

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Submitted: June 21, 2012
Decided: September 27, 2012

Paul D. Brown, Esq., Joseph B. Cicero, Esq., Ann M. Kashishian, 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 is before me on a motion to dismiss the plaintiff's breach of contract and conversion claims. These claims arise out of a dispute over the handling of collateral for a \$10 million loan. The collateral at issue includes rare coins and gold bullion. The primary lender in this case took a security interest in this collateral upon issuing a loan to its client. The client in turn issued loans to its own clients and took an interest in collateral for those loans. The primary lender had an interest in this collateral due to its security interest in its client's assets. The assets are stored with a custodian at a private depository. The primary lender, its client, and the custodian entered into an agreement regarding the storage of the collateral. The parties agreed that, upon receiving written notice from the lender, the custodian would no longer be permitted to release the collateral except as authorized by the lender. The lender provided this written notice instructing the custodian to stop releasing the collateral. The custodian continued to release the collateral. The lender now seeks the return of its collateral to the depository from the custodian or from an owner who allegedly participated in the wrongful release of collateral. The custodian and the owner would have this Court dismiss the action in favor of arbitration. Alternatively, they seek to dismiss all of the asserted claims for failure to state a claim upon which relief can be granted.

Having considered the parties' arguments, the express terms of the parties' agreements, and the well-pleaded allegations of the Complaint, I find that this Court has subject matter jurisdiction over this dispute and that the lender has not failed to state a claim. The agreement that controls the parties' dispute does not contain an arbitration

provision and, contrary to the defendants' arguments, I find that the parties did not agree to submit this dispute to arbitration. Additionally, the Complaint sufficiently alleges facts to support the primary lender's breach of contract and conversion claims. Therefore, I deny the motion to dismiss.

I. BACKGROUND

A. The Parties¹

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

There are two named defendants. Defendant Certified Assets Management, Inc. ("CAMI") is a Delaware corporation. The other defendant is the owner of the private depository where the collateral at issue in this case is stored, First State Depository Company, LLC ("FSD" or, collectively with CAMI, "Defendants"). FSD is a Delaware limited liability company. Robert Higgins, who is not a party to this action, owns FSD. Robert Higgins also serves as a principal stockholder of CAMI. Robert's son Eric Higgins, also not a party, manages FSD. FSD and CAMI share a location for their principal place of business and have the same registered agent for service of process.

¹ Plaintiff filed its Verified Complaint on February 13, 2012. Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Complaint and documents incorporated by reference in, or integral to, the Complaint.

B. Facts

1. Agreements

IDB entered into a revolving credit agreement with its client Republic National Business Credit LLC (“Republic”) on December 7, 2004. In exchange for making certain loans, advances, and extensions of credit to Republic, IDB took a security interest in all of Republic’s assets pursuant to separate security agreements.² On June 29, 2006, Republic and IDB entered into an Amended and Restated Loan and Security Agreement (the “Credit Agreement”).³ The Credit Agreement grants IDB a “first lien and security interest upon the Collateral.”⁴ Collateral is defined by a list of sixteen items preceded by the following statement: “‘Collateral’: All the following assets[,] property, interests and/or rights of [Republic] on or in which a security and lien interest is granted to [IDB], whether now owned or existing or hereafter created, acquired or arising and wheresoever located.”⁵ The Credit Agreement provides that IDB’s security interest in the collateral

² The parties’ first loan agreement was the Revolving Credit Agreement entered into on December 27, 2004 and their first security agreements were entered into on October 6, 2004 and December 27, 2004. These agreements were amended by the June 29, 2006 Amended and Restated Loan and Security Agreement. *See* Compl. Ex. A. Republic and IDB entered into seven more amendments to the Amended and Restated Loan and Security Agreement between June 11, 2007 and November 1, 2011. The Seventh Amendment is attached to the Complaint as Exhibit B.

³ Compl. Ex. A.

⁴ Credit Agreement § 3.4 (“Borrower acknowledges that the security interest granted to Lender pursuant to this Section 3 is and continues to be a first lien and security interest upon the Collateral.”).

⁵ *Id.* § 1.1(v).

“shall remain in full force and effect until all of the Obligations of [Republic] to [IDB] are fully paid and satisfied.”⁶ IDB asserts that its loan to Republic has a current balance of \$10,649,880.30.

The assets Republic pledged to IDB as collateral include \$17 million in the form of certified numismatic coins, gold and silver coins, bullion, collectibles, and other items of value (the “Assets”). Although IDB alleges that its security interest in Republic’s Assets is not limited to the Assets held by FSD, the Assets at issue in this litigation were stored at FSD’s Delaware depository. Pursuant to reports generated by FSD on January 31, 2012 and February 8, 2012, the Assets were stored at FSD’s depository at those times. The Assets were held at FSD’s depository in separate accounts. The Complaint alleges that two accounts are held by Defendant CAMI.⁷ It further alleges that two accounts are held by Republic clients Don Ketterling and Vicki Lott.⁸ FSD, Republic, and Republic’s clients entered into Collateral Custody Account Agreements (“CCAAs”) to govern these accounts.⁹ The two CCAAs governing CAMI’s accounts were entered

⁶ *Id.* § 3.1.

⁷ These accounts are CAMI Collateral One, Acct. No. COLC000900, and CAMI Collateral Two, Acct. No. COLC000901. Compl. ¶ 18.

⁸ These accounts are Don Ketterling Collateral, Acct. No. COLI000902 and Vicki Lott, Acct. No. COLI000919. *Id.*

⁹ The collateral accounts governed by these agreements are discussed in the Complaint and are referenced in the Bailment Agreement, which is Exhibit C to the Complaint. Therefore, they are “integral” to the Complaint and may be considered on a motion to dismiss under Rule 12(b)(6). *See e4e, Inc. v. Sircar*, 2003 WL 22455847, at *3 (Del. Ch. Oct. 9, 2003). For purposes of Defendants’

into on August 24, 2006.¹⁰ FSD, Republic, and IDB entered into a CCAA on August 12, 2009.¹¹ This CCAA covers additional Assets that Republic pledged to IDB, namely, 12,956 rare missing edge (“error”) Presidential and Sacagawea dollar coins.

In connection with the financing arrangement between IDB and Republic and IDB’s security interest in the Assets, IDB, Republic, and FSD entered into an agreement on August 24, 2006 (the “Bailment Agreement” or “Agreement”).¹² In this Agreement, the parties agree 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 (the “Property”) pursuant to separate agreements between [FSD], [Republic] and [Republic]’s clients (collectively and individually, the “Contracts”).¹³

The parties further “acknowledge and agree that [IDB] is a third-party beneficiary of such Contracts.”¹⁴ Among other things, FSD and Republic also

12(b)(1) motion, the Court may consider documents outside the Complaint. *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 429 n.15 (Del. Ch. 2007).

¹⁰ Defs.’ Revised Opening Br. in Supp. of Their Mot. to Dismiss and Answering Br. in Opp’n to Pl.’s Second Mot. for Contempt (“Defs.’ Op. Br.”) Exs. 4, 5. The Ketterling CCAA is dated December 21, 2006 and the Lott CCAA, which was never executed, is dated April 31, 2008. *Id.* Exs. 6, 7.

¹¹ Compl. Ex. D.

¹² *Id.* Ex. C, Bailment Agreement.

¹³ Bailment Agreement 1.

¹⁴ *Id.*

acknowledge and agree that [FSD]: (a) is acting as the custodian for, and the bailee for the benefit of . . . [IDB], to perfect the security interest of [IDB] in the Property; (b) shall hold the Property for the benefit of [IDB], and (c) will make dispositions of the Property only in accordance with the terms of this Agreement.¹⁵

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.¹⁶

Importantly, IDB alleges that it gave such written notice on December 23, 2009 and reiterated it in a November 4, 2011 letter. The notice allegedly stated that “FSD may no longer release the Assets to, or pursuant to the instructions of, Republic.”¹⁷

2. Facts leading to the alleged breach of contract and conversion of the collateral

This litigation was precipitated, in part, by IDB’s discovery of the relationship between FSD and CAMI, namely that Robert Higgins allegedly controls both entities.¹⁸

¹⁵ *Id.* § 1.

¹⁶ *Id.* § 6. As previously noted, the term “Property” is defined broadly in the Bailment Agreement to include 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. *Id.* at 1.

¹⁷ Compl. ¶ 21.

¹⁸ *Id.* ¶ 28 (“IDB did not discover the [] relationship between FSD and CAMI until October 27, 2011 . . .”).

“Upon this discovery, IDB became concerned that its Assets were not protected adequately because they are being stored at a facility affiliated with a substantial borrower and pledgor of certain of the Assets.”¹⁹ In response to this concern, IDB began a series of attempts to inspect the collateral stored at FSD’s facility based on its rights under the Bailment Agreement.²⁰ FSD refused Plaintiff access to the depository on each such attempt.²¹

IDB further alleges that around the same time it “learned that the Defendants engaged in a variety of unauthorized and unlawful conduct by removing certain of the Assets from FSD’s depository in Delaware without IDB’s authorization, and by marketing for sale and by attempting to sell the removed Assets to third parties without IDB’s consent.”²² IDB learned, for example, that Robert Higgins attended the August 18, 2011 Chicago World’s Fair of Money with a 1776 Continental “Currency” pewter \$1

¹⁹ *Id.* ¶ 29.

²⁰ *See id.* ¶¶ 29 (IDB visits FSD on November 3, 2011 and is not permitted to verify individual collateral), 31–32 (IDB unsuccessfully attempts to coordinate a visit to FSD with Republic’s managing director Ned Fenton—with whom IDB historically had coordinated such visits—between December 2011 and January 2012), 33 (inspection date set with Ned Fenton, but Eric Higgins advises IDB that this date is not convenient for FSD).

²¹ *See id.* ¶¶ 36 (IDB arrives at FSD on February 3, 2012, Eric Higgins refuses access), 37–39 (IDB arrives at FSD on the agreed upon date of February 10, 2012, but Eric Higgins refuses access).

²² *Id.* ¶¶ 40–45.

coin, grade 65, serial number 1887816-001 while this coin was listed on FSD's 2012 detail reports as an Asset held at FSD's depository in Delaware.²³

C. Procedural History

Plaintiff, IDB, filed its Complaint in this action on February 13, 2012, asking this Court for specific performance based on a breach of contract claim against Defendant FSD and alleging conversion of property against Defendants FSD and CAMI. At the same time, IDB moved for a temporary restraining order. I granted that motion on February 21, 2012. On the same day, IDB moved for a preliminary injunction which I granted on February 29 pursuant to a stipulation of the parties. On March 2, Plaintiff filed a Motion for Contempt. I granted that motion in part finding that FSD and CAMI had violated, and were in contempt of, the Preliminary Injunction Order. On April 16, 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, 2012. On May 2, Defendants moved to stay discovery. I heard oral argument on Defendants' Motion to Dismiss and Motion to Stay Discovery and on Plaintiff's Second Motion for Contempt on June 1. At that time, I denied the Motion to Stay Discovery and stayed Plaintiff's Second Motion for Contempt

²³ *Id.* ¶¶ 41–42; *see also id.* ¶ 45 (setting forth eleven additional items that IDB alleges were held for sale at the February 2, 2012 Long Beach Expo while appearing on FSD's collateral inventories).

pending at least resolution of Defendants’ Motion to Dismiss if not a full trial on the merits.²⁴ This Memorandum Opinion reflects my ruling on the Motion to Dismiss.

D. Parties’ Contentions

Defendants advance two theories why this Court should dismiss IDB’s Complaint. First, they seek dismissal for lack of subject matter jurisdiction under Court of Chancery Rule 12(b)(1). Second, they argue that the Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. I address these two distinct theories, in that order, in the Analysis section, *infra*.

II. ANALYSIS

A. Subject Matter Jurisdiction Under Rule 12(b)(1)

The Court of Chancery will dismiss an action under Rule 12(b)(1) “if it appears from the record that the Court does not have subject matter jurisdiction over the claim.”²⁵ This Court can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction.²⁶ The plaintiff “bears the burden of establishing this Court’s jurisdiction.”²⁷ Moreover, on a

²⁴ Tr. 64, 103. Trial is scheduled to begin on November 29, 2012.

²⁵ *AFSCME Locals 1102 & 320 v. City of Wilmington*, 858 A.2d 962, 965 (Del. Ch. 2004).

²⁶ *ASDC Hldgs., LLC v. Richard J. Malouf 2008 All Smiles Grantor Annuity Trust*, 2011 WL 4552508, at *4 (Del. Ch. Sept. 14, 2011).

²⁷ *Yancey v. Nat’l Trust Co.*, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993).

motion to dismiss under Rule 12(b)(1), the court may consider material outside the allegations of the Complaint.²⁸

In this case, IDB purports to invoke this Court's traditional equity jurisdiction by seeking an equitable remedy, namely, specific performance and injunctive relief. One requirement of that jurisdiction is that the plaintiff not have an adequate remedy at law.²⁹

Here, Defendants claim that IDB does have such a remedy in the form of arbitration. Specifically, Defendants assert that the agreements at issue in IDB's breach of contract claim—with the exception of the Bailment Agreement—contain arbitration clauses and, thus, that this Court “lacks subject matter jurisdiction over a dispute that the parties committed to binding arbitration.”³⁰ Although IDB is not a signatory to those agreements, Defendants present several reasons why the arbitration provision contained in the CCAAs binds IDB to arbitrate its breach of contract claim, including that (1) IDB is a third-party beneficiary under the CCAAs, (2) equitable estoppel requires the Court to submit this case to arbitration, and (3) IDB is subject to the terms of the CCAAs based on (a) assumption principles and (b) agency principles.

Defendants maintain that the absence of an arbitration provision in the Bailment Agreement, upon which Plaintiff principally relies, is not dispositive for three reasons. First, in the Bailment Agreement, IDB expressly acknowledges that it is a third-party

²⁸ *Acierno v. New Castle Cty.*, 2006 WL 1668370, at *1 n.8 (Del. Ch. June 8, 2006).

²⁹ *ASDC Hldgs., LLC*, 2011 WL 4552508, at *4.

³⁰ Defs.' Op. Br. 16.

beneficiary of the CCAAs. Second, without the CCAAs and the loan agreements upon which they are based, the Bailment Agreement allegedly would be meaningless. In this regard, Defendants note that IDB “is and has relied upon the accounts created by the [CCAAs] in support of its claims and as [a] basis for the entry of injunctive relief.”³¹ Lastly, Defendants argue that the Bailment Agreement would fail for lack of consideration without the coexistence of the CCAAs.

In response to Defendants’ 12(b)(1) argument, IDB contends that the Court has jurisdiction to adjudicate its claims for two main reasons. First, Plaintiff asserts that its claims are governed solely by the Bailment Agreement which is not subject to arbitration. Second, even if its claims would have been subject to arbitration, IDB argues that Defendants have waived any right they may have had to compel arbitration. In that regard, IDB asserts that Defendants waived their right by fully engaging in this litigation for months before moving for a dismissal in favor of arbitration, including by contesting IDB’s factual allegations, bringing and defending various pretrial motions, and assenting to certain pretrial orders, including a stipulated preliminary injunction order that Defendants later violated.

1. Who should decide substantive arbitrability?

Before examining whether IDB’s claims must be submitted to arbitration, the Court must answer a threshold question: whether this court or an arbitrator should decide

³¹ Defs.’ Reply Br. in Further Support of Their Mot. to Dismiss (“Defs.’ Reply Br.”) 6.

the issue of arbitrability. Under Delaware law, a court must decide such questions of substantive arbitrability unless the parties clearly and unmistakably agree by contract that issues of substantive arbitrability will be answered in arbitration.³² Under the Delaware Supreme Court's *Willie Gary*³³ decision, this Court will submit arbitrability issues to an arbitrator where an arbitration clause (1) generally provides for arbitration of all disputes and (2) incorporates rules, such as the American Arbitration Association rules, that empower the arbitrator to decide substantive arbitrability.³⁴

Relying on the CCAAs, Defendants argue that the parties have agreed by contract to submit this dispute to arbitration. They suggest further that *Willie Gary* should apply even though the arbitration clause in the CCAAs does not provide for arbitration of *all* disputes.³⁵ The relevant language of the arbitration clause reads as follows:

20. **Jurisdiction, Venue And Waiver** – *Except for interpleader suits*, the Parties agree that any controversy or claim arising out of or in connection with this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the commercial arbitration rules of the American Arbitration Association and judgment on the award

³² *Willie Gary LLC v. James & Jackson LLC*, 2006 WL 75309, at *1 (Del. Ch. Jan. 10, 2006), *aff'd*, 906 A.2d 76 (Del. 2006).

³³ *James & Jackson, LLC v. Willie Gary*, 906 A.2d 76 (Del. 2006).

³⁴ *Id.* at 80.

³⁵ Letter from David A. Felice, Defs.' Att'y, to the Court 4 n.1 (June 21, 2012) ("Defs.' June 21 Letter").

rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.³⁶

On its face, this provision's exclusion of interpleader suits from the scope of the arbitration clause suggests that under *Willie Gary* this Court, and not the arbitrator, should decide whether IDB's claims must be arbitrated. Defendants argue to the contrary, emphasizing that the only carve-out from the CCAA arbitration provision is for interpleader actions.³⁷ To support their argument, Defendants point to this Court's decision in *BAYPO Limited Partnership v. Technology JV, LP*.³⁸ In *BAYPO*, the arbitration clause excluded requests for temporary injunctive relief from its scope. There, the Court found that, under *Willie Gary*, the Court should not decide substantive arbitrability because, although the parties did not agree to arbitrate *all* claims, the arbitration clause contained only a narrow carve-out "to provide the parties with limited ancillary relief to protect their interests during the pendency of the arbitration process."³⁹ In *BAYPO*, however, the arbitration clause specifically directed that "all substantive and procedural issues" would be decided in arbitration.⁴⁰ In contrast, the arbitration clause in the CCAAs contains no such directive. Further, the carve-out in Section 20 of the

³⁶ Compl. Ex. D. ("8-12-09 CCAA") § 20 (emphasis added). This language appears in each of the CCAAs at Section 20.

³⁷ Defs.' June 21 Letter 4 n.1.

³⁸ 940 A.2d 20 (Del. Ch. 2007).

³⁹ *Id.* at 26, 27.

⁴⁰ *Id.* at 27.

CCAAs is for interpleader actions, not temporary injunctive relief.⁴¹ That distinction is especially relevant here because IDB’s breach of contract claim seeks to enforce its right under the Bailment Agreement to control the disposition of collateral in the possession of bailee FSD. If FSD faced competing instructions from IDB and Republic or CAMI, for example, one viable alternative to ignoring IDB’s instructions and potentially breaching its contractual obligations would be to commence an interpleader action.

The decision in *BAYPO*, therefore, does not support a finding in this case that the parties have committed substantive arbitrability issues to an arbitrator. Rather, because the arbitration provisions do not provide for the arbitration of all disputes, this Court is responsible for answering questions of substantive arbitrability.⁴²

⁴¹ Rather than a carve-out to hold the case in status quo pending arbitration on the merits, the CCAAs provide for a court to decide the merits of a dispute in an interpleader action. For example, Section 9(C) of the CAMI, Lott, and Ketterling CCAAs states: “In the event [FSD] becomes involved in litigation arising out of or in connection with this Agreement, or should [FSD] be unable to resolve conflicting instructions concerning the Account or the Assets held therein, Lender and Company jointly and severally agree and consent to [FSD] filing an action in interpleader for the purpose of resolving the rights and claims of the Parties.”

⁴² *James & Jackson, LLC v. Willie Gary*, 906 A.2d 76, 81 (Del. 2006) (“In this case, the arbitration clause . . . expressly authoriz[es] the nonbreaching Members to obtain injunctive relief and specific performance in the courts. Thus, despite the broad language at the outset, not all disputes must be referred to arbitration . . . [and] the trial court properly undertook the determination of substantive arbitrability.”).

2. Are IDB's claims subject to arbitration?

The proper approach for analyzing questions of substantive arbitrability is set forth in *Parfi Holding AB v. Mirror Image Internet, Inc.*⁴³ In *Parfi*, the Supreme Court stated:

When the arbitrability of a claim is disputed, the court is faced with two issues. First, the court must determine whether the arbitration clause is broad or narrow in scope. Second, the court must apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions that require arbitration. If the court is evaluating a narrow arbitration clause, it will ask if the cause of action pursued in court directly relates to a right in the contract. If the arbitration clause is broad in scope, the court will defer to arbitration on any issues that touch on contract rights or contract performance.⁴⁴

The Supreme Court cautioned, however, that “[t]he policy that favors alternate dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation.”⁴⁵ And, where an “arbitration clause signals only an intent to arbitrate matters that touch on the rights and performance related to the contract. The contract term ‘arising out of or in connection with’ must be considered in that light.”⁴⁶

As in *Parfi*, the arbitration provision in the CCAAs commits the parties to arbitrate “any controversy or claim arising out of or in connection with this Agreement.”⁴⁷ The

⁴³ 817 A.2d 149 (Del. 2002).

⁴⁴ *Id.* at 155.

⁴⁵ *Id.* at 156.

⁴⁶ *Id.* (citation omitted).

⁴⁷ *See, e.g.*, 8-12-09 CCAA § 20.

Parfi Court found this provision to be broad in scope because it indicates an intent to arbitrate all matters that touch on the rights created by the agreement.⁴⁸ The CCAAs' provision contains the same broad language but also contains a carve-out for interpleader suits. In the context of this case, where the claim in dispute is analogous or closely related to the excluded category of disputes, *i.e.*, interpleader suits, the scope of the arbitration clause could be considered narrow. In that case, the relevant question would be whether IDB's breach of contract claim "directly relates to a right in the contract." The specific right IDB seeks to enforce is its ability to insist, upon written notice to FSD, that FSD follow only IDB's instructions. As discussed in the succeeding paragraphs, that right emanates entirely from the Bailment Agreement and, to a certain extent, supersedes rights granted under the CCAAs. Thus, I conclude that IDB's breach of contract claim does not relate directly to a right in the CCAAs, and that because, unlike the CCAAs, the Bailment Agreement does not contain an arbitration clause, IDB's claim need not be submitted to arbitration.

Even if I considered the arbitration clause in the CCAAs to be broad within the meaning of *Parfi*, however, I would reach the same conclusion. In the case of a broad arbitration provision, the next step under *Parfi* is to determine whether the claim in question falls within this broad scope. In *Parfi*, the Court addressed whether the plaintiffs' contract claim and breach of fiduciary duty claim fell within the scope of the

⁴⁸ See *Parfi*, 817 A.2d at 155 (finding that a similar provision was broad in scope because it signals the parties' "intent to arbitrate all possible claims that touch on the rights set forth in their contract").

contract's arbitration provision when the same conduct formed the basis for both claims. Here, the question presented is not whether the contract sweeps up all claims arising from a defendant's conduct. Rather, the question is whether Plaintiff's claims fit within the rubric of a claim "arising out of or in connection with" the CCAAs. In this regard, the Supreme Court's analysis in *Parfi* is instructive. The Supreme Court stated that the Court of Chancery should concentrate on the separate *rights* pursued by the plaintiff rather than the similarity of the *conduct* that led to claims both under the parties' contract and under a duty that arose outside of the contract. In this case, the right pursued by IDB is the right to demand that FSD handle the collateral only in accordance with its instructions.⁴⁹ The CCAAs themselves do not confer upon IDB a right to direct FSD in handling the collateral. Rather, the Bailment Agreement creates this right and explicitly gives IDB the authority to require FSD to ignore any contrary instructions.⁵⁰ The Bailment Agreement, however, does not contain an arbitration clause.

⁴⁹ See Bailment Agreement 3 ("Upon delivery of any such written instruction, [FSD] agrees to handle the Property only in accordance with [IDB]'s instructions.").

⁵⁰ Under CCAA Section 9(D), FSD is "protected in acting upon any Formal Notice, written notice, request, waiver, consent, certificate, receipt, authorization, power of attorney or other document executed by Authorized Signer(s)." Republic representative Ned Fenton is an Authorized Signer to each CCAA except the Lott CCAA which was never fully executed. Defs.' Op. Br. Exs. 4–7 § 19. It does not appear that IDB or any of its agents are Authorized Signer(s) under the CCAA, and even if they were, that probably would not support a different conclusion here. In any event, although FSD relies on CCAA Section 9(D) to defend its actions in connection with the collateral, the Bailment Agreement purports to override the arrangement between FSD, Republic, and Republic's clients. Bailment Agreement § 6 ("Until [FSD] has received written notification to the contrary from an officer of [IDB], [FSD] may continue to release the Property in accordance

FSD argues that the absence of an arbitration provision in the Bailment Agreement is not dispositive. It avers that to enforce the Bailment Agreement, IDB is suing only upon the collateral maintained under the CCAAs. FSD maintains, therefore, that IDB is claiming rights under the CCAAs because its rights to collateral stem entirely from these agreements. Simply put, FSD argues that IDB would have rights to nothing under the Bailment Agreement without the CCAAs. This point, according to Defendants, distinguishes this case from *Parfi* where the parties' additional rights derived from Delaware statutory and common law, not from a separate and related agreement between the parties.

This distinction, however, is not material in the circumstances of this case. The Bailment Agreement gives IDB the right to control the collateral stored at FSD, which right is independent of the rights IDB enjoys as a third-party beneficiary to the CCAAs. As the Bailment Agreement states in its first paragraph:

[Republic] has pledged and granted to [IDB] a security interest in and continuing general lien and security interest in and upon [Republic]'s assets, including, but not limited to, its 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 (the "Property") pursuant to separate agreements between [FSD], [Republic] and [Republic]'s clients⁵¹

with instructions issued by [Republic]. Upon written notice from an officer of [IDB], *[FSD] agrees that it will hold all such Property subject only to [IDB]'s written instruction*" (emphasis added)).

⁵¹ Bailment Agreement 1.

While the Bailment Agreement relates to the separate agreements between FSD, Republic, and Republic's clients (*i.e.*, the CCAAs), the Property encompassed by the Bailment Agreement is broader than, and not limited to collateral held pursuant to, the CCAAs. The CCAAs give IDB rights to the collateral as a third-party beneficiary. The Bailment Agreement gives IDB the separate and distinct right to direct FSD's conduct relating to that collateral, even in the face of contrary instruction from other parties to the CCAA. "[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it."⁵² The parties easily could have added an arbitration clause to the Bailment Agreement if the parties had intended disputes between IDB and FSD under that Agreement to be decided in arbitration.⁵³

Defendants further argue that this Court's decision in *BAYPO* supports their position that IDB is bound by the CCAAs' arbitration provision. In *BAYPO*, the parties were all affiliates.⁵⁴ The plaintiffs were Bayer Corporation and three of its affiliates; the defendants were Lyondell Chemical Company and two affiliates created by Bayer and Lyondell to effectuate the disputed transaction. Bayer and Lyondell entered into a Master

⁵² *Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006).

⁵³ *Union Oil Co. of Cal. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *12 (Del. Ch. Dec. 15, 2006) ("Delaware law will not create contract rights and obligations that were not part of the original bargain, especially where, as here, the contract could easily have been drafted to expressly provide for them.").

⁵⁴ *BAYPO Ltd. P'ship v. Tech. JV, LP*, 940 A.2d 20, 21–22 (Del. Ch. 2007).

Transaction Agreement (“MTA”) which contained an arbitration clause. The plaintiffs sued under a license agreement entered into by affiliates of Bayer and Lyondell who were not parties to the MTA. Bayer contended that because the affiliates were not parties to the MTA, they were not bound by its arbitration clause. The court rejected Bayer’s position as “contrary to Delaware law and to common sense.”⁵⁵ This is because the affiliates were created for the sole purpose of furthering the transaction outlined in the MTA. Furthermore, the license agreement at issue incorporated the provisions of the MTA. Thus, the Court found that the overall transaction was “exceptionally complex,” that it “necessarily involved a number of inter-related documents,” and that the various agreements “served no other independent purpose than their function in the framework of the MTA.”⁵⁶

The facts here are distinguishable from *BAYPO* and compel a different result. This case does not involve layers of affiliated corporations involved in coordinated transactions. As noted, in *BAYPO*, the parties to the dispute included the plaintiff Bayer, three of its affiliates, the defendant Lyondell, and two limited partnerships created by Bayer and Lyondell to operate their joint venture. Here, there are four main parties: IDB, Republic, FSD, and CAMI. These parties are unaffiliated entities, although the same individual allegedly controls both FSD and CAMI. The entities were not created for the specific purpose of effectuating the CCAAs or the Bailment Agreement. And, although

⁵⁵ *Id.* at 27.

⁵⁶ *Id.*

the parties to this litigation are involved in business dealings with each other either directly or indirectly, each entity engages in business other than the transaction at issue here. Additionally, the Bailment Agreement does not incorporate the provisions of the CCAAs. The custody arrangement at issue is not exceptionally complex nor is there the number of inter-related documents that existed in *BAYPO*.⁵⁷ Finally, the 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. For example, although the CCAAs give Republic and Republic's clients the right to exercise some control over the collateral by instructing FSD how to handle it, the Bailment Agreement gives IDB the ability, on written notice to FSD, to insist that FSD follow only

⁵⁷ The *BAYPO* Court specifically addressed four sets of agreements. The MTA was entered into by Bayer and Lyondell and governed the overall transaction. The license agreement was entered into by BAYPO and the Technology Partnership, one of two partnerships created by Bayer and Lyondell for the sole purpose of effectuating the transaction. The license agreement governed the technology and patent rights at issue. Lyondell also entered into five tolling contracts that it assigned to Bayer. The parties disputed whether these contracts, which related to the processing of the raw materials at issue, were within the field of use contemplated by the license agreement. In addition, a limited partnership purchase and sale agreement provided for the sale of limited partnership units in the PO Partnership, the second of two partnerships created by Bayer and Lyondell to effectuate the transaction, from a Lyondell subsidiary to Bayer subsidiaries BAYPO I and BAYPO II. *Id.* at 22–23. The Court in *BAYPO* noted that although the Bayer affiliates did not sign the MTA, “PO Offtake and BAYPO signed the PO Partnership Agreement. The Technology Partnership, through its general partner, along with BAYPO I signed the License Agreement. [And] BAYPO II signed the Sales Agreement” *Id.* at 27 n.32. In comparison, the handful of documents relevant to this litigation do not rise to the level of relatedness and complexity that existed in *BAYPO*.

IDB's instruction. Moreover, the Complaint alleges that IDB, in fact, exercised that right. In addition, IDB's breach of contract claim asserts that FSD breached that obligation by failing to adhere to IDB's instructions. In that regard, 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.

Defendants also advance a "totality of the circumstances" approach under this Court's decision in *Westendorf v. Gateway 2000, Inc.*⁵⁸ In *Westendorf*, the Court started with the rule that "arbitration should be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."⁵⁹ Citing the Southern and Eastern Districts of New York, the Court noted that courts have examined the totality of the circumstances when evaluating the effect of an arbitration clause that appears in only one of a series of related agreements.⁶⁰ *Westendorf* dealt with the purchase of a Gateway computer. The arbitration clause in the standard terms and conditions agreement ("standard agreement") stated: "[a]ny dispute or controversy arising out of or relating to this Agreement, its interpretation *or any related purchase* shall be resolved exclusively and finally by arbitration."⁶¹ The owner of the

⁵⁸ 2000 WL 307369 (Del. Ch. Mar. 16, 2000).

⁵⁹ *Id.* at *5 (citing Second Circuit cases).

⁶⁰ *Id.*

⁶¹ *Id.* at *2 (emphasis added).

Gateway computer, who did not purchase the computer but who the Court found to be a third-party beneficiary subject to the standard agreement because she accepted the computer as a gift, entered into a separate service agreement with Gateway for internet service. The owner sued under the service agreement, which did not contain an arbitration clause. Nevertheless, relying on the broad arbitration clause in the standard agreement and finding that the owner intended to subject herself to that agreement because she accepted the computer and thereby became a third-party beneficiary of the standard agreement, the Court found that the agreement's arbitration clause applied to this dispute as a "related purchase."⁶² In the Court's words, "[t]he absence of an arbitration clause in [] Gateway's [service agreement] does not somehow undo the arbitration clause present in Gateway's [standard agreement]."⁶³

Defendants FSD and CAMI argue that the CCAAs' arbitration clause applies here under the same totality of the circumstances approach. They emphasize that one CCAA was executed on the same day as the Bailment Agreement and that it was "directed at defining the parties' rights and obligations regarding the collateral."⁶⁴ They contend, therefore, that the absence of an arbitration clause in the Bailment Agreement does not "somehow undo" the arbitration clause in the CCAAs. This argument is unpersuasive for at least two reasons. First, the CCAAs' arbitration clause is not as broad as the clause in

⁶² *Id.* at *5.

⁶³ *Id.* at *4.

⁶⁴ Defs.' June 21 Letter 6.

Westendorf. The standard agreement arbitration clause applied directly to the service agreement transaction as a “related purchase” to the computer purchase. In contrast, the arbitration clause in the CCAAs, to which IDB admittedly is a third-party beneficiary, contains no similar language indicating that IDB intended it to apply to the Bailment Agreement. Second, the Court’s totality of the circumstances approach in *Westendorf* did not involve simply connecting the dots of related parties and a series of agreements. Rather, the Court considered “the manner in which plaintiff came to own her Gateway computer, the fact that she retained it for over thirty days, [thus becoming subject to the standard agreement as a third-party beneficiary,] and the language in the arbitration clause expressly stating the clause covered ‘any related purchase.’”⁶⁵ Here, although IDB is a third-party beneficiary to the CCAAs, nothing in the language of the arbitration clause in those agreements precludes IDB from entering a direct agreement with a party to the CCAAs on different terms. Indeed, in the situation Defendants highlighted, where IDB, FSD, and Republic entered into a CCAA and the Bailment Agreement on the same day, that is exactly what happened. As such, concluding that the parties did not intend IDB’s claim under the Bailment Agreement to be subject to arbitration does not effectively “undo” the CCAA arbitration clause as the Court sought to avoid in *Westendorf*. The language of the arbitration clause at issue here is similar to that involved in *Parfi*. For the reasons discussed *supra*, I find that the analysis under *Parfi*

⁶⁵ *Westendorf*, 2000 WL 307369, at *5.

compels the conclusion that the CCAA arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

I reach the same result with regard to IDB's conversion claims. "An arbitration clause can extend only so far as the series of obligations set forth in the underlying agreement."⁶⁶ The question to ask is "do the [tort] claims depend on the existence of the [] Agreement?"⁶⁷ The Defendants' alleged acts that form the basis of IDB's conversion claims neither arise out of nor are in connection with the CCAAs. The facts IDB alleges that support its claim for conversion are based on its right to control the collateral under the Bailment Agreement.⁶⁸ IDB alleges that, contrary to its instruction that the collateral be released only upon IDB's written instruction, both FSD and CAMI unlawfully exercised dominion and control over the assets by removing them from FSD's depository.

Therefore, the arbitration clause in the CCAAs does not divest this Court of jurisdiction to hear IDB's claims that Defendant FSD breached its duties and obligations under the Bailment Agreement and that Defendants FSD and CAMI converted IDB's property. Because I find that the Bailment Agreement controls IDB's breach of contract

⁶⁶ *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156 (Del. 2002).

⁶⁷ *Id.* at 155.

⁶⁸ IDB also has alleged facts that conceivably could support a claim that FSD's and CAMI's actions with regard to the collateral amount to conversion based on IDB's rights to the collateral through its agreements with Republic and its status as a third-party beneficiary of certain of those agreements. See discussion *infra* Part II.B.2.b.

claim against FSD, and does not require that it be arbitrated, I need not address IDB's further argument that FSD waived its right under the CCAAs to demand arbitration by participating in this litigation and express no opinion on that issue.

B. Failure to State a Claim Under Rule 12(b)(6)

Having determined that this Court has subject matter jurisdiction under Rule 12(b)(1), I turn next to Defendants' argument that IDB's Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The governing pleading standard in Delaware to survive such a motion to dismiss is reasonable "conceivability."⁶⁹ If the well-pleaded allegations of the Complaint would entitle Plaintiff to relief under a reasonably conceivable set of circumstances, the Court must deny the motion to dismiss. The Court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."⁷⁰

Defendants' 12(b)(6) argument proceeds along two lines. First, Defendants assert that IDB fails to plead any factual scenario under which FSD is not exculpated for a loss or diminution in value of the collateral. Absent cognizable damages, Defendants argue, IDB cannot maintain a breach of contract claim against FSD. Second, Defendants assert

⁶⁹ *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).

⁷⁰ *Price v. E.I. DuPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

that IDB's conversion claims against FSD and CAMI must fail.⁷¹ In that regard, Defendants argue that the allegedly converted collateral is fungible and that IDB cannot maintain a claim for conversion of fungible assets. Alternatively, Defendants contend that the economic loss doctrine bars IDB's conversion claim because that claim stems from the parties' contractual dealings. The economic loss argument, however, applies only as to Defendant FSD with whom IDB has a contract.

IDB denies that its Complaint fails to state a claim under Rule 12(b)(6). As to the exculpation and hold harmless provisions relied on by FSD, IDB emphasizes that those provisions appear in the CCAAs but not in the Bailment Agreement, the only contract IDB has accused FSD of breaching. IDB argues in the alternative that even if its claim was subject to the exculpation and hold harmless provisions, FSD could be held liable nonetheless because those provisions do not apply to "willful misconduct" and IDB has alleged that FSD engaged in willful misconduct. In response to Defendants' arguments regarding IDB's conversion claims, Plaintiff denies that the collateral is fungible and asserts that the economic loss doctrine does not bar recovery for the intentional tort of conversion. In addition, IDB argues that, at the very least, the issue of fungibility is a question of fact that is not suitable for decision on a motion to dismiss. I address these arguments next beginning with IDB's breach of contract claim.

⁷¹ Defs.' Reply Br. 28–31.

1. Breach of contract claim

FSD argues that no reasonably conceivable set of circumstances exist under which FSD can be held liable for breach of contract because of the exculpation and hold harmless provisions in the CCAAs. These provisions, FSD asserts, provide contractual protection for any incidental or consequential damages associated with the collateral and from liability for any claim “arising out of or related to” disputes of title, ownership, transfers of the collateral, or FSD’s acts or omissions.⁷² FSD offers three reasons why these CCAA provisions apply to Plaintiff’s breach of contract claim: first, IDB is an intended third-party beneficiary of the CCAAs; second, the Bailment Agreement would fail for lack of consideration without the CCAAs and so the provisions therein must be incorporated into the Bailment Agreement; and third, because IDB previously sued to enforce the terms of a CCAA, it cannot deny the validity and applicability of the CCAAs to this lawsuit.

FSD’s arguments lack merit for the same reasons that I found the Bailment Agreement independently controlling on the question of arbitration in Part II.A.2, *supra*. The Bailment Agreement creates rights and obligations between FSD and IDB that are independent of the CCAAs. IDB admittedly is a third-party beneficiary of the CCAAs.⁷³ Thus, if IDB was suing to enforce a provision of the CCAA, such as, for example, a provision regarding fees or FSD’s compliance with procedures outlined for shipments

⁷² 8-12-09 CCAA § 13; *see also id.* §§ 9E, 10.

⁷³ *See* Tr. 11.

into and out of FSD’s facilities, IDB would be bound to the terms of that agreement “to the same extent that [one of the signatories] is bound.”⁷⁴ But where, as here, IDB is suing for breach of a contractual obligation that appears in only the Bailment Agreement, the terms of the parties’ ancillary agreements are not necessarily apposite. 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.⁷⁵ The Court, therefore, will not incorporate the hold harmless provisions into the Bailment Agreement where the parties failed to do so.⁷⁶

Other material differences in the CCAAs and the Bailment Agreement bolster this conclusion. For example, Section 9(D) of the CAMI, Lott, and Ketterling CCAAs protects FSD when it acts upon instruction of Republic. Section 9(E) insulates FSD from liability for “any act it may do or refrain from doing in connection [with this CCAA], except for acts of willful misconduct on its part.” Section 9(G) allows FSD to “refuse to comply with any claims or demands on it or refuse to take any other action [under this agreement]” if it receives contradictory instructions from Republic and Republic’s client.

⁷⁴ *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 431 (Del. Ch. 2007) (quoting 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37.24 at 154 (4th ed. 1992)).

⁷⁵ See Bailment Agreement 1 (“[Republic] has pledged and granted to [IDB] a security interest in and continuing general lien and security interest in and upon [Republic]’s assets, . . . 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” (emphasis added)).

⁷⁶ See *supra* note 53.

In contrast, upon IDB's providing written notice to FSD, the Bailment Agreement requires FSD to hold the collateral "subject only to [IDB]'s written instruction" and not "to hinder or delay [IDB] in enforcing [IDB]'s right in and to [the] Property."⁷⁷

IDB also argues that the hold harmless and exculpation provisions would not apply even if the Court found that the CCAAs governed this dispute. This is because, under the terms of the CCAAs, those provisions do not apply if FSD engages in "willful misconduct."⁷⁸

FSD's second and third arguments also fail because of the nature of the Bailment Agreement as a distinct contract that creates the rights upon which IDB bases its breach of contract claim. 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. The Agreement also provides for FSD to be paid and conditions IDB's control

⁷⁷ Bailment Agreement § 6.

⁷⁸ *See, e.g.*, 8-12-09 CCAA §§ 9(E) ("[FSD] shall not be liable for any act it may do or refrain from doing in connection herewith, except for acts of gross negligence or willful misconduct on its part."), 13 (stating that FSD will be indemnified and held harmless for damages and liabilities "except to the extent such liabilities, damages, losses, expenses, claims, demands, suits, fines or judgments result from the gross negligence or willful misconduct of [FSD]").

over the collateral on FSD having received payment of the accrued charges on the Property in question.⁷⁹

Defendants' third argument attempts to give precedence to the CCAA provisions based on IDB's previous action under those agreements. Defendants emphasize that IDB's claim to the collateral maintained at FSD exists only by virtue of Republic having rights to that collateral and IDB then having rights to the same through its security interest in Republic's assets. Republic's rights arise from the CCAAs under which Republic's customers pledged the collateral to it. Defendants assert that as an assignee and third-party beneficiary subject to the CCAAs, IDB must take its interest in the collateral subject to the provisions therein.

This argument, however, ignores the fact that an overarching and direct agreement among FSD, Republic, and IDB exists. In the circumstances of this case, I find that the latter agreement, *i.e.*, the Bailment Agreement, specifically governs the actions of IDB and FSD that are at issue here. This is especially true with regard to the actions expressly and uniquely addressed within the Bailment Agreement (*i.e.*, that despite having received written notice from IDB, FSD failed to hold the collateral subject to IDB's written instruction).

Before the Bailment Agreement was executed, IDB's rights to the collateral would have been governed solely by the contracts that Republic's creditors, such as CAMI, had

⁷⁹ See Bailment Agreement 1 ("In connection with the financing described above, and as a condition to [IDB]'s agreement to enter into such financing arrangement, [FSD], [Republic] and [IDB] hereby agree as follows: . . .").

with Republic and in which IDB had an indirect interest based on its status as a third-party beneficiary or on its working relationship with Republic. Because FSD later or contemporaneously in one instance, agreed with Republic's concurrence that IDB would have superior rights to direct the disposition of collateral held by FSD, however, it is at least reasonably conceivable that IDB will be able to show that the Bailment Agreement alone governs the conduct of FSD that is at issue in this litigation and that, thus, FSD is not exculpated for the loss or diminution in value of the collateral. Therefore, I deny Defendants' motion to dismiss IDB's breach of contract claim under Rule 12(b)(6).

2. Conversion claims

Next I address Defendants' challenge to Plaintiff's conversion claims against FSD and CAMI. To 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.⁸⁰ To prevail on their motion to dismiss for failure to state a claim, Defendants must show that IDB cannot prevail under any reasonably conceivable set of facts susceptible of proof in support of its

⁸⁰ See *Jarvis v. Elliott*, 2010 WL 761089, at *4 (Del. Ch. Mar. 5, 2010); see also *Cornell Glasgow, LLC v. LaGrange Props., LLC*, 2012 WL 3157124, at *5 (Del. Ch. Aug. 1, 2012) ("Conversion is any distinct act of dominion wrongfully exerted over the property of another, in denial of [the plaintiff's] right, or inconsistent with it." (internal quotation marks omitted)).

claim.⁸¹ Because the Complaint meets the low threshold to withstand dismissal under Rule 12(b)(6), I deny Defendants' motion.

Defendants argue that IDB cannot plead conversion because it also has asserted a breach of contract claim against FSD based on the same facts. Preliminarily, I note that Plaintiff is permitted under Rule 8(e)(2) to plead claims in the alternative.⁸² Therefore, even if IDB's breach of contract and conversion claims were mutually exclusive, that would not preclude IDB from pursuing both claims in the alternative. Furthermore, for the following reasons, I find that IDB conceivably can prove a set of facts consistent with the allegations in the Complaint that would support a conversion claim against Defendants FSD⁸³ and CAMI.⁸⁴

⁸¹ See *supra* Part II.B.

⁸² Ct. Ch. R. 8(e)(2) ("When 2 or more statements are made in the alternative and 1 of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of 1 or more of the alternative statements.")

⁸³ See, e.g., Bailment Agreement § 6 (requiring FSD to release collateral to IDB on IDB's demand); Compl. ¶¶ 35 ("IDB made demands to inspect and to remove the Assets. FSD agreed that IDB could visit the depository to inspect and appraise the Assets on February 10, 2012, but refused to permit IDB to remove the Assets on any date, including February 3, 2012, the date demanded by IDB."), 40 ("Defendants engaged in a variety of unauthorized and unlawful conduct by removing certain of the Assets from FSD's depository in Delaware without IDB's authorization, and by marketing for sale and by attempting to sell the removed Assets to third parties without IDB's consent.").

⁸⁴ See Compl. ¶¶ 28 (alleging Robert Higgins's status as a principal of CAMI and the CEO of FSD), 42–45 (alleging that Robert Higgins was in possession of collateral that was pledged to IDB and that was unlawfully taken from FSD's depository).

a. Defendants' argument that the collateral is fungible

Defendants also argue that the collateral is fungible and therefore cannot be subject to a claim for conversion. In that regard, Defendants rely on the loan agreement between Republic and CAMI in which those parties expressly agreed that the collateral is fungible.⁸⁵ Because they contend that IDB's rights to the collateral pledged by Republic arise only from what was pledged to Republic by Republic's clients, Defendants assert that the Republic–Cami loan agreement constitutes the final word on whether the collateral is fungible.⁸⁶

I disagree. Even if Republic, CAMI, and other Republic clients agreed that the collateral was fungible and Republic could trade it openly, that would not necessarily be binding on IDB. The Bailment Agreement between IDB, Republic, and FSD, for example, reflects no such agreement. That is, the Bailment Agreement purports to authorize IDB unilaterally to place restrictions on the movement and sale of the collateral held at FSD's depository.⁸⁷ Moreover, IDB alleges that Robert Higgins controls both FSD and CAMI.⁸⁸ Based on the well-pleaded facts alleged in the Complaint, it is reasonably conceivable that IDB could prove that CAMI or FSD, through Robert

⁸⁵ Defs.' Op. Br. Ex. 2 § 12(C) (“[CAMI] agrees that all Collateral pledged under this Agreement is fungible and is an openly traded commodity.”).

⁸⁶ Tr. 30–31.

⁸⁷ Bailment Agreement 3 (“Upon delivery of any [] written notification, [FSD] agrees to handle the Property only in accordance with [IDB]’s instructions.”).

⁸⁸ Compl. ¶ 27.

Higgins, wrongfully exercised dominion and control over the collateral at issue in contravention of IDB's rights.⁸⁹ In any event, the facts alleged support at least a colorable argument that the agreement as to fungibility among FSD, Republic, and CAMI would not be binding on IDB. This is especially true here because the Complaint alleges that at least some of the collateral is unique, such as the 1776 Continental "Currency" pewter \$1 coin.⁹⁰ Thus, whether the collateral is fungible and whether consequently this would give FSD or CAMI the right to engage in the challenged conduct cannot be determined on a motion to dismiss.

b. Defendants' argument that the economic loss rule bars IDB's claim

Lastly, Defendants seek dismissal of Plaintiff's conversion claim based on the economic loss rule. This rule is a judicially created doctrine "which prohibits a party from recovering in tort for economic losses, the entitlement to which flows only from [a] contract."⁹¹ The rule requires a plaintiff to sue in contract and not in tort "where an action is based entirely on a breach of the terms of a contract between the parties and not on a violation of an independent duty imposed by law."⁹² "While initially a doctrine related to product liability actions, the courts have expanded the doctrine's application

⁸⁹ *Id.* ¶¶ 40–45 (alleging that Defendants unlawfully removed, marketed for sale, and attempted to sell the collateral and that Robert Higgins specifically was in possession of and attempting to sell coins pledged as collateral to IDB).

⁹⁰ *Id.* ¶ 43.

⁹¹ *Edelstein v. Goldstein*, 2011 WL 721490, at *7 (Del. Super. Mar. 1, 2011).

⁹² *Id.* (quoting *Marcucilli v. Boardwalk Builders, Inc.*, 1999 WL 1568612, at *4 (Del. Super. Dec. 22, 1999)).

beyond its original scope to any kind of dispute arising from a commercial transaction where the alleged damages do no harm to a person or to property other than the bargained for item.”⁹³ “The driving principle for the rule is the notion that contract law provides a better and more specific remedy than tort law.”⁹⁴ The rule “supports the ability of persons to allocate the risks of business transactions.”⁹⁵ There are exceptions to the economic loss rule, however; they include “[c]laims of fraud, as well as other intentional torts.”⁹⁶

Defendants argue that the economic loss rule precludes IDB from raising a conversion claim against Defendant FSD because a contract exists between IDB and FSD that defines their rights and obligations to each other. Defendants assert that IDB’s conversion claims rest entirely on economic losses resulting from Defendants’ alleged conduct under the Bailment Agreement and the CCAAs. Plaintiff counters that conversion is an intentional tort and, therefore, falls under an exception to the economic loss rule. IDB also claims an ownership interest in the collateral that is independent of the rights set forth in the Bailment Agreement. It contends that that interest arises from

⁹³ *Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Mktg.*, 2002 WL 1335360, at *5 (Del. Super. June 13, 2002).

⁹⁴ *Brasby v. Morris*, 2007 WL 949485, at *6 (Del. Super. Mar. 29, 2007).

⁹⁵ *Id.*

⁹⁶ *Penn Mut. Life Ins. Co. v. Norma Espinosa 2007-1 Ins. Trust*, 2011 WL 710970, at *3 (D. Del Feb. 22, 2011) (citing *Commonwealth Constr. Co. v. Endecon, Inc.*, 2009 WL 609426, at *5 (Del. Super. Mar. 9, 2009) (recognizing the trend to exclude intentional torts, including fraudulent misrepresentation, from the economic loss doctrine)).

its security interest in Republic's assets as defined in IDB's loan agreement with Republic and the amendments thereto.⁹⁷ According to IDB, FSD "has an independent duty imposed under tort law not to convert IDB's property."⁹⁸ In particular, IDB bases its conversion claim on the acts of Robert Higgins, a principal stockholder of CAMI and the owner of FSD.⁹⁹ As IDB's counsel explained at oral argument, "We're not saying that just CAMI [converted the property]. Higgins is controlling both entities. We have no idea at this point what hat he was wearing that day when he took the material."¹⁰⁰

Having considered the parties' arguments, I note first that the economic loss doctrine is not widely used in Delaware jurisprudence. Indeed, as IDB points out in its Answering Brief, "[n]o Delaware court ever has barred a claim for conversion based upon the economic loss doctrine."¹⁰¹ In addition, even if I concluded that this doctrine applied to IDB's conversion claim against FSD, Defendants' motion to dismiss on this theory still would not be well-founded. Based on the allegations in the Complaint, it is

⁹⁷ See Compl. ¶¶ 12–14; see also *Haft v. Haft*, 671 A.2d 413, 417 (Del. Ch. 1995) ("A security interest is a property right in identified property created by contract for the purpose of protecting in some respect some right, title, or interest of the secured party.").

⁹⁸ Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss and Reply Br. in Support of Pl.'s Second Mot. for Contempt ("Pl.'s Ans. Br.") 30.

⁹⁹ Compl. ¶ 36 ("[Eric] Higgins explained that he could not permit [IDB representatives access to the depository] without his father [Richard]'s approval and that his father specifically refused to permit IDB access at that time.").

¹⁰⁰ Tr. 54.

¹⁰¹ Pl.'s Ans. Br. 29.

reasonably conceivable that IDB could prove, first, that it has a property interest in the collateral as a secured party that is independent of its rights under the Bailment Agreement. While any such property right IDB has stems from a contract, that contract would not be the Bailment Agreement under which IDB has sued for breach of contract.¹⁰² If Plaintiff has a property interest in the collateral that is independent of its rights under the Bailment Agreement, IDB's conversion claim rests on Defendants' knowledge of IDB's rights under those agreements and their act of nonetheless intentionally exercising dominion or control over the collateral which interferes with IDB's right to control it.¹⁰³ Taking Plaintiff's well-pleaded allegations as true, it is also reasonably conceivable that IDB could prove that Defendants intentionally moved and sold the collateral while falsely representing to IDB that the collateral remained in the possession of FSD.¹⁰⁴ Accordingly, I deny Defendants' motion to dismiss IDB's conversion claim based on the economic loss rule.

¹⁰² The Complaint could be read to allege that IDB's right to prohibit FSD from releasing assets for sale and to have FSD hold the assets for its benefit arise solely from the Bailment Agreement. See Compl. ¶ 2. Other allegations in the Complaint, however, support a broader reading. See *id.* ¶ 15 (quoting the Seventh Amendment to the Credit Agreement between Republic and IDB which grants IDB the right to "inspect, appraise and secure the Collateral").

¹⁰³ See *Cornell Glasgow, LLC v. LaGrange Props., LLC*, 2012 WL 3157124, at *5 (Del. Ch. Aug. 1, 2012) (citing RESTATEMENT (SECOND) TORTS § 222A(1) (1965)).

¹⁰⁴ See Compl. ¶ 45 (listing twelve coins allegedly offered for sale at the Long Beach Expo while such coins were listed on FSD's collateral inventory reports).

III. CONCLUSION

For the foregoing reasons, I deny Defendants' motion to dismiss Plaintiff's breach of contract and conversion claims.

IT IS SO ORDERED.