breach[ing] . . . certain Loan Documents . . . and to put an end to [Republic's] three-card monte game of hiding, moving, pledging, selling and misidentifying [IDB's] collateral under those Loan Documents."[136] The New York Action sought $10,590,187.70 in damages for, among other things, breach of contract, unjust enrichment, and conversion.

Notably, IDB asserted that it "discovered that FSD and CAMI—upon information and belief, with the authorization of Defendants Republic and Ned Fenton—have allowed the Collateral to be removed from the depository and to be marketed for sale, and possibly sold, without IDB's authorization or benefit."[137] IDB also alleged in its conversion claim that Republic had "wrongfully exercised dominion and control over property that [IDB] has a right to possess, thereby depriving [IDB] of its rightful possession of the Collateral."[138]

On April 2, 2012, IDB obtained a consent order in the New York Action enjoining the defendants from "transferring, concealing, selling, using, pledging, assigning,

---

135 *See* JX 250.

136 *Id.* ¶ 1.

137 *Id.* ¶ 46.

138 *Id.* ¶ 79.

encumbering, or otherwise exercising dominion and control over the Collateral (as . . . defined in the Loan Documents)."[139] On July 19, 2012, after accepting an offer of judgment, IDB obtained a judgment against the defendants in the New York Action for $11,327,488.92.[140]

C. Procedural History

As previously recited, IDB commenced this action on February 13, 2012, seeking damages and equitable relief based on a breach of contract claim against FSD and a conversion of property claim against FSD and CAMI. I granted a TRO on February 21 and a stipulated preliminary injunction in favor of IDB on February 29, 2012. Shortly thereafter, IDB filed a motion for contempt, which I granted on March 16, 2012. On April 16, 2012, Defendants moved in the alternative to dismiss or to dissolve or amend the preliminary injunction and contempt orders (the "Motion to Dismiss"). IDB then filed a second motion for contempt on April 23. On June 1, 2012, I stayed IDB's second motion for contempt and held it in abeyance until trial. In a Memorandum Opinion dated September 27, 2012 (the "September 2012 Opinion"), I denied Defendants' Motion to Dismiss.[141]

---

139 JX 257.

140 JX 279.

141 *Israel Disc. Bank of New York v. First State Depository Co*., 2012 WL 4459802 (Del. Ch. Sept. 27, 2012). I also denied a subsequent application for an interlocutory appeal of the September 2012 Opinion. *Israel Disc. Bank of New York v. First State Depository Co.*, 2012 WL 5359296 (Del. Ch. Oct. 31, 2012). The Supreme Court likewise refused to hear that interlocutory appeal. *First State*

From November 19 through 21, 2012, I presided over a three-day trial in this action. After extensive post-trial briefing, counsel presented their final arguments on February 21, 2013. Between then and March 7, 2013, the parties also filed supplemental briefing on a few specific issues. This Memorandum Opinion constitutes my post-trial findings of fact and conclusions of law.

D. Parties' Contentions

In Count I of the Complaint, IDB alleges that FSD breached the Bailment Agreement by releasing Collateral without IDB's authorization and refusing to allow IDB to inspect and remove the Collateral. Count II charges CAMI with converting the Collateral by wrongfully exercising dominion and control over it without IDB's authorization.

Defendants dispute IDB's allegations, including, for example, that FSD received the December 2009 Notice, and urge the Court to deny IDB's claims in their entirety. Defendants also have counterclaimed and seek a declaratory judgment pronouncing that: (1) FSD never sold, traded, or offered to sell or trade its customers' property; (2) pursuant to the CCAAs, IDB is responsible for FSD attorneys' fees; (3) IDB's only remaining claim is one for a deficiency judgment; (4) the Bailment Agreement is void; and (5) the December 2009 Notice is unenforceable. Finally, Defendants assert a plethora of other

---

Depository Co. v. Israel Disc. Bank of New York, 55 A.3d 838, 2012 WL 5513046, at *1 (Del. 2012) (TABLE).

defenses, including that IDB's claim is barred by the doctrine of laches, the Uniform Commercial Code ("UCC"), and the doctrine of election of remedies.

Both sides also seek an award of attorneys' fees. Specifically, each side accuses the other of engaging in bad faith and vexatious litigation conduct and asserting frivolous allegations.

II. ANALYSIS

IDB bears the burden of proving its claims by a preponderance of the evidence.[142] "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[143] Under this standard, IDB is not required to prove its claims by clear and convincing evidence or to exacting certainty.[144]

A. Did FSD Breach the Bailment Agreement?

To prove a breach of contract claim, a plaintiff must show: "the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to

---

142 *See United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 834 n.112 (Del. Ch. 2007) ("The burden of persuasion with respect to the existence of the contractual right is a 'preponderance of the evidence' standard." (citations omitted)); *Gould v. Gould*, 2012 WL 3291850, at *7 (Del. Ch. Aug. 14, 2012) ("As the claimant, Jay had the burden to prove his claim of conversion of these motors by a preponderance of the evidence.").

143 *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002) (quoting Del. Super. P.J.I. § 4.1 (2000)).

144 *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *6 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010) (TABLE).

the plaintiff."[145] IDB contends that one way in which FSD breached the terms of the Bailment Agreement is by releasing Collateral without the written authorization of IDB. FSD, on the other hand, denies any such liability, because: (1) the Bailment Agreement is void; (2) the December 2009 Notice is unenforceable; (3) IDB's claim is barred by the doctrine of laches; (4) the CCAAs require IDB to indemnify FSD and hold it harmless for its actions; and (5) FSD is entitled to various statutory defenses under the UCC

1. Existence of a contract

The first element of a breach of contract claim is the "existence of a contract."[146] It is undisputed that IDB, FSD, and Republic signed the Bailment Agreement on August 24, 2006. FSD nonetheless contends that the Bailment Agreement is void because: (1) IDB is not qualified to transact banking business in Delaware; and (2) the Bailment Agreement lacked consideration.

FSD first argues that IDB is not qualified to transact banking business in Delaware, that IDB conducted banking business in Delaware, and that, as a result, the Bailment Agreement is void. As a foreign bank organized under the laws of New York,[147] IDB is required to comply with the provisions of 5 *Del. C.* § 1402. Specifically, Section 1402 provides:

---

145 *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

146 *Id.*

147 Compl. ¶ 7 ("Plaintiff IDB is a bank organized under the laws of the State of New York.").

> (a) No foreign banks shall transact a banking business or maintain in this State an office for carrying on such business or any part thereof, except as otherwise provided in subchapter III of this chapter, unless such foreign bank has:
>
> (1) Been authorized by the laws under which it was organized and by its charter to carry on such business;
>
> (2) Furnished to the Commissioner such proof as to the nature and character of its business and as to its financial condition as the Commissioner may require; and
>
> (3) Filed with the Commissioner an application containing the information required by § 1403 of this title and received a certificate of authority duly issued to it by the Commissioner as provided in § 1403 of this title.[148]

FSD's argument, however, ignores Subsection (b) of 5 *Del. C.* § 1402, which provides in pertinent part:

> (b) *This section shall not be construed to prohibit foreign banks which do not maintain an office in this State for the transaction of the business from*:
>
> (1) Making loans or issuing letters of credit in this State secured by mortgages on real property, nor from contracting in this State with a banking organization to acquire from or through such banking organization a part interest or the entire interest in a loan or evidence of debt which such banking organization has heretofore or hereafter made, purchased or acquired, for its own account or otherwise, together with a like interest in any security or in any security instrument proposed to be given or heretofore or hereafter given to secure or evidence such loan or evidence of debt;
>
> (2) *Enforcing in this State obligations heretofore or hereafter acquired by it in the transaction of business outside*

---

[148] 5 *Del. C.* § 1402(a).

> *of this State*, or in the transaction of any business authorized by this section;
>
> (3) *Acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise protecting or conveying property in this State heretofore or hereafter assigned, transferred, mortgaged or conveyed to it as security for, or in whole or part, satisfaction of a loan or loans made by it or obligations made by it or obligations acquired by it in the transaction of business outside of this State*, or in the transaction of any business authorized by this section . . . .[149]

Subsection (b) explicitly permits a foreign bank to contract with respect to or otherwise protect property that is assigned to it as security for loans made outside of Delaware. In other words, Section 1402 does not prohibit IDB from contracting with respect to and protecting Republic's Collateral, which served as security for the loan to Republic that was made outside of Delaware. Therefore, I conclude that IDB's transaction of the business challenged by Defendants was permitted by Section 1402(b) and that, as a result, Section 1402 does not render the Bailment Agreement invalid.[150]

FSD next argues that the Bailment Agreement is void for lack of consideration. That argument, however, was raised previously in FSD's Motion to Dismiss and rejected.[151] In my September 2012 Opinion, I wrote:

---

149 *Id.* § 1402(b) (emphasis added).

150 Even if I were to conclude that IDB did violate 5 *Del. C.* § 1402, FSD has presented no authority, nor does this Court know of any authority, that supports FSD's position that the Bailment Agreement, therefore, would be void.

151 *Israel Disc. Bank of New York v. First State Depository Co.*, 2012 WL 4459802, at *12 (Del. Ch. Sept. 27, 2012).

> Consideration for the Bailment Agreement can be found in the bargained for exchange that occurred when IDB loaned money to Republic and accepted certain items as collateral in return for Republic's and FSD's agreement that IDB would maintain a measure of control over the collateral that IDB agreed would remain stored with FSD.[152]

Defendants presented no convincing evidence or argument that would cause me to alter that ruling. In that regard, and based on the evidence presented at trial, I find that the Bailment Agreement provided FSD with the opportunity to perform fee-generating services for Republic and IDB. In addition, I infer from the evidence that IDB would not have given FSD that opportunity without receiving the degree of control provided for in the Bailment Agreement. Therefore, I reject FSD's argument that the Bailment Agreement is void for want of consideration.[153]

2. Breach of an obligation imposed by contract

Having concluded that the Bailment Agreement is a valid signed agreement between IDB, FSD, and Republic, I next consider whether FSD breached an obligation imposed by that contract. Section 6 of the Bailment Agreement provides that, if IDB notifies FSD in writing that IDB is invoking its consent rights, FSD only can release Collateral in accordance with IDB's written instructions.[154] The Bailment Agreement also states that IDB "will be permitted during [FSD]'s normal business hours to: (i)

---

152 *Id.*

153 For the reasons stated in this section, I also deny FSD's request for a declaratory judgment that the Bailment Agreement is void.

154 JX 9 § 6.

examine the Property . . . , and; (ii) discuss matters relating to [FSD]'s performance under this [Bailment] Agreement . . . with any of [FSD]'s officers, directors and employees having such knowledge of such matters."[155] The Bailment Agreement states that FSD "will release [the Collateral] to [IDB] on demand."[156] Finally, the Bailment Agreement provides that FSD "agrees that [it] will not hinder or delay [IDB] in enforcing [its] right in and to" the Collateral.[157]

IDB asserts that FSD breached its obligations by: (1) releasing the Collateral without IDB's written consent as required by the December 2009 Notice; (2) disregarding IDB's right to inspect the Collateral; and (3) interfering with IDB's right to have the Collateral released to it. I address each of these alleged breaches in turn.

a. IDB's right to limit release of the Collateral

IDB contends that the December 2009 Notice was valid and enforceable, and that, therefore, FSD breached the Bailment Agreement by releasing the Collateral. FSD, on the other hand, asserts that the December 2009 Notice is unenforceable because IDB has not proved by a preponderance of the evidence that the notice letter either was sent by IDB or received by FSD.

FSD argues that because IDB did not call as a witness at trial Landerer's assistant, who was responsible for sending the December 2009 Notice, the Court should draw an

---

155 *Id.* § 2.

156 *Id.* § 6.

157 *Id.*

adverse inference against IDB and find that IDB has not shown that the notice was sent. In *Wheatley v. State*,[158] the Delaware Supreme Court stated, "[a] missing-witness inference is permissible only where it would be 'natural' for the party to produce the witness if his testimony would be favorable."[159] Here, it would not have been "natural" for IDB to call Landerer's assistant because "[m]ailing can be prove[n] by office custom without producing as a witness the person who personally placed the letter in [the United States mails]."[160]

Rather, a presumption exists under Delaware law "that mailed matter, *correctly addressed*, stamped and mailed, was received by the party to whom it was addressed."[161] "This presumption may be strengthened, weakened or overcome by proof of attendant pertinent circumstances."[162] "The addressee's mere denial of receipt of the notice is insufficient to rebut this presumption."[163]

---

158 465 A.2d 1110 (Del. 1983).

159 *Id.* at 1111.

160 *United States v. Hannigan*, 27 F.3d 890, 894 (3d Cir. 1994) (alterations in original) (quoting *United States v. Joyce*, 499 F.2d 9, 17 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974)).

161 *Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 282 (Del. 2006) (quoting *State ex rel. Hall v. Camper*, 347 A.2d 137, 138–39 (Del. Super. 1975)).

162 *Id.* (quoting *Graham v. Commercial Credit Co.*, 194 A.2d 863, 865–66 (Del. Ch. 1963)).

163 *Brown v. City of Wilm.*, 1995 WL 653460, at *3 (Del. Super. Sept. 21, 1995); *see also Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at *3 (Del. Super. Apr. 30, 2009) ("Lack of evidence of any mailing error by the Department of Labor

There is no question that the December 2009 Notice was addressed to First State Depository at its proper address.[164] Moreover, Landerer testified that he sent the December 2009 Notice in accordance with his normal procedures, which included "print[ing] the letter out," "hav[ing] it cosigned," and "giv[ing] it to [his] assistant to mail out."[165] In Landerer's experience, this procedure always led to the mail being received by its addressees.[166] The most reasonable inference from the evidence and testimony, therefore, is that mail sent through this procedure would have been stamped and mailed.

Accordingly, I conclude that the December 2009 Notice, which was sent using Landerer's standard procedure, was properly addressed, stamped and mailed, thereby creating a presumption that the December 2009 Notice was received. Eric Higgins's testimony to the contrary, which amounted to a mere denial of receipt of the December 2009 Notice and a general, but inconclusive, description of FSD's mail procedures, was insufficient to rebut that presumption. FSD further failed to present evidence of a

---

supports the presumption that properly mailed and addressed mail was received."), *aff'd*, 984 A.2d 124 (Del. 2009).

164 Specifically, the letter was addressed to:

> First State Depository Company LLC
> 100 Todds Lane
> Wilmington, DE 19802
> Attention: Michael B. Clark

JX 38. FSD's "principal place of business" is "100 Todds Lane, Wilmington, Delaware 19802." Stip. ¶ 2.

165 Tr. 50 (Landerer).

166 *Id.*

mailing error. Eric's denial that he ever saw the December 2009 Notice before November 2011 may be true. Even so, however, the evidence indicates that more likely than not Higgins saw the notice received by FSD and decided not to show it to Eric. Indeed, the presumption that the December 2009 Notice was received is buttressed by the parties' conduct after December 23, 2009, which conformed to the December 2009 Notice having been received.[167] For these reasons, I conclude that FSD did receive the December 2009 Notice and that, therefore, the December 2009 Notice was effective.[168]

The fact that the December 2009 Notice was addressed to the former president of FSD, Michael Clark, is immaterial. The most reasonable inference from the evidence presented is that FSD received the December 2009 Notice and that it was shown to at least Higgins. Higgins most likely either ignored the letter because Clark no longer worked for FSD or read it and decided not to comply with it. Either way FSD would be responsible for Higgins's conduct.

The December 2009 Notice and the Bailment Agreement, therefore, limited FSD's ability to release the Collateral absent IDB's consent. Nevertheless, on September 12, 2011 and without consent from IDB, FSD released all the Collateral to CAMI. In doing

---

167 *See supra* notes 55–56 and accompanying text.

168 *State ex rel. Hall v. Camper*, 347 A.2d 137, 138–39 (Del. Super. 1975). ("Generally speaking, the law requires that notice be actually received in order to be effective."). For the reasons stated in this section, I also deny FSD's request for a declaration that the December 2009 Notice is unenforceable.

so, FSD breached the obligation imposed by the Bailment Agreement and December 2009 Notice to refrain from releasing the Collateral absent IDB's consent.

b. IDB's right to inspect the Collateral

Between November 3, 2011 and March 29, 2012, FSD disregarded numerous requests by IDB to inspect the Collateral. Although FSD finally allowed IDB to visit the facility on March 2, 2012 and to inspect what remained of the Collateral on March 29, 2012, FSD's actions unmistakably interfered with IDB's explicit right to "examine the Property."

By this Court's calculation, IDB asked on five separate occasions to inspect the Collateral,[169] visited FSD's facility three times to inspect the Collateral (and was turned away on each occasion),[170] sent three formal demands to inspect the Collateral,[171] and obtained a preliminary injunction on February 29, 2012, requiring FSD to permit IDB to inspect the Collateral.[172] Yet, FSD interfered and failed to comply with IDB's requests until March 29, 2012. Therefore, I conclude that, beginning on November 3, 2011, FSD repeatedly breached its obligation to allow IDB to examine the Collateral.

---

169 *See supra* notes 75, 81, 82, 97, & 105 and accompanying text.

170 *See supra* notes 74–80, 102, & 107 and accompanying text. IDB also visited the facility to inspect and bag the Error Coins. *See supra* notes 117–119 and accompanying text.

171 *See supra* notes 85, 88, & 94 and accompanying text.

172 *See supra* notes 115–116 and accompanying text.

c. IDB's right to release of the Collateral

Similarly, between January 20, 2012 and March 2012, FSD violated its obligation to release the Collateral to IDB on demand. During that time period, IDB made no less than five requests and one formal demand to remove the Collateral.[173] FSD's scheme of postponement and delay clearly interfered with IDB's right to remove the Collateral on demand. Thus, FSD breached IDB's right to release of the Collateral, beginning on January 20, 2012.

d. IDB's enforcement rights in the Collateral

Even if IDB had not sent, and FSD had not received, the December 2009 Notice, FSD's conduct still would constitute an independent breach of FSD's agreement "that [it] will not hinder or delay [IDB] in enforcing [its] right in and to" the Collateral.[174]

FSD *should* have notified IDB about situations that were not in accord with FSD's purported standard practice for the release and subsequent return of the Collateral, as described *supra* Part I.B.4. For example, FSD could have alerted IDB that the Collateral had not been returned from the Philadelphia and Baltimore Shows. Instead, FSD engaged in a corporate shell game whereby Higgins, as the common owner of FSD and CAMI, abused the corporate form to avoid the technical requirements of the Bailment Agreement and other relevant agreements. FSD further deceived IDB by creating the

---

173 *See supra* notes 91, 94, 96, 99, 103, & 105 and accompanying text. On another occasion, IDB made a visit to FSD to remove the Collateral. *See supra* note 107 and accompanying text.

174 JX 9 § 6.

false impression that FSD continued to have possession of the Collateral in late 2011 and early 2012. Finally, FSD delayed and prevented IDB from discovering the truth by interfering with IDB's right to inspect and remove the Collateral. These acts collectively constitute a separate and independent breach of FSD's obligations to not hinder or delay IDB's enforcement rights under the Bailment Agreement.

3. Damages

The third element of a breach of contract claim is "resulting damages to the plaintiff."[175] As a result of FSD's breaches of the obligations imposed by the Bailment Agreement, IDB has been damaged because it no longer has sufficient collateral to cover its loan balance on the loans it made to Republic. Based on the evidence presented, I find that IDB could have taken effective remedial action to preserve the Collateral in late 2011, if FSD had not breached the Bailment Agreement. Therefore, IDB has established all three elements of its breach of contract claim. I address the calculation of damages *infra* in Part II.C.

4. Laches

In a short paragraph in its post-trial answering brief, FSD argues that IDB's breach of contract claim is barred by the doctrine of laches. There are three generally accepted elements to the equitable defense of laches: "(1) plaintiff's knowledge that she has a basis for legal action; (2) plaintiff's unreasonable delay in bringing a lawsuit; and (3)

---

[175] *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007).

identifiable prejudice suffered by the defendant as a result of the plaintiff's unreasonable delay."[176]

Although FSD has identified a date, December 24, 2009, by which it alleges IDB knew or should have known of the breach of the Bailment Agreement, it failed to present probative evidence or argument regarding either unreasonable delay or identifiable prejudice. As the Delaware Supreme Court has stated:

> [I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived . . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work . . . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.[177]

Moreover, "Delaware courts presume, in the absence of exceptional circumstances, that an action filed within the analogous limitations period was neither the product of unreasonable delay nor the cause of undue prejudice."[178] Here, Plaintiff filed its Complaint within the three-year analogous statute of limitations for a claim of breach

---

176 *Whittington v. Dragon Gp. LLC*, 2008 WL 4419075, at *3 (Del. Ch. June 6, 2008) (quoting *Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *7 (Del. Ch. Mar. 22, 2004)).

177 *Roca v. E.I. duPont de Nemours & Co., Inc.*, 842 A.2d 1238, 1243 n.12 (Del. 2004) (quoting *Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994)).

178 *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, – A.3d –, 2013 WL 911118, at *10 (Del. Ch. Feb. 22, 2013).

of contract.[179] Because IDB filed its breach of contract claim within the analogous limitations period and FSD has failed to demonstrate the existence of either prejudice or unreasonable delay, there is no merit to FSD's defense of laches.

5. The CCAAs' indemnification and hold harmless provisions

FSD next argues that the CCAAs, which contain indemnification and hold harmless provisions, apply to IDB and absolve FSD of any liability. Those provisions state that the parties, Republic and CAMI, agree to hold harmless and indemnify FSD for disputes "arising out of or related to any disputes of title, ownership, transfers of the Assets, or [FSD]'s acts or omissions, except to the extent such damages or liability result from the willful misconduct of [FSD], its officers, directors, employees."[180] At the motion to dismiss stage, FSD advanced three reasons why the CCAA provisions should apply to IDB's breach of contract claim, and I rejected each of those arguments.[181] Undeterred, FSD now raises three fresh reasons for holding the provisions in the CCAAs applicable to IDB's breach of contract claim. They are: (1) that two of the CCAAs and the Bailment Agreement were executed on the same day; (2) that the CCAAs were made part of the 2006 Revolver pursuant to the revolver's terms; and (3) that, because

---

179 10 *Del. C.* § 8106. The earliest time by which FSD avers that IDB should have known of its claims is December 2009. Defs.' Answering Br. 9. The Complaint was filed on February 13, 2012, well within the three-year analogous limitations period.

180 JX 7 ¶¶ 9.C, 13.

181 *Israel Disc. Bank of New York v. First State Depository Co.*, 2012 WL 4459802, at *11–13 (Del. Ch. Sept. 27, 2012).

Republic's loans to CAMI, Lott, and Ketterling purportedly were assigned to IDB at origination, agency principles dictate that IDB must be held to the terms of the CCAAs.

FSD's first argument is that because the two CAMI CCAAs allegedly were interrelated and executed on the same day, they should be read together as forming one contract. In support of that proposition, FSD cites *BAYPO Limited Partnership v. Technology JV, LP*[182] and *Karish v. SI International, Inc.*,[183] both of which relate to arbitration provisions. In my September 2012 Opinion, I distinguished *BAYPO* and rejected FSD's position that IDB is bound by the CCAAs' arbitration clause, reasoning that "the Bailment Agreement, unlike the ancillary license agreement between affiliates of the MTA contracting parties at issue in *BAYPO*, supersedes and operates independently of the CCAAs."[184] Unlike the agreements in *Karish* and *BAYPO*, the CCAAs and Bailment Agreement operate independently of one another in important respects. As I observed in my September 2012 Opinion:

> [T]he Bailment Agreement serves a purpose independent of the CCAAs; it defines the relationship between FSD and IDB. Importantly, the Bailment Agreement reflects the parties' clear intent that it override the CCAAs in certain respects that are central to this litigation.[185]

I also noted that:

---

182 940 A.2d 20 (Del. Ch. 2007).

183 2002 WL 1402303 (Del. Ch. June 24, 2002).

184 *Israel Disc. Bank of New York*, 2012 WL 4459802, at *8–9.

185 *Id.* at *8.

> FSD, IDB, and Republic could have, but did not, incorporate the hold harmless or exculpation provision of the "separate agreements," like the CCAAs, into the Bailment Agreement. The Court, therefore, will not incorporate the hold harmless provisions into the Bailment Agreement where the parties failed to do so.[186]

Based on that reasoning, I reaffirm that the CCAAs and the Bailment Agreement should not be read together so as to incorporate the CCAAs' indemnification provision and hold harmless provision into the Bailment Agreement.

FSD next argues that the CCAAs were made part of the 2006 Revolver pursuant to the Revolver's own terms. Specifically, the 2006 Revolver states that "Agreement" is defined as:

> The contents hereof together with the contents of any and all schedules and exhibits annexed hereto and all of which are made a part hereof and all other writings and any amendments, modifications, extensions, renewals and/or supplements hereto submitted by the Borrower [Republic] to Lender [IDB] pursuant hereto, all of which are incorporated herein by reference as though fully set forth herein at length.[187]

FSD asserts that the CCAAs fall within the category of Client Loan Documents, which the 2006 Revolver defines as including all "agreements, contracts, documents[,] and instruments, pertaining or otherwise securing at any time any *extensions of credit* by Borrower [Republic] to Clients."[188] I find, however, that the CCAAs were not Client

---

186 *Id.* at *11.

187 JX 6 § 1.1(b).

188 *Id.* § 1.1(t) (emphasis added).

Loan Documents because the CCAAs did not involve "extensions of credit" by Republic, but rather governed the storage of the Collateral at FSD. That is, FSD has failed to show that the CCAAs constitute Client Loan Documents within the meaning of the 2006 Revolver. Moreover, I accord no weight to Landerer's contrary testimony that the CCAAs would be such Client Loan Documents, because Landerer is not an attorney and his lay opinion on this legal issue is not probative.

Finally, FSD argues that because Republic's *loans* to CAMI were assigned to IDB at origination, agency principles require that Republic's actions bind IDB, including Republic's actions in entering into the four CCAAs. While IDB conceded in its interrogatories and at trial that the *loans* made to CAMI, Lott, and Ketterling were assigned to IDB, IDB did not admit that the CCAAs, which govern the storage of Collateral at FSD, were assigned to IDB.[189] Indeed, the record is devoid of any evidence that the CCAAs were assigned to IDB. Because FSD is unable to show that the CCAAs were assigned to IDB, FSD seeks to rely on agency principles to create a presumption that anything Republic did after it made the loans to CAMI, Lott, and Ketterling bound FSD, including Republic's execution of the four CCAAs. FSD, however, cites no cases nor does this Court know of any that have held that an assignment of a loan creates an agency relationship whereby the assignor's other actions and other agreements bind the assignee. Nor has FSD demonstrated that IDB was bound to the CCAAs as a result of Republic having been authorized, or appearing to an unsuspecting third party to have

---

[189] JX 277 at Interrog. No. 3; Tr. 400 (Kerneklian).

been authorized, to bind IDB.[190] To the contrary, Republic appears to have acted contrary to IDB's authority.[191] Accordingly, I conclude that IDB is not subject to any duties or obligations under the CCAAs based on "agency principles."

Having concluded that the CCAAs do not apply to IDB, I need not reach the question of whether FSD engaged in willful misconduct that would fall outside of the indemnification and hold harmless provisions.

6. UCC defenses

FSD further contends that two sections of the UCC, namely Article 7, Sections 404 and 603, provide statutory defenses to FSD as a bailee. FSD first argues that UCC Article 7, Section 404, entitled "No liability for good-faith delivery pursuant to document of title," absolves a bailee who "in good faith has received goods and delivered . . . goods according to the terms of a document of title" even if "[t]he person from which the bailee received the goods did not have authority . . . to dispose of the goods" or "to receive the goods."[192] FSD avers that it complied with the terms of the CCAAs and the Bailment Agreement, and is thereby shielded by the protections afforded in Section 404. As previously discussed, however, the December 2009 Notice provided written instructions to FSD *not* to release the Collateral without IDB's written consent. Thus, FSD's

---

190 *Heller v. Kiernan*, 2002 WL 385545, at *4 (Del. Ch. Feb. 27, 2002), *aff'd*, 806 A.2d 164 (Del. 2002).

191 *MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *10 (Del. Ch. May 16, 2007) ("Under agency law, the knowledge of an agent is generally imputed to his principal except when the agent's own interests become adverse.").

192 6 *Del. C.* § 7-404.

argument assumes that IDB failed to send, or FSD did not receive, the December 2009 Notice. Because I have concluded that IDB did send and FSD did receive the December 2009 Notice, I find that FSD did not act in good faith or within its authority when it released and delivered the Collateral to CAMI on September 12, 2011. FSD's failure to insist that Higgins and CAMI return the Collateral to FSD's custody after the Baltimore Show, together with FSD's actions to deceive IDB as to the whereabouts of the Collateral in December of 2011 and early 2012, buttress my finding of a lack of good faith.

FSD further argues that UCC Article 7, Section 603 excuses a bailee from delivery, where "more than one person claims title to or possession of the goods," until the bailee "has [had] a reasonable time to ascertain the validity of the adverse claims or to commence an action for interpleader."[193] FSD contends that there were conflicting claims of title to or entitlement to possession of the Collateral,[194] and, as a result, it is entitled to the protection of Section 603. Section 603, however, only excuses a bailee from its obligation of delivery for a reasonable time until it takes some action, either to ascertain the validity of the claims or to commence an action for interpleader. FSD neither sought to ascertain the relative validity of IDB and Republic's allegedly conflicting claims nor brought an action for interpleader in a reasonable amount of time. Thus, FSD cannot avail itself of the protections of 6 *Del. C.* § 603.

---

193 *Id.* § 7-603.

194 FSD bases its allegations regarding the existence of conflicting claims on the purported authorizations given by Republic pursuant to the CCAAs and the directions provided by IDB in documents like the December 2009 Notice.

B. Did CAMI Convert the Collateral?

Conversion is the "act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it."[195] In order to prove conversion, a plaintiff must show that: (1) it had "a property interest in equipment or other property"; (2) it had "a right to possession of the property"; and (3) "the property was converted."[196] In other words, "[t]o make out a claim for conversion, IDB must prove that, at the time of the alleged conversion, (1) IDB had a property interest in the allegedly converted property, (2) IDB had a right to possession of such property, and (3) Defendants wrongfully possessed or disposed of such property as if it were their own."[197]

As previously discussed, IDB had a property interest (specifically, a security interest) in the Collateral. Moreover, IDB had a right to set the Collateral Ratio, which required CAMI to maintain a certain amount of collateral against advances. Finally, IDB had a right to have the Collateral stored at FSD. On September 12, 2011, in contravention of IDB's rights and interests in the Collateral, CAMI took possession of the

---

195 *McGowan v. Ferro*, 859 A.2d 1012, 1040 (Del. Ch. 2004) (quoting *Arnold v. Soc'y for Savs. Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996)).

196 *B.A.S.S. Gp., LLC v. Coastal Supply Co.*, 2009 WL 1743730, at *8 (Del. Ch. June 19, 2009).

197 *Israel Disc. Bank of New York v. First State Depository Co.*, 2012 WL 4459802, at *13 (Del. Ch. Sept. 27, 2012) (citing *Cornell Glasgow, LLC v. LaGrange Props., LLC*, 2012 WL 3157124, at *5 (Del. Ch. Aug. 1, 2012) and *Jarvis v. Elliott*, 2010 WL 761089, at *4 (Del. Ch. Mar. 5, 2010)); *see also Gen. Video Corp. v. Kertesz*, 2008 WL 5247120, at *26 (Del. Ch. Dec. 17, 2008) ("One who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversion." (quoting Restatement (Second) of Torts § 227 (2008))).

Collateral. Defendants deny that CAMI wrongfully took possession of the Collateral. I have found that FSD released the Collateral to CAMI in violation of the Bailment Agreement and the December 2009 Notice. In addition, the evidence shows that Higgins controlled the actions of both FSD and CAMI as they relate to the Collateral at all relevant times from September 12, 2011 to at least March 27, 2012. Therefore, I hold that CAMI wrongfully took possession of the Collateral on September 12, 2011.

Moreover, even if the Collateral properly had been released to CAMI for the Philadelphia and Baltimore Shows, as Defendants allege, the Collateral was not returned to FSD, as required by the Bailment Agreement. Instead, Higgins caused it to be deposited into CAMI's safes.[198] Indeed, CAMI was the last party in possession of the Collateral and continued to sell the Collateral through March 2012.[199] Only a small portion of the Collateral ultimately was returned to FSD, only to be seized later by the FBI.

"Generally speaking, any distinct act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it, is a conversion."[200] By taking possession of the property, selling the Collateral, and failing to return it, CAMI wrongfully committed a distinct act of dominion over the Collateral as if it were its own. Accordingly, IDB has satisfied the elements of conversion by showing that IDB had a

---

198 *See supra* notes 60–61 and accompanying text.

199 *See supra* notes 124–126 and accompanying text.

200 *Drug, Inc. v. Hunt*, 35 Del. (5 W.W. Harr.) 339, 354 (Del. 1933).

property interest in and right to possess the Collateral, and that CAMI wrongfully possessed and disposed of the property as if it were its own.

CAMI denies any liability for its actions regarding the Collateral and raises various defenses, including that: (1) Republic authorized CAMI's use of the Collateral; (2) the Collateral was fungible; (3) no enforceable Collateral Ratio ever was set; (4) IDB cannot recover under more than one theory of liability; and (5) IDB violated the UCC by failing to enforce its rights in a commercially reasonable manner. I address each of those defenses in turn.

1. Republic's authorization of CAMI's use of the Collateral

CAMI first argues that it cannot be held liable for conversion because Republic authorized and permitted CAMI to use the Collateral, including removing it from the depository, marking it for sale, and selling it. Notably, Eric Higgins testified that he received authorization from Fenton for the release of the Collateral "a dozen or more" times from 2009 to 2011.[201] According to Eric, those authorizations permitted CAMI to remove the Collateral from storage at FSD, show the Collateral at a trade show, and return the Collateral upon completion of a trade show.[202]

---

[201] Tr. 548–50 (Eric). In addition, IDB admitted in the New York Action that "FSD and CAMI—upon information and belief, with the authorization of Defendants Republic and Ned Fenton—have *allowed* the Collateral to be removed from the depository and to be marketed for sale, and possibly sold, without IDB's authorization or benefit." JX 250 ¶ 46 (emphasis added).

[202] Tr. 528–29, 537–38 (Eric).

CAMI's conduct on and after September 12, 2011, however, was not in accordance with Republic's previous authorizations for CAMI to use the Collateral to be shown at trade shows "and thereafter returned to the depository."[203] The Collateral was removed from FSD and then allegedly displayed at the Philadelphia and Baltimore Shows in September and November 2011, respectively. The evidence at trial demonstrated that the Collateral was not returned to FSD after either of those shows or, indeed, before March 2012. Instead, CAMI, through Higgins, caused the Collateral to be deposited into CAMI's safes in its section of the same building where FSD is located.

CAMI further argues that Republic's authorizations for CAMI to use the Collateral were not expressly prohibited by the Bailment Agreement because CAMI never "released" the Collateral. In that regard, CAMI relies on Black's Law Dictionary, which defines "release" as the "[l]iberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced."[204] In the context of the Bailment Agreement, however, "release" had a different meaning. Webster's New World Dictionary defines "release" as "to set free as from confinement, duty, work, etc." and "to let go or let loose."[205] In that sense, the Bailment Agreement and December 2009 Notice limited FSD's ability to let go of the Collateral by relinquishing possession of the property. Therefore, I construe Republic's authorizations

---

203 Defs.' Opening Br. 9.

204 Black's Law Dictionary 1403 (9th ed. 2009).

205 Webster's New World Dictionary 1199 (2d ed. 1986).

for CAMI to use the Collateral to visit or participate in trade shows as being for a limited time only with the understanding that the Collateral would be returned to FSD after the conclusion of the show. Defendants failed to prove either that Republic authorized an open-ended release or relinquishment in September 2011 or that such an authorization and release would have complied with the Bailment Agreement. Furthermore, and in any event, the September 2012 release had to be authorized by IDB, not just Republic.

For these reasons, I conclude that CAMI's conduct was not in accordance with either the Bailment Agreement or Republic's purported authorizations. Therefore, CAMI did convert the Collateral when it took possession of the Collateral in September 2011 and did not return it.

2. Was the Collateral "fungible"?

CAMI next argues that because the Collateral is fungible, IDB cannot maintain a claim for conversion. Specifically, CAMI relies on this Court's statement that "[g]enerally, an action in conversion will not lie to enforce a claim for the payment of money."[206]

---

[206] *See Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 890 (Del. Ch. 2009); *see also Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v. Wachovia Bank of Del. Nat'l Ass'n*, 2011 WL 864421, at *3 (D. Del. Mar. 9, 2011) ("A conversion claim based on money deposited in an account but not returned is not recognized under Delaware law, which requires as an element of conversion the taking of specific property."); *Goodrich v. E.F. Hutton Gp., Inc.*, 542 A.2d 1200, 1203 (Del. Ch. 1988) ("No Delaware court has apparently recognized a cause of action for conversion of money, as opposed to goods.").

CAMI asserts that the Collateral was "merely a means to a cash payment," [207] and that under both California law[208] and the CAMI Loan Agreement,[209] the Collateral is a "fungible" and "openly traded commodity." Even so, CAMI's argument must fail. The Delaware law on conversion does not focus on whether an asset is fungible, but rather on whether the conversion claim relates to "specific property."[210] Delaware distinguishes, for example, between money and tangible goods.[211] Here, the Collateral, as either numismatic coins or bullion, constituted specific, identifiable, and tangible property. The detailed records kept by FSD before September 12, 2011 on the large number of specific tangible items that made up the Collateral confirms this fact. Thus, I reject CAMI's argument that because the Collateral might be considered fungible in some sense, it is not sufficiently specific, identifiable, or tangible to be subject to a claim of conversion.

---

207 Defs.' Answering Br. 23 (citing Tr. 392 (Kerneklian)).

208 *See* Cal. Com. Code § 1201(b)(18)(B) (defining fungible goods as "[g]oods that by agreement are treated as equivalent"). The CAMI Loan Agreement is required to be construed under California law. *See* JX 3 ¶ 12L.

209 *See* JX 3 ¶ 12C ("[A]ll Collateral pledged under this Agreement is fungible and is an openly traded commodity.").

210 *Capitaliza-T Sociedad*, 2011 WL 864421, at *3.

211 *See Goodrich*, 542 A.2d at 1203 (distinguishing between money and a "trunk," "specific equipment," "identified cars," or "specific stock certificates"); *see also Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, 1995 WL 694397, at *16 (Del. Ch. Nov. 21, 1995) ("An action for conversion has traditionally applied to the wrongful exercise of dominion over *tangible goods*." (emphasis added)).

3. Was there an enforceable "Collateral Ratio"?

CAMI also argues that because there is no evidence of an enforceable Collateral Ratio, CAMI was not required to maintain a specific amount of collateral, and cannot be liable for conversion. Specifically, CAMI contends that the loan-to-value ratio in the 2006 Revolver is not the same metric as the Collateral Ratio in the CAMI Loan Agreement, and therefore does not evidence an enforceable Collateral Ratio.

The Collateral Ratio is defined in the CAMI Loan Agreement as "the proportion, expressed as a percentage that the dollar value of the Collateral held in the Collateral Account bears to the outstanding Advances."[212] The loan-to-value ratio was set by the 2006 Revolver's definition of "Borrowing Base" as the lesser of "the Maximum Commitment" or 85% of eligible receivables (*i.e.*, the loans due to Republic from the client in question).[213] Thus, the loan-to-value ratio meant that Republic's eligible loan receivables or the Maximum Commitment could not exceed 85% of the value of Republic's Collateral.[214]

CAMI recognizes the similarity between these two benchmarks in that the only difference it identified between them was how they define "Fair Market Value" and "forced liquidation value."[215] The CAMI Loan Agreement defines fair market value as

---

212 JX 3 § 1.

213 JX 6 § 1.1(k).

214 *Id.* § 1.1(k), (bb).

215 Defs.' Answering Br. 25.

the current price quoted on a recognized commodity exchange, whereas the 2006 Revolver states that "[f]or purpose of determining collateral value, Numismatic Coins will be valued at the price at which such coins could be sold at forced sale with prompt payment."[216] CAMI ignores, however, the 2006 Revolver's statement that "a nationwide computer system furnishes up to the minute bid and ask prices for thousands of numismatic coins, thereby providing an active two-way *market* and a method to *accurately value the collateral*."[217] The 2006 Revolver set fair market value using a recognized commodity exchange or national wholesale market. Thus, the approved approach prescribed in the 2006 Revolver comported with the definition of Fair Market Value in the CAMI Loan Agreement. Moreover, the parties' conduct during the relevant time period reflected their recognition of the existence of an enforceable Collateral Ratio. For example, in August 2009, the Error Coins were assigned as additional collateral to help alleviate and offset the overadvance to Republic.[218] Steven Higgins also acknowledged at trial that CAMI was required to maintain a Collateral Ratio.[219] For these reasons, I conclude that IDB set an enforceable Collateral Ratio and Defendants' argument to the contrary lacks merit.

---

216 JX 3 § 1; JX 6 sched. 1.1(r).

217 JX 6 sched. 1.1(r).

218 JX 25 at 031145; JX 29; Tr. 38 (Landerer).

219 Tr. 612.

4. Election of remedies

CAMI next argues that this Court should deny IDB's recovery because it elected to pursue its damages under a contract theory of recovery in the New York Action and is foreclosed by the doctrine of election of remedies from recovering under a conversion theory in this case.

CAMI principally relies on *Segovia v. Equities First Holdings, LLC*[220] for the proposition that a plaintiff can recover under only one theory and must elect its damages. In *Segovia*, the plaintiff had proven claims for the tort of conversion and for breach of contract against the same defendant.[221] Judge Slights concluded that a plaintiff "may recover only under one theory" and that "allowing [the plaintiff] to recover twice 'would yield an unwarranted windfall recovery.'"[222] *Segovia*, however, is distinguishable from this case in that IDB's claims are directed against two different defendants. Indeed, "[t]he doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party."[223] "The bar of an election does not apply to the assertion of distinct causes of action against different persons arising out of independent transactions with such persons."[224] Because IDB has

---

220 2008 WL 2251218 (Del. Super. May 30, 2008).

221 *Id.* at *20.

222 *Id.* (quoting *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 218 (3d Cir. 1992)).

223 28A C.J.S. *Election of Remedies* § 13 (2010).

224 *Id.*

asserted independent causes of action against Defendants FSD and CAMI, the doctrine of election of remedies is inapplicable.

Moreover, the Restatement (Second) of Judgments states that: "A judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor" and declares that the rules regarding election of remedies are "obsolete."[225] Double recovery is foreclosed, but that is accomplished "by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments."[226] That rules states:

> When a judgment has been rendered against one of several persons each of whom is liable for a loss claimed in the action on which the judgment is based:
>
> . . .
>
> (2) Any consideration received by the judgment creditor in payment of the judgment debtor's obligation discharges, to the extent of the amount of value received, the liability to the judgment creditor of all other persons liable for the loss.[227]

Accordingly, any recovery by IDB should be reduced pro tanto by any payment received as a result of the New York action.[228]

---

225 Restatement (Second) of Judgments § 49 & cmt. a (1982).

226 *Id.* § 49 cmt. a.

227 *Id.* § 50.

228 IDB's counsel stated at argument that "I think we [have] received $35,000 from Mr. Fenton at this point." Oral Arg. Tr. 24. To the extent that amount of recovered damages pertains to the same loss alleged by IDB as part of its claims for breach of contract and conversion in this action, it presumably will discharge that amount of liability to IDB under a final judgment in this action.

5. UCC defense

Finally, CAMI argues that IDB's recovery is barred by the UCC because IDB failed to enforce its rights in a "commercially reasonable manner." Specifically, UCC Article 9, Section 607 requires that a party collect or enforce obligations in a commercially reasonable manner. "If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions."[229]

Here, CAMI alleges that IDB failed to act in a commercially reasonable manner because it contacted the FBI and provided the FBI with the documents the FBI used to seize part of the Collateral.[230] Whether an act "is commercially reasonable is a question for the trier of fact and must be determined on a case-by-case basis,"[231] unless the act "fits under one of the 'safe harbor' exceptions of 6 *Del. C.* § 9-627(b) and (c)."[232] None of the safe harbor exceptions provided for in Sections 627(b) and (c) apply in the circumstances of this case. Accordingly, I must determine whether IDB acted in a commercially reasonable way when it purportedly contacted the FBI in connection with enforcing its rights.

---

229 6 *Del. C.* § 9-625(a).

230 Defs.' Answering Br. 25–26.

231 *Edgewater Growth Capital P'rs LP v. H.I.G. Capital, Inc.*, – A.2d –, 2013 WL 1789462, at *7 (Del. Ch. Apr. 18, 2013); *see also M & T Bank v. Bolden*, 2012 WL 6628947, at *2 (Del. Com. Pl. July 11, 2012) ("Commercial reasonableness is determined on a case by case basis.").

232 *M & T Bank*, 2012 WL 6628947, at *2.

Preliminarily, I note that the record is less than clear as to whether and, if so, how IDB contacted the FBI.[233] Nevertheless, even assuming that IDB did contact the FBI, as I do, Defendants have failed to prove that any contacts IDB had with the FBI regarding the Collateral were either commercially unreasonable or undertaken in bad faith. The evidence shows that Higgins intentionally concealed material facts regarding the loans, the Collateral, and its whereabouts from IDB. FSD and CAMI also repeatedly stymied IDB's efforts to discover the relevant facts regarding those issues both before and during this litigation, and through formal and informal means. In such circumstances, it would not be unreasonable for a litigant to contact law enforcement authorities for assistance. Accordingly, I deny CAMI's UCC defense based on 6 *Del. C.* §§ 9-607 and 9-625.[234]

C. Damages

1. Standard

IDB must prove its damages by a preponderance of the evidence.[235] Delaware does not "require certainty in the award of damages where a wrong has been proven and

---

233 At trial, IDB's counsel instructed Kerneklian not to answer questions regarding his knowledge of who called the FBI to the extent that he had gained that knowledge as a result of contact with outside or in-house counsel. Tr. 411–12, 466–67. After I overruled that objection, Kerneklian testified that he did not know who contacted the FBI, Tr. 466–67, but believed someone associated with IDB provided documents to the FBI. Tr. 468. The record does not disclose, however, whether IDB volunteered that information or provided it to the FBI upon request.

234 For the same reasons, I also deny CAMI's request that IDB's recovery be barred by the doctrine of unclean hands as a result of IDB's contact with the FBI.

235 *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *22 (Del. Ch. Jan. 29, 2010).

injury established."[236] Indeed, "[t]he quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage."[237] Responsible estimates of damages that lack mathematical certainty are permissible so long as the court has a basis to make such a responsible estimate.[238] Furthermore, public policy has led Delaware courts to show a general willingness to make a wrongdoer "bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven."[239] Nevertheless, when acting as the fact finder, this Court may not set damages based on mere "speculation or conjecture" where a plaintiff fails adequately to prove damages.[240]

---

236 *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *15 (Del. Ch. Oct. 23, 2002) (quoting *Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Prods., Inc.*, 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992)).

237 *Total Care Physicians, P.A. v. O'Hara*, 2003 WL 21733023, at *3 (Del. Super. July 10, 2003).

238 *Del. Express Shuttle*, 2002 WL 31458243, at *15 (quoting *Red Sail Easter*, 1992 WL 251380, at *7).

239 *Great Am. Opportunities*, 2010 WL 338219, at *23 (citing *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1023 (Del. 2001), *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1958), *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 855 A.2d 1059, 1067 (Del. Ch. 2003), and *Dionisi v. DeCampli*, 1995 WL 398536, at *18 (Del. Ch. June 28, 1995)).

240 *Medek v. Medek*, 2009 WL 2005365, at *12 n.78 (Del. Ch. July 1, 2009) (quoting *Henne*, 146 A.2d at 396).

2. Damages calculation

This case is not an action to collect a deficiency judgment.[241] Rather, IDB claims to have been damaged by both FSD's breach of the Bailment Agreement and CAMI's conversion of the Collateral to the extent it no longer has sufficient collateral to cover the outstanding loan balance owed to IDB.

On September 9, 2011, three days before FSD's unauthorized release and CAMI's subsequent conversion of the Collateral, IDB had sufficient collateral to cover its loan balance against Republic. Indeed, the Collateral associated with the Accounts was valued by FSD at $18,266,776.38.[242] Around the same time, on October 6, 2011, Republic's loan balance was $12.553 million, with loans to CAMI, Ketterling, and Lott accounting for 92% or $11.551 million of that amount.[243] Thus, IDB had ample collateral to cover

---

241 Defendants argue that IDB's only viable claim after liquidating the Collateral is for a deficiency judgment against CAMI. In support of that proposition, Defendants cite two UCC sections, 6 *Del. C.* §§ 9-608 and 9-615, which deal with how proceeds of collateral are to be applied after collection, enforcement, or disposition. These sections, however, assume that the secured party receives proceeds through either collection, enforcement, or disposition, which includes the sale, lease, license, or other disposition of collateral. *See* 6 *Del. C.* § 9-610. Neither Section 9-608 nor Section 9-615 restricts a secured party from seeking judgment in a court. Indeed, Section 9-601 permits a "secured party" to "reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure." *See id.* § 9-601. Here, IDB is exercising its right to enforce its security interest in the Collateral and to reduce its claim to judgment. Therefore, I deny Defendants' request for a declaration "that IDB's only viable claim is for a deficiency judgment against CAMI in an amount to be determined at a later date in a court of law."

242 *See supra* note 59 and accompanying text.

243 JX 95 (dated October 6, 2011).

the entire loan balance. As a result of CAMI and FSD's conduct, however, only a fraction of that Collateral was returned to FSD, and IDB was left under-collateralized.

IDB bases its damages claim on the amount of Republic's outstanding loan balance and does not seek to recover more than that from Defendants here. IDB's damages are mitigated further by the value of any collateral IDB could execute on and sell to satisfy the outstanding loan balance, including the Error Coins and any collateral returned to FSD and later seized by the FBI.

Accordingly, to calculate IDB's damages, this Court must determine the amount of the loan balance on its loan to Republic and offset against that amount the estimated value of any remaining Collateral.

a. The amount of the loan balance

IDB submits that the legal loan balance on its loan to Republic as of July 10, 2012, the date of the judgment against Republic, is $11,327,488.92.[244] Defendants do not dispute that number. Therefore, I conclude that the legal amount of the loan balance is $11,327,488.92.

---

[244] *See* JX 279 ("[J]udgment is hereby entered in favor o[f] Plaintiff Israel Discount Bank of New York and against Defendants [Republic], Ned Jay Fenton, Susan R. Fenton and the R. Zvansky Trust, jointly and severally, in the amount of $11,327,488.92, which sum includes interest and default interest pursuant to § 2.2 of the [2006 Revolver]." (emphasis omitted)). According to IDB, interest and costs continue to accrue under the 2006 Revolver. Pl.'s Opening Br. 38 n.18.

b. Value of the remaining Collateral

The remaining Collateral (the "Remaining Collateral") consists of three components: (1) the first cache of coins retained by the FBI ("FBI's First Cache"); (2) the second cache of coins retained by the FBI ("FBI's Second Cache" and together with the FBI's First Cache, the "Seized Collateral"); and (3) the Error Coins.

IDB was the only party that called an expert witness, Todd Imhof, to render an opinion on the value of the Remaining Collateral. Imhof is a vice president of Heritage Numismatic Auctions, Inc. ("Heritage"), which is "one of the largest rare coin companies in the world, the largest collectibles auctioneer and the third largest auction house in the world."[245] In the past five years, Imhof has handled the sale of over $300 million in rare coins at auction or via private sale.[246] Imhof also has served as an expert and legal consultant in other legal matters, including matters involving numismatics and the valuation of rare coins and collectibles.[247]

Defendants urge this Court to exclude or ignore Imhof's testimony and report because his opinions were based on his "professional experience" and "best guess," as opposed to a reliable methodology for valuing the Remaining Collateral. Instead, Defendants seek to rely on valuations conducted as part of IDB's ordinary course of business. For the following reasons, I find that Imhof is a competent expert witness and

---

245 JX 286 ¶ 1.

246 *Id.* Ex. 1.

247 *Id.* ¶ 5.

that he employed a reliable method in reaching his valuation. Thus, I accept his opinions for purposes of my damages calculation.

1. Imhof's methodology

Imhof based his valuation of the Remaining Collateral on three factors: (1) scarcity, (2) demand, and (3) condition.[248] Condition is determined on a numeric scale of 1 to 70.[249] Although grading rare coins is somewhat subjective, Professional Coin Grading Service ("PCGS") and Numismatic Guaranty Corporation ("NGC") provide grading and third party certification information that frequently is recognized and embraced by major dealers, collectors, and investors.[250] A coin certified by either PCGS or NGC is encapsulated in an inert coin case along with pertinent data such as date of issue, mintmark, denomination, and grade. Although it is preferable to have a coin in-hand, it is common to evaluate, buy, and sell coins "sight-unseen," relying entirely on the third-party certification because of the accuracy and market acceptance of coins certified by NGC and PCGS.[251]

In performing the appraisal, Heritage's staff, under Imhof's supervision, consulted various published price guides, recent private sales, and auction prices realized for

---

248 *Id.* ¶ 17.

249 *Id.*; Tr. 213 (Imhof).

250 JX 286 ¶ 17.

251 *Id.*

comparable items, and considered the then-current market environment.[252] According to Imhof, his valuation would not have differed materially if he had evaluated the coins in-hand. In that regard, he also stated that any deviation would have been limited to a 5% upward or downward differential from his appraised values.[253]

In addition, Imhof made a handful of adjustments to better approximate fair market value. Fair market value is defined as: "The price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect."[254] Imhof testified that what the coins would sell for at a large public auction best approximated fair market value.[255] According to Imhof, "most sellers of rare coins choose to sell via . . . auction because of the 'peace-of-mind' they get knowing that their coins were marketed to the widest possible audience and that their items sold for a single bid increment more than anyone else in the industry (dealers, collectors and investors alike) was willing to pay."[256]

---

252 *Id.* ¶ 18. This Court has recognized that a comparables analysis is a reliable methodology for valuing assets where the assets being valued are comparable. *Cf. Le Beau v. M.G. Bancorporation, Inc.*, 1998 WL 44993, at *8 (Del. Ch. Jan. 29, 1998) ("Where the valuation exercise rests upon data derived from companies comparable to the company being valued, it stands to reason that the more 'comparable' the company, the more reliable will be the resulting valuation information."), *aff'd in part, rev'd in part*, 737 A.2d 513 (Del. 1999).

253 JX 286 ¶ 19.

254 Black's Law Dictionary 1691 (9th ed. 2009).

255 JX 286 ¶ 20. In contrast, Imhof used a private sale value to value the Error Coins. *See infra* Part II.C.2.b.3.

256 *Id.* ¶ 20.

Imhof's valuation also took into account transaction costs. For a typical auction, Heritage, like other auction houses, charges a seller's fee of 10% and a buyer's fee of 17.5%.[257] Based on the quality and quantity of the Seized Collateral, however, Imhof assumed that Heritage would waive the seller's fee and reduce the buyer's fee to 15%.[258] Thus, in a hypothetical sale of a portion of the Seized Collateral for $100,000, Imhof would expect IDB to be able to realize $85,000 toward the reduction of Republic's outstanding loan balance.

2. The Seized Collateral

The FBI's First Cache, which was seized on March 29, 2012, consists of 998 coins.[259] On April 4, 2012, IDB compiled a list of the FBI's First Cache and provided it to Imhof to conduct his appraisal. Imhof appraised the FBI's First Cache at a value of $2,542,590 before any adjustment for transaction costs.[260] The FBI's Second Cache, which was seized on May 8, 2012, consists of coins pledged as collateral between September 12, 2011 and April 4, 2012, and inspected by IDB on April 5, 2012.[261] Imhof appraised the FBI's Second Cache at a value of $1,263,981.[262]

---

257 *Id.* ¶ 23.

258 *Id.*

259 *See* JX 205 Ex. A.

260 JX 286 Tab 2(c) Ex. A.

261 Tr. 353–55 (Kerneklian), 456–59 (Miller); JX 259–262.

262 JX 286 Tab 2(c) Ex. B.

Although Imhof valued the Seized Collateral in April 2012 as part of IDB's second motion for contempt, Imhof and his staff conducted a market check in October 2013 to insure that no intervening conditions warranted a change in his prior valuation. Specifically, Imhof testified that "we did a significant amount of cross fact-checking, going back and forth, both myself and probably three, four or five of my other staff, reviewing everything to make sure that we still were comfortable with the valuations" and we "looked to see if there were any updated trades or more recent trades, comparable trades in the auction venues."[263] Imhof ultimately concluded that "there wasn't a whole lot of movement in . . . precious metals" and that the indexes related to the rare coin industry "were pretty stable."[264] That conclusion also comported with Imhof's opinion that the coin market does not "have really dramatic and violent short-term market swings."[265]

Having considered the evidence presented by Imhof and Defendants' challenges to it, I find that the methodology Imhof used was reasonable and reliable in the circumstances of this case. Therefore, I accept Imhof's valuation of the Seized Collateral at $3,806,571. When adjusted to reflect the 15% transaction fee, the net value of the Seized Collateral following an auction would be $3,235,585.35.

---

263 Tr. 222.

264 *Id.*; *see also id.* at 223.

265 Tr. 217 (Imhof).

3. The Error Coins

On March 2, 2012, FSD released the Error Coins to IDB, which moved them to Diamond State Depository. On or around March 20, 2012, Imhof's colleague, Michael Berkman, a rare coin trader, authenticator, and numismatist, counted and inspected the Error Coins. Relying on Berkman's work, Imhof attributed to the Error Coins an "appraisal value of $800,000 to $1,200,000 if they were marketed and sold over the course of one to two years in an orderly, controlled and gradual manner."[266]

In contrast to the Seized Collateral, Imhof asserts that the Error Coins will generate a higher sale value through a series of private sales, rather than public auction.[267] Imhof opined that selling the Error Coins via public auction would reduce their value because "the quantities of the Error Coins far exceed the current market capacity for such coins and the market likely does not even realize that the Error Coins exist in such large quantities."[268] Indeed, Imhof reports that the number of certain Error Coins exceeds the number of NGC certified coins in all grades of that type. Private retailers and marketers, on the other hand, might purchase a large quantity of the Error Coins, invest time, effort, money, and other resources in creating a large broad-based advertising campaign, and thereby increase the demand for the Error Coins.[269] IDB could obtain the highest value

---

266 JX 286 ¶¶ 12, 26; Tr. 212, 221 (Imhof).

267 JX 286 ¶ 21.

268 *Id.*

269 *Id.* ¶ 22.

for the Error Coins, therefore, by selling them to such private retailers and marketers. Based on the overabundance of Error Coins in terms of current market demand, I accept Imhof's opinion that a series of private sales to reputable private retailers and marketers would best approximate fair market value.

In a series of large private sales, IDB would need to hire a broker to arrange the transactions between IDB and the ultimate private sellers and marketers.[270] Imhof predicted that Heritage would charge between a 10% to 15% commission, but for purposes of the valuation he assumed a 10% commission that would be deducted from the appraised value of the Error Coins.[271] Applying that commission to the March 20, 2012 appraisal, the net appraised value of the Error Coins would be between $720,000 and $1,080,000.

Defendants, on the other hand, argue that the Court should use a 2009 valuation of the coins by Allan Levy, an expert on error coins. Levy concluded that the Error Coins would have a Forced Liquidation Value of $10,401,600. Although Defendants contend that Levy's report is "highly probative of the [E]rror [C]oins' valuation,"[272] Levy was unavailable to testify at a deposition or at trial because he passed away in 2011.

---

270 *Id.* ¶ 24.

271 *Id*.

272 *See* JX 32, 310; Letter from David Felice, Defs.' Att'y, to the Court (Mar. 7, 2013).

Consequently, IDB could not cross-examine Levy and the Court was unable to observe his testimony.

IDB has objected to the inclusion of Levy's valuation report based on the Delaware Rules of Evidence regarding authenticity and hearsay. Under Rule 802, "[h]earsay is not admissible except as provided by law or by these Rules."[273] Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[274] Thus, for evidence to constitute hearsay, it must (1) be a statement[275] uttered (2) by a declarant[276] (3) out of court and (4) offered in evidence to prove the truth of the matter asserted. Levy's valuation report meets these criteria and, therefore, is hearsay. Moreover, Defendants offer Levy's valuation report precisely to prove the truth of the assertion in his valuation report that the Error Coins have a value of $10,401,601. Because Levy's report is hearsay, it is not admissible unless one of the hearsay exceptions applies.[277] Having carefully reviewed the hearsay exceptions, I conclude that none apply in this

---

273 D.R.E. 802.

274 D.R.E. 801(c).

275 A statement is "an oral or written assertion." D.R.E. 801(a).

276 A declarant is "a person who makes a statement." D.R.E. 801(b).

277 *Morris v. State*, 795 A.2d 653, 663 (Del. 2002) ("The statements are therefore inadmissible unless they fall within a recognized exception to the hearsay rule.").

case.[278] I hold, therefore, that because Levy's valuation report is hearsay evidence to which no exception applies, it is inadmissible and must be stricken.

In addition, Imhof asserts that Levy's valuation is "fundamentally flawed and grossly overstated because it does not factor in the supply/demand problem."[279] Even in supplemental briefing, Defendants were unable to explain whether Levy took into account the supply and demand problem identified by Imhof.[280] Accordingly, even if Levy's valuation were admissible, I would give it little or no weight.[281]

For these reasons, I accept Imhof's valuation of the Error Coins and select $1,000,000 as the value of the Error Coins net of expenses, which is within the range of values expressed by Imhof and conforms to a price, as discussed *infra*, that IDB stated it would be willing to sell the Error Coins for.

c. Damages summary

The following table shows the amount that IDB is under-collateralized and, therefore, damaged as a result of Defendants' conduct:

---

278 Defendants did not argue in their briefs that Levy's valuation report fit within any particular exception to the hearsay rule.

279 JX 282 ¶ 27.

280 Letter from David Felice, Defs.' Att'y, to the Court (Mar. 7, 2013).

281 I also find inadmissible and unpersuasive the valuations proffered by Defendants by Bowers and Merena Auctions, JX 311, and Randy Karlin, JX 312. As in the case of Levy, those appraisers were not deposed or called to testify. Furthermore, Defendants did not address how either of those putative experts dealt with the supply and demand issue raised by Imhof.

Loan Balance	$11,327,488.92
Value of the Seized Collateral	($ 3,235,585.35)
Value of the Error Coins	($ 1,000,000.00)
Total Damages	**$ 7,091,903.57**

Thus, IDB is entitled to a damages award of $7,091,903.57 against CAMI and FSD, jointly and severally, for the wrongs they committed beginning on September 12, 2011.

d. Defendants' right to repurchase the Error Coins

Defendants contend that Imhof's valuation of the Error Coins drastically underestimates their true value. To reduce the risk to Defendants of undervaluation, the Court will afford Defendants thirty (30) days from the date of entry of the Judgment resulting from this Memorandum Opinion to repurchase the Error Coins, which are in possession of IDB or its agents, for $1,000,000. If the Error Coins are indeed undervalued, then Defendants can repurchase the Error Coins for a highly discounted rate, resell the Error Coins, and recapture the value lost as a result of this Court's and Imhof's purported undervaluation.[282]

Indeed, IDB's recovery likely will be the same under either scenario. In both scenarios, IDB will receive a judgment against CAMI and FSD for $7,091,903.57. If Defendants choose to exercise their repurchase right, IDB will be made whole because its

---

[282] IDB is amenable to this solution. At argument, IDB represented that it would be willing to sell the Error Coins to Higgins or Defendants for $1 million. Oral Arg. Tr. 28 (The Court: "So you would be willing to sell [the Error Coins] to Mr. Higgins for [$]5 million." IDB's Counsel: "We would be willing to sell them to anyone for the $1 million.").

damages will be mitigated and reduced by the amount it estimated the Error Coins were worth.

e. Prejudgment interest

IDB requested prejudgment interest in the Complaint and the Joint Pre-Trial Order.[283] Delaware law is settled that "[a] successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues."[284] Generally, the legal rate of interest has been used as "the benchmark for pre-judgment interest."[285] Nevertheless, this Court "has broad discretion, subject to principles of fairness, in fixing the [interest] rate to be applied."[286] Interest is awarded with two goals in mind, one of which is "to require the respondent to disgorge any benefit it received."[287] Here, none of the parties presented any evidence in favor of the use of a rate of prejudgment interest other than the legal rate. In the exercise of my discretion, therefore, I award IDB prejudgment interest at the legal rate from September 12, 2011 to the date of judgment, compounded monthly.

---

283 Joint Pre-Trial Order § V.a.13; Compl. ¶ E.

284 *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 755 (Del. Ch. 2007) (quoting *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988)).

285 *Summa Corp.*, 540 A.2d at 409.

286 *Id.*

287 *Ramunno v. Capano*, 2006 WL 1830080, at *1 (Del. Ch. June 23, 2006), *aff'd*, 922 A.2d 415 (Del. 2007) (TABLE). The other goal of prejudgment interest is to compensate the plaintiff for the loss of the use of its money. *Id.*

D. Attorneys' Fees and Costs

1. Attorneys' Fees

Delaware follows the American Rule, under which each party must bear its own litigation expenses, including attorneys' fees, absent certain exceptions that warrant a shifting of such fees.[288] One exception to this rule is that a court may award attorneys' fees in cases where the court finds that the losing party brought the action in bad faith or that a party acted in bad faith or vexatiously to increase the costs of the litigation.[289] Another exception is where the parties agree by contract to shift the costs and expenses of litigation.[290]

"The bad faith exception is not 'lightly' invoked."[291] "Rather, the party seeking fee shifting must show by 'clear evidence' that the party from whom fees are sought has acted in subjective bad faith."[292] "There is no single standard of bad faith that justifies an

---

288 *FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *5 (Del. Ch. Jan. 22, 2007).

289 *See, e.g.*, *Openwave Sys. Inc. v. Harbinger Capital P'rs Master Fund I, Ltd.*, 924 A.2d 228, 246 (Del. Ch. 2007); *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005).

290 *Jackson's Ridge Homeowners Ass'n v. May*, 2008 WL 241617, at *1 n.3 (Del. Ch. Jan. 23, 2008); *see also Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, – A.3d –, 2013 WL 1914714 (Del. May 9, 2013).

291 *Auriga Capital Corp. v. Gatz Props., LLC*, 40 A.3d 839, 880 (Del. Ch. 2012) (citing *Nagy v. Bistricer*, 770 A.2d 43, 64 (Del. Ch. 2000)), *aff'd*, 59 A.3d 1206 (Del. 2012).

292 *Id.* at 880 (citing *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998)).

award of attorneys' fees—whether a party's conduct warrants fee shifting under the bad faith exception is a fact-intensive inquiry."[293] "The Court typically will not find a litigant acted in bad faith for purposes of shifting attorneys' fees unless the litigant's conduct rose to the level of 'glaring egregiousness.'"[294] "[M]erely being adjudicated a wrongdoer under our corporate law is not enough to justify fee shifting."[295]

"An award of counsel fees is also a proper consideration" for civil contempt.[296] "To be held in contempt, a party must be bound by an order, have notice of it, and nevertheless violate it."[297]

In a previous ruling in this case, I concluded that Defendants acted in bad faith and vexatiously in negotiating and stipulating to the PI Order, and granted attorneys' fees and costs associated with IDB's efforts in obtaining the Contempt Order and in drafting and

---

293 *Id.* (citing *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005)).

294 *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 47 (Del. Ch. 2010) (citing *Kaung v. Cole Nat'l Corp.*, 2004 WL 1921249, at *6 (Del. Ch. Aug. 27, 2004), *aff'd in part, rev'd in part*, 884 A.2d 500 (Del. 2005)).

295 *Id.* (quoting *VGS, Inc. v. Castiel*, 2001 WL 1154430, at *2 (Del. Ch. Sept. 25, 2001)).

296 *Miller v. Steller Enters., Inc.*, 1980 WL 6432, at *3 (Del. Ch. Dec. 22, 1980); *see also Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *7 (Del. Ch. May 18, 2009) ("Therefore, I grant Triton's motion for contempt against Elliott and Eastern and award Triton its reasonable attorneys' fees and costs associated with that motion.").

297 *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1181 (Del. Ch. 2009) (citing *Arbitrium v. Johnston*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997)).

negotiating the PI Order.[298] To the extent that Defendants have not satisfied that order, I reaffirm that award here.

Both parties contend they are entitled to attorneys' fees and costs based on the bad faith exception to the American Rule. IDB avers that it is entitled to attorneys' fees as a result of Defendants' litigation conduct, including: (1) "hiding from IDB that the Collateral was removed from the depository prior to the commencement of litigation and misleading IDB and this Court that at least some of the Collateral was maintained in the depository when opposing the TRO Motion"; (2) "misleading the Court about the whereabouts of the Collateral and the identity of the individual possessing the Collateral"; and (3) "creating unnecessary costs and delay by arguing that a blanket protective order must be issued to prevent the depositions of Defendants' witnesses because they in fact would be asserting the Fifth Amendment in response to all relevant questions."[299] FSD, on the other hand, seeks an award of Attorneys' Fees because IDB's

---

298 *Israel Disc. Bank of New York v. First State Depository Co.*, 2012 WL 1021180, at *4 (Del. Ch. Mar. 19, 2012). As a result of Defendants' failure to abide by the terms of the Contempt Order, Defendants are required to pay a $35,000 fine to the Court for not returning Collateral to the depository by March 20, 2012 and for failing to generate complete depository reports and provide them to IDB by March 21, 2012. *See* Order (Mar. 16, 2013). IDB also incurred $65,415.54 in attorneys' fees, litigation expenses, and costs in connection with the negotiation of the PI Order and the prosecution of the motion for contempt, which Defendants have refused to pay.

299 Pl.'s Opening Br. 40–41.

claim that FSD was selling Collateral "relied on baseless, false and frivolous allegations."[300]

a. IDB's request for attorneys' fees

IDB first seeks an award of attorneys' fees because Defendants misled the Court concerning the existence and whereabouts of the Collateral during the pendency of the TRO Motion. IDB's TRO Motion sought to "temporarily enjoin FSD from transferring additional Assets from its depository in Delaware without the express authorization of IDB or further order of this Court."[301] FSD did not inform the Court that IDB's TRO Motion was unnecessary because the Collateral no longer remained at FSD. To the contrary, FSD created the false impression that the Collateral remained at FSD, through statements, such as:

> As for the Republic Account, there are no allegations alleged by the Plaintiff that any of the items held in the Republic Account have ever been removed from First State. The allegation that First State, or its officers, will wrongfully remove property that First State is contractually obligated to hold in its accounts, is without merit. First State has never moved, sold, traded or exchanged any assets in any of the Accounts. To the extent that assets have been removed, it has been with the authorization of all of the parties to the applicable Collateral Custody Agreement and the customer has removed it. There is no need for an injunction.[302]

---

300 Defs.' Opening Br. 19.

301 Pl.'s TRO Mot. 14–15.

302 JX 209 at 14.

Likewise, at argument on IDB's TRO Motion, FSD's former counsel agreed with this Court's statement that the Collateral is "physically held at [FSD] when they're not out at a show or something like that."[303] Finally, FSD did not correct the Court when it incorrectly surmised, based on Defendants' statements, that there was Collateral remaining at FSD.[304] By misleading IDB, FSD forced IDB to incur unnecessary time and expense in pursuing the TRO Motion. By also misleading the Court, FSD succeeded in rendering the TRO largely ineffectual. This problem was exacerbated by Higgins's subsequent use of the separate corporate identities of FSD and CAMI to circumvent the intent of the TRO.

Defendants also negotiated and entered into the PI Order under the false premise that the Collateral had "a market value of at least $12.5 million."[305] That representation ultimately proved to be untrue, and I found Defendants in contempt of the PI Order. I also awarded attorneys' fees and costs associated with the Contempt Order because "Defendants acted in bad faith and vexatiously in negotiating and stipulating to the PI Order."[306]

---

303 TRO Mot. Tr. 32 (The Court: "All right. And they're [*i.e.*, the coins] physically held at First State when they're not out at a show or something like that?" Daniel Crossland, Defendants' Counsel: "That is my understanding, Your Honor.").

304 *Id.* at 45–47.

305 JX 221 ¶ 4.

306 *See Israel Disc. Bank of New York v. First State Depository Co.*, 2012 WL 1021180, at *4 (Del. Ch. Mar. 19, 2012); *see also* JX 241 ¶ 7.

Defendants misled IDB and the Court again regarding the whereabouts of the Collateral and the identity of the individual possessing the Collateral in connection with Plaintiff's first motion for contempt. At the hearing on that motion, I inquired as to whether Defendants could comply with an order requiring the return of the Collateral to FSD.[307] After a short recess, Defendants' counsel stated:

> Your Honor, I was able to talk to my client. I am told that the property is in the possession of a *third party*. The third party made my client aware earlier this week that they were going to be gone for two weeks on a vacation, and that it would be necessary for this to be a two-week time period if he's not able to get in touch with them and be able to arrange a suitable family member or whomever it would be that would allow them access in order to comply.[308]

The "client" presumably was Robert Higgins or Eric Higgins. In any event, the "third party" turned out to be Higgins, himself.[309] Higgins, however, was not a true "third party," in that he was the sole proprietor of both FSD and CAMI. Defendants' representation that they needed an additional two weeks to comply with the Court's order because the Collateral was in possession of a "third party," *i.e.*, Higgins, was calculated to mislead the Court.

Based on that misrepresentation, among other things, I entered a Contempt Order giving Defendants five days to comply.[310] Defendants later violated that order by: (1) not

---

307 JX 240 at 25–26.

308 *Id.* at 26 (emphasis added).

309 *See* JX 271; Tr. 584 (Eric), 617 (Steven).

310 JX 240 at 31.

returning the Collateral to FSD within two business days of the Contempt Order;[311] (2) failing to generate and provide to IDB depository reports that listed the Collateral held at FSD on or before March 21, 2012;[312] and (3) not permitting IDB and its representatives to appraise all of the Property held at the Depository by March 22, 2012.[313]

Defendants also caused IDB to incur unnecessary costs and delay by arguing for a blanket protective order to *preclude* the depositions of Higgins, Eric, and Lott (the "Witnesses") on the ground that the Witnesses needed protection under the Fifth Amendment. Specifically, Defendants argued in their opening brief in support of their motion for a protective order that: (1) "the deposition testimony that IDB seeks will undoubtedly implicate topics upon which the [Witnesses] will have to assert their Fifth Amendment privilege against self-incrimination"; (2) "the [Witnesses] will invoke their right to remain silent"; (3) "the deposition of an alternative 30(b)(6) witness will merely result in the circumvention of the Witnesses' privilege against self-incrimination because the Witnesses are the only individuals with relevant knowledge to this litigation."[314] All three Witnesses ultimately provided deposition testimony and only Higgins invoked the Fifth Amendment privilege against self-incrimination. Notably, although Higgins provided almost nine hours of deposition testimony, he invoked the Fifth Amendment

---

311 JX 241 ¶ 4; *see also supra* note 298.

312 JX 241 ¶ 6.3.

313 *Id.* ¶¶ 6.5, 6.6.

314 Defs.' Op. Br. in Supp. of Mot. for Prot. Order at 1, 7 (emphasis in original).

only on the topic of the disposition of the Collateral after it was released on September 12, 2011.[315] Moreover, Eric and Steven testified that they did not believe, and had no reason to believe, that they were under investigation.[316] Contrary to Defendants' representations to this Court, the Witnesses generally did not invoke their right to remain silent. Thus, Defendants' motion for a protective order provides yet another example of Defendants delaying the judicial process and imposing unnecessary costs and prejudice on IDB through misrepresentations to IDB and the Court.

In *Johnston v. Arbitrium (Cayman Islands) Handels AG*,[317] the Delaware Supreme Court upheld a fee-shifting award of attorneys' fees under the bad faith exception, where the defendants had: (i) defended the action despite their knowledge that they had no valid defense; (ii) delayed the litigation and asserted frivolous motions; (iii) falsified evidence; and (iv) changed their testimony to suit their needs.[318] Similarly, in *RGC International Investors v. Greka Energy Corp.*,[319] this Court awarded attorneys' fees against the defendant under the bad faith exception, because the defendant had forced the plaintiff to engage in litigation that would not have been necessary if the defendants had acted with even minimal responsibility, and because the multiple theories advanced by the defense

---

315 *See* JX 302 at 48, 59–60.

316 Tr. 605–06 (Eric), 623 (Steven).

317 720 A.2d 542 (Del. 1998).

318 *Id.* at 546.

319 2001 WL 984689 (Del. Ch. Aug. 22, 2001).

had "minimal grounding in fact and law" and made the litigation more expensive than it should have been.[320]

In this case, Defendants have: (1) misled the Court and IDB as to the whereabouts and value of the Collateral;[321] (2) failed to abide by the terms of the PI Order and Contempt Order; (3) delayed the litigation and asserted frivolous motions, such as Defendants' motion for a protective order; and (4) advanced multiple theories that had "minimal grounding in fact and law."[322] Accordingly, I hold that an order holding FSD and CAMI liable for paying IDB's reasonable attorneys' fees and expenses is warranted under the "bad faith" exception to the American Rule.

b. FSD's request for attorneys' fees

FSD argues that it is entitled to an award of attorneys' fees because IDB's claim that FSD was selling Collateral purportedly was based on frivolous allegations. In its Complaint, IDB alleged that FSD was marketing Collateral for sale without IDB's authorization. On November 20, 2012, IDB informed the Court that it no longer would

---

320 *Id.* at *19 n.111.

321 Indeed, Higgins consciously deceived IDB as to the whereabouts of the Collateral, as evidenced by his statement to Fenton on February 2, 2012 that "[y]ou [*i.e.*, Fenton] need to stop this or I have to spill the beans." JX 182 at 000479.

322 Although Defendants made numerous technical legal arguments to avoid or deny their obligations to IDB, the factual record demonstrates that Higgins understood the obligations that Defendants owed to IDB and deliberately chose not to comply with those obligations. *See, e.g.*, JX 134 ("If I deposit Inventory and they [IDB] lock it up I am screwed[.]"); JX 102 at 007120 ("Whether they [IDB] received wire's [sic] or checks it all came from [CAMI] and they would have discovered [t]he secrets that were being kept from them.").

be pursuing its claim for conversion against FSD.[323] Defendants emphasize that the evidence at trial showed that there is no basis for finding that that FSD sold, traded, or offered to sell IDB's property.[324] Because IDB voluntarily dismissed its claim, a form of amending its complaint, after a responsive pleading was filed, I consider that claim to have been dismissed with prejudice.[325]

Dismissal with prejudice does not mean that the claim was necessarily frivolous or that FSD is entitled to attorneys' fees. IDB's claim was based on allegations that Higgins controls both FSD and CAMI.[326] At the motion to dismiss stage, I concluded that "[b]ased on the well-pleaded facts alleged in the Complaint, it is reasonably conceivable that IDB could prove that CAMI or FSD, through Robert Higgins, wrongfully exercised dominion and control over the collateral at issue in contravention of IDB's rights."[327]

---

323 Letter from Joseph Cicero, Pl.'s Att'y, to the Court (Nov. 20, 2012).

324 Tr. 483 (Eric: "We do not buy, sell or trade anything."); Tr. 298–99 (Imhof). In that regard, FSD seeks a declaration that FSD never sold, traded, or offered to sell or trade its customers' property. Whether or not FSD ever sold *other customers'* property is not a justiciable controversy properly before this Court. *See Cartanza v. Dep't of Natural Res.*, 2009 WL 106554, at *2 (Del. Ch. Jan. 12, 2009) (requiring the existence of an actual controversy between the parties). Consequently, I decline to declare that FSD did not sell, trade, or offer to sell or trade IDB's or other customers' property on the ground that the issue is not ripe in the case of other customers and is moot as to IDB. No ruling in this Memorandum Opinion depends on whether FSD sold, traded, or offered to sell or trade any of the Collateral.

325 Ct. Ch. R. 15.

326 Compl. ¶ 27.

327 *Israel Disc. Bank of New York v. First State Depository Co.*, 2012 WL 4459802, at *13 (Del. Ch. Sept. 27, 2012).

Higgins, who was the sole owner of, and played a significant role at, both CAMI and FSD, was seen selling Collateral at trade shows.[328] On that basis, among others, it was not unreasonable until late in these proceedings for IDB to have alleged that FSD was converting the Collateral. Therefore, IDB's allegations were not frivolous, and Defendants' request for an award of attorneys' fees on that basis is without merit.[329]

2. Costs

Under the American Rule, litigants are generally responsible for their own expenses.[330] Court of Chancery Rule 54(d), however, creates an exception to the general rule whereby costs "shall be allowed as of course to the prevailing party unless the court otherwise directs."[331] Under Rule 54(d), the "prevailing" party is a party who successfully prevails on the merits of the main issue or the party who prevailed on *most*

---

328 *See* JX 305.

329 IDB argues that Defendants' request for attorneys' fees was so "baseless and inflammatory" that the Court should order Defendants' counsel to pay IDB's attorneys' fees for having to consider and respond to such a request. Pl.'s Answering Br. 3 n.2. I need not address this question because, as previously discussed, Defendants' other litigation conduct was sufficiently egregious to justify an award against them of IDB's attorneys' fees.

330 *See FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *5 (Del. Ch. Jan. 22, 2007).

331 For the purposes of Rule 54(d), costs include "expenses necessarily incurred in the assertion of a right in court, such as court filing fees, fees associated with service of process or costs covered by statute. . . . [I]tems such as computerized legal research, transcripts, or photocopying are not recoverable." *Id*. at *17.

of her claims.[332] Courts interpret the term "prevailing" to mean that a party need not be successful on all claims, but rather must succeed on a general majority of claims.[333]

In this case, IDB plainly is the prevailing party. Thus, IDB is entitled to recover from CAMI and FSD its costs under Rule 54(d) to the extent those costs are recoverable under Rule 54(d).

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I find in favor of IDB. Specifically, I find that FSD breached the Bailment Agreement by, among other things, releasing the Collateral and interfering with IDB's rights under that agreement. I also find that CAMI converted the Collateral by wrongfully possessing and disposing of the Collateral as if it were its own. Therefore, I direct that judgment be entered against FSD and CAMI, jointly and severally, in the amount of $7,091,903.57 plus prejudgment interest from September 12, 2011 at the legal rate, compounded monthly. IDB also is entitled to the return of the $25,000 that it posted in support of the TRO it obtained. Finally, IDB is entitled to an award of its attorneys' fees and expenses for prosecuting this action, including, without limitation, its costs under Rule 54(d).

As to Defendants' request for declaratory judgment, I deny that request in its entirety. In terms of injunctive relief, any of Republic's Collateral that remains in the possession, custody or control of Defendants must be turned over to IDB. Moreover,

---

332 *See id.*; *Brandin v. Gottlieb*, 2000 WL 1005954, at *27 (Del. Ch. July 13, 2000).

333 *See FGC Hldgs.*, 2007 WL 241384, at *17.

IDB is entitled to inspect and to obtain the release of Republic's Collateral to the extent any of it remains within the possession, custody, or control of either Defendants or their agents. Defendants also shall have thirty (30) days from the date of entry of the Judgment resulting from this Memorandum Opinion in which to repurchase from IDB or its agent the Error Coins for the sum of $1,000,000.

Counsel for IDB shall submit, on notice, a proposed form of final judgment reflecting these rulings within ten (10) days of the date of this Memorandum Opinion. Counsel for IDB also shall file within ten (10) days of the date of this Memorandum Opinion an appropriately documented and detailed request for reimbursement of the attorneys' fees and expenses they incurred in connection with this action. Defendants shall have ten (10) days after their receipt of service of IDB's request to file any and all objections to that request.