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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WINDSOR I, LLC Below Plaintiff, Current Appellant, v. CWCAPITAL ASSET MANAGEMENT LLC, and U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR TO WELLS FARGO BANK, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF COBALT CMBS COMMERCIAL MORTGAGE TRUST 2007-C2, COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-C2, Below Defendants, Current Appellees.	C.A. No.: 443,2019 Court Below: New Castle County Superior Court C.A. No. N18C-06-115 EMD CCLD

APPELLEES' ANSWERING BRIEF

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Nature of the Proceedings

On December 12, 2016, Windsor I, LLC ("Plaintiff," "Appellant" or "Windsor") filed a "Complaint for Specific Performance, Injunctive, and Other Equitable Relief" ("Chancery Litigation") against CWCapital Asset Management, LLC ("CWCAM") seeking to preemptively enjoin foreclosure of a commercial mortgage and compel negotiation based on a Prenegotiation Agreement ("PNA") entered into by the parties. B-108-115. On July 31, 2016, Chancellor Andre G. Bouchard dismissed the Chancery Litigation with prejudice, holding that the plain language of the PNA did not include an obligation to negotiate in good faith. B-166-167. Chancellor Bouchard also found based on statements in the complaint that CWCAM had in fact engaged in negotiations and that "Windsor's real grievance is not that the parties did not negotiate, but that the parties did not reach an agreement that Windsor desired." B-170 at fn. 25. Windsor appealed the Chancellor's decision to this Court. B-255.

On August 28, 2017, CWCAM and U.S. Bank National Association, as Trustee (the "Trust" and collectively with CWCAM, the "Defendants" or "Appellees"), filed a scire facias foreclosure action against Windsor in the Superior Court. B-16 at ¶ 56. Windsor pled "unjust enrichment" and "promissory estoppel" as affirmative defenses based on the same allegations in this case. B-359-365. While the foreclosure action and appeal were pending, CWCAM sold the Loan to a

third-party at a substantial loss. B-25-27. After failing to convince the Superior Court to stay foreclosure and allow discovery on its defenses, Windsor paid the Loan in full and dismissed its appeal of the Chancery Court decision. B-28.

Windsor filed suit again on June 15, 2018 ("Original Complaint") alleging a single claim for breach of contract based on negotiations which took place during the Chancery Litigation. A-1. Judge Eric. M. Davis dismissed the Original Complaint without prejudice by order dated December 12, 2018, holding that as a matter of law Windsor's allegations could not result in an enforceable contract. B-1-2. Windsor has not appealed this ruling.

Windsor filed an Amended Complaint on December 21, 2019 (the "Amended Complaint") asserting "Promissory Estoppel" and "Unjust Enrichment" based on essentially the same facts pled in the Original Complaint and previously asserted in defense of foreclosure. B-3-36. By Order dated September 27, 2019, Judge Davis dismissed the Amended Complaint holding that Windsor (i) was bound by a comprehensive release the ("General Release"); and (ii) had failed to state a claim for Promissory Estoppel or Unjust Enrichment. The Superior Court found, among other deficiencies, that the Amended Complaint did not plausibly allege a "firm and definite promise," reasonable reliance, enrichment of the Defendants or impoverishment of Windsor. B-562-584. In short, rather than addressing the elements of the alleged causes of action, Windsor argued only "injustice" resulting

from an alleged breach of a "free-floating" duty of good faith – a duty repeatedly disavowed by the Delaware Courts in the absence of a contract. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (Implied covenant does create a "free-floating duty...unattached to the underlying legal document."); *Nemec v. Shrader*, 991 A.2d 1120, 1126 fn. 18 (Del. 2010) (same); *Dawson v. Pittco Capital Partners, L.P.*, No. 2012 WL 1564805, at *24 (Del. Ch. 2012) ("To state a claim for breach of the implied covenant, a litigant must allege a specific obligation ***implied in the contract***…").

Summary of the Argument[1]

1. CWCAM denies the Appellant's statements in paragraph 1 of its summary of argument in their entirety. The plain language of the General Release extends to all claims, known and unknown, against CWFS-REDS, LLC ("CW REDS") and all affiliates. Mr. Stella was required to scroll through Auction T&C and click "Accept" in order to bid. B-560. Consequently, he is charged with knowledge of the General Release even if he did not read it. Mr. Stella admits knowing that the Auction was run by an affiliate of CWCAM. B-23 at ¶ 93. Even without such knowledge, it was Windsor's responsibility to inquire about the identity of affiliates if it was concerned about the scope of the release. Mr. Stella's 11th hour affidavit claiming that he utilized a private bidding process which did not include the Auction T&C is not part of the Amended Complaint and is therefore not entitled to a presumption of truth. Moreover, as an unauthorized sur-reply filed three months after the Answering Brief, seven weeks after the Reply and less than one day before the original hearing date, the Superior Court was not required to give Mr. Stella's affidavit any consideration at all.

2. CWCAM denies the Appellant's statements in paragraph 2 of its summary of argument in their entirety. The terms of an unsigned Purchase Release

[1] Capitalized terms not defined in the Summary of Argument shall have the meanings ascribed to them in the Answering Brief.

which Windsor would have executed if it had not reneged on its $6.2 million offer cannot alter the plain language of the executed General Release. In addition, the Purchase Release is not "specifically tailored" to the Proposed Transaction as alleged by the Windsor. It references only the Chancery Court Litigation by name. Therefore, even by Windsor's logic, it would not exclude the Proposed Transaction. Finally, the two releases have separate purposes based on when they were signed. The General Release is, by definition, executed before any bidding takes place. The Purchase Release is not executed until the closing of a sale. Consequently, it addresses events which occur after the General Release, such as the Auction itself. *UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 348 (Del. Ch. 2006) ("The rule in Delaware is that a release cannot apply to future conduct.").

3. CWCAM denies the Appellant's statements in paragraph 3 of its summary of argument in their entirety. The Superior Court correctly held that no claim for unjust enrichment can lie where the Appellees sold a validly held commercial loan for a substantial loss and Windsor only repaid what it had borrowed. Moreover, as observed by Judge Davis, if Windsor's due diligence expenses constituted actionable "injustice," every unsuccessful bidder would have a cause of action. B-585.

4. CWCAM denies the Appellant's statements in paragraph 4 of its summary of argument in their entirety. Windsor fails to state a claim for promissory

estoppel because it does not allege a "firm and definite promise" or reasonable reliance. The Proposed Transaction was explicitly conditioned upon further approval and it was inherently unreasonable for Windsor to assume such approval had already been given despite undisputed language to the contrary. B-13 at ¶ 44. In addition, the PNA expressly disavows any claim of reliance in the absence of an executed agreement. B-110 at ¶ 6.

5. CWCAM denies the Appellant's statements in paragraph 5 of its summary of argument in their entirety. The only misconduct in this case is Windsor's attempt to defraud the Trust. As more fully explained before the Superior Court and *infra*, Windsor concealed the existence of prospective replacement tenants as part of a failed scheme to artificially depress the appraised value of the Property and payoff the Loan at a substantial discount. Mr. Stella's plan was revealed when he appeared on the cover of the Delaware News Journal with a new tenant three months after the Proposed Transaction. B-539-541.

Statement of Facts[2]

1. Windsor was formerly the obligor on a note and mortgage in the original principal amount of $7,400,000 (the "Loan"). B-6 at ¶ 15.

2. The Loan was held by the Trust until March 2018, when it was sold to WM Capital Partners 66, LLC ("WM"). B-7 at ¶ 18, B-24 at ¶ 99.

3. In July 2015, Windsor believed it was facing default due to the imminent loss of its only tenant and requested that the Loan be transferred to special servicing to discuss a possible restructuring. B-8 at ¶¶ 25-6.

4. Thereafter, the parties exchanged several drafts of a "Prenegotiation Agreement" (*i.e.*, the PNA) to establish ground rules for any discussions "concerning the obligations owed to the Holder" and avoid any confusion about the procedure for obtaining approval of a settlement. B-10 at ¶¶ 32-4; B-104-107.[3]

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[2] The facts are drawn from the Amended Complaint and exhibits wherever possible. The parties attached additional information to the Motion to Dismiss pleadings and these documents are cited where appropriate. Windsor did not move to strike any of this material and did not argue in its Opening Brief that consideration of these documents was improper.

[3] The fully executed PNA was attached to the Amended Complaint as Exhibit F. B-108-116.

5. Windsor negotiated changes to the draft agreement, resulting in execution of the final version of the PNA by Robert Stella on or about March 23, 2016. B-108-116.

6. The resulting document "establishes rules to govern any discussions that may take place" and states that if Windsor and a representative of CWCAM reach a preliminary agreement, the terms will be submitted to senior management for approval.[4] Only after (i) notification of such approval; and (ii) execution and delivery of a "definitive, formal written agreement prepared and signed by Holder" would ***any agreement*** concerning ***any matter*** be effective. B-168; B-109-110 at ¶ 5.

7. The PNA further states that:

> Borrower acknowledges and agrees that Borrower ***may not in any way rely on, or claim reliance on, the Negotiations.*** B-110 at ¶ 6 (emphasis supplied).
>
> Any party shall have the right to terminate the Negotiations at any time ***upon written notice to the other party***… and upon such termination the parties' respective obligations to one another shall be only as set forth in the Loan Documents, ***except that the provisions of this letter agreement shall survive.*** B-110 at ¶ 8 (emphasis supplied).

[4] The letter decision of Chancellor Andre G. Bouchard dismissing the Chancery Court Action with prejudice, Civil Action No. 12977-CB, was attached to the Defendant's Motion to Dismiss as Exhibit 1. B-162-173. The quoted language is from the letter decision. B-168.

8. In the following months, Windsor and CWCAM exchanged proposals to modify the Loan but failed to reach a settlement acceptable to both sides. B-11 at ¶ 35; B-170 at fn. 25, B-182 at ¶¶ 31, B-184 at ¶ 44, B-106-108 at ¶ 190-192.[5]

The Chancery Court Litigation and the April and May 2017 Negotiations

9. Dissatisfied with the state of negotiations, on December 12, 2016, Windsor filed suit against CWCAM (the "Chancery Court Litigation") alleging that the PNA was an enforceable contract which obligated CWCAM to negotiate in good faith. B-175; 195 at ¶ 100 ("Here, a valid contract to negotiate exists, namely, the Agreement to Negotiate in Good Faith [the PNA].").

10. Notwithstanding the pending Chancery Court Litigation, negotiations resumed through counsel in April 2017. B-183 at ¶¶ 41-42.

11. Windsor acknowledges that emails from CWCAM's counsel repeatedly stressed that any proposed settlement remained subject to approval by the credit committee. B-13 at ¶ 44.

12. Consistent with the procedure set forth in the PNA and reiterated in the parties' correspondence, counsel agreed to present a proposal to the credit committee which would permit Windsor to pay off the Loan in full for $5,288,000,

[5] Windsor's Complaint for Specific Performance, Injunctive, and Other Equitable Relief was attached to the Motion to Dismiss as Exhibit 2. B-175-199.

a discount of more than a million dollars (the "Proposed Transaction"). B-10 at¶¶ 43-44; B-25 at ¶ 116, 110 at ¶5.

13. The credit committee declined to accept the proposed settlement and its rejection was promptly communicated to the Plaintiff in May 2017. B-15 at ¶ 55.

14. Chancellor Andre J. Bouchard held a hearing on CWCAM's Motion to Dismiss the Chancery Court Litigation on July 25, 2017. B-201.[6]

15. Although not part of its initial complaint, Windsor argued extensively to the Chancery Court that CWCAM had a contractual obligation to consider the Proposed Transaction in good faith based on the PNA:

> [C]ircumstances surrounding this agreement, this pattern of recalcitrance, of radio silence, the fact that we got into a settlement agreement post Complaint that at the 11th hour was pulled out from under us for no real explanation other than the loan committee didn't approve it, despite the fact that we worked out a putative settlement agreement. There is something going on. Something doesn't smell right. B-226, ln. 19 – B-227, ln. 2.
>
> Your Honor, we feel that the four corners of this agreement are clear as to what it says, which is to engage the parties in an agreement to negotiate in good faith. Maryland law supports that. The agreement would be of no moment, would be meaningless if that weren't the case, and because of this and in light of this, and in light of the conduct of CW in dealing with us for that year, the subsequent settlement agreement that was pulled out at the

[6] The full transcript of the hearing before Chancellor Bouchard was attached to the Motion to Dismiss as Exhibit 3. B-201-244.

> last minute by the loan committee, we think there's something there. B-234 at lns. 9-18.

16. By letter decision dated July 31, 2017, the Chancery Court adopted CWCAM's position and held that "when read as a whole, the [PNA] is a document that simply establishes rules to govern any discussions that may take place. It does not obligate any party to negotiate or forbear from exercising remedies otherwise available." B-168.

17. Windsor filed an appeal of the Chancery Court decision and on November 7, 2017 represented to this Court that the PNA remained "a binding contract between the parties" subject to specific performance. B-281.[7]

18. Windsor also included a promissory estoppel argument in its appellate brief stating "Even assuming arguendo, there was no agreement to negotiate (and there was), CW should be estopped from denying Windsor the benefit of its bargain…". B-284-285.

19. On January 31, 2018, Windsor reiterated to the Supreme Court in its Reply Brief that the PNA was a binding contract:

> Windsor entered the Agreement and effectively paid for CW's promise to negotiate. CW was not obligated to enter

[7] Windsor's Opening Brief to the Supreme Court was attached to the Motion to Dismiss at Exhibit 4. B-255-294.

> that written agreement, but it did ***creating a binding contract between the parties***. B-302.[8]

20. In addition, Windsor dedicated three full pages in its Reply Brief to the argument that not only did the PNA remain in effect, but that it ***could not be terminated*** until additional negotiations took place:

> CW inaccurately characterizes the Agreement as "terminable at will" pursuant to Paragraph 8 of the Agreement… In point of fact, Paragraph 8 permits either party to terminate "*the Negotiations*" upon written notice to the other party. This distinction is important for two reasons. First, there must be good faith negotiations, *i.e.*, if no good faith negotiations have taken place there cannot be a termination in good faith under the parties' agreement. B-236 (emphasis in original).

21. Windsor voluntarily dismissed its appeal in April 2018. Consequently, the Chancery Court decision is now final and binding on the parties. B-12 at ¶ 40, fn. 3.

The Foreclosure Action

22. On August 28, 2017, CWCAM filed a foreclosure action against Windsor in the Superior Court before Judge Andrea L. Rocannelli (the "Foreclosure Action"). B-16 at ¶ 65.

[8] Windsor's Reply Brief was attached to the Motion to Dismiss as Exhibit 5. B-296-323.

23. Windsor answered and pled "Promissory Estoppel/Unjust Enrichment" as affirmative defenses based on allegations nearly identical to those made in the Amended Complaint. B-359-361.[9]

24. In response to several discovery disputes and Windsor's refusal to agree to a briefing schedule for summary judgment, Judge Rocanelli held a wide-ranging conference with the parties on February 13, 2018. B-390.[10]

25. At the conference, Windsor argued that no briefing schedule should be set until it was permitted to conduct much of the same discovery it sought to conduct in this case. B-430, lns. 14-21.

26. With the benefit of the PNA and a full explanation from both parties on the Chancery Court's decision and the pending appeal, Judge Rocanelli set a briefing schedule for summary judgment on the foreclosure and ***stayed all further discovery on Windsor's affirmative defenses.*** B-452.[11]

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[9] Windsor's Answer and Affirmative Defenses filed in the Foreclosure Action were attached to the Motion to Dismiss at Exhibit 6. B-325-368.

[10] The transcript of the February 13, 2018 conference with J. Rocanelli was attached to the Motion to Dismiss as Exhibit 9. B-390-450.

[11] The docket order issued by Judge Rocanelli in the wake of the conference was attached to the Motion to Dismiss as Exhibit 10. B-452.

27. Judge Rocanelli unambiguously stated her opinion that if the Supreme Court ruled against Windsor, it would be dispositive of Windsor's affirmative defenses:

> The Court: I don't think it's that complicated. It's a pretty straightforward mortgage foreclosure case. And this is a court of law and there are some affirmative defenses that are recognized by the Delaware Supreme Court in a foreclosure case, but we're not going to litigate it in two separate Courts. ***If the Delaware Supreme Court affirms the Court of Chancery, then that's off the table for your client***. B-433, lns. 13-22. (Emphasis supplied).

28. In March 2018, CWCAM sold the Loan to WM Capital for $5,750,000, but remained the named plaintiff in the Foreclosure Action. B-27 at ¶ 114.[12]

29. Shortly thereafter, Windsor paid $7,400,000 to WM Capital in full satisfaction of the Loan. B-28 at ¶¶ 120-1.

30. Windsor claims it had "no realistic option other than to payoff the Note at a premium price" recognizing that by allowing summary judgment to

[12] Windsor complains bitterly that this sale took place during a period of mediation but (i) cannot point to any injunction preventing a sale; and (ii) never lodged any complaint with Judge Rocanelli.

move forward while staying discovery, Judge Rocanelli had effectively ruled against Windsor on its affirmative defenses.[13] B-28 at ¶ 119.

31. Rather than amending its answer to assert the affirmative defenses as counterclaims before a court already familiar with the issues, on April 2, 2018, Windsor stipulated to the dismissal of the Foreclosure Action with prejudice. B-454-455.[14]

Windsor's Participation in the Auction

32. In order to establish a market value for the Property, CWCAM included the Loan in an auction conducted by an affiliated entity, CWFS-REDS, LLC, on February 13-15, 2018 (the "Auction"). B-19 at ¶ 76, B-21 at ¶ 85, B-33 at ¶ 145.

33. Windsor was invited to participate in the Auction through its principal owner, Robert Stella. B-20 at ¶¶ 79-81.

34. Mr. Stella registered for the Auction and, as a condition of bidding, executed the "RealINSIGHT Marketplace Auction Sale Terms and Conditions/Bidder Confidentiality" (the "Auction T&C"). A-22-29.

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[13] Of course, Windsor could have allowed the Supreme Court to rule and renewed its affirmative defenses if it prevailed.

[14] The Stipulated Order dismissing the Foreclosure Action with prejudice was attached to the Motion to Dismiss as Exhibit 11. B-454-455.

35. The Auction T&C include a broad general release of all known and unknown claims against CWFS-REDS ***and its affiliates*** stating:

> The submission of a Bid serves as verification that the Bidder accepts and agrees to the terms and conditions posted on the Property's webpage at the time of the Bid….
>
> Placing a Bid on a Property indicates the Bidder's intent to purchase such Property. All placed Bids are IRREVOCABLE and shall constitute a legally binding commitment to purchase the Property in agreement with these Terms in the event that a Bid is designated as the winning Bid…
>
> EACH BIDDER RELEASES CW REDS, RI AND THEIR EMPLOYEES, AGENTS, AFFILIATES, DIRECTORS AND SUBSIDIARIES ("**REPRESENTATIVES**") FROM ANY CLAIMS, WHETHER CURRENT OR FUTURE, AGAINST CW REDS, RI OR THEIR REPRESENTATIVES. THIS WAIVER IS INCLUSIVE OF ANY AND ALL CLAIMS OF WHICH BIDDER IS CURRENTLY UNAWARE, REGARDLESS OF WHETHER SUCH CLAIMS WOULD AFFECT BIDDER'S RELEASE OF CW REDS AND/OR RI.[15]

A-27 at pg. 6 (emphasis in original).

36. Robert Stella placed multiple bids during the auction, including the high third-party bid of $6,200,000.[16] B-22 at ¶ 88.

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[15] "Bidder" is specifically defined to include the agent, principals and affiliates of the person or entity bidding. A-22.

[16] Higher bids were placed on behalf of the CWCAM. CWCAM's right to bid is specifically reserved and disclosed in the Auction T&C. A-25.

37. At the conclusion of the Auction, representatives of CWCAM contacted Mr. Stella to move forward with a sale based on his $6,200,000 bid. B-22 at ¶ 89-91.

38. Mr. Stella reneged on his bid and instead tried to negotiate a purchase for a lesser amount, evidently believing there were no other third-party bidders. B-22-23 at ¶¶ 87-95.

39. Because of Mr. Stella's refusal to honor his bid, CWCAM moved forward with a sale of the Loan to WM Capital Partners 66, LLC ("WM") for $5,750,000. B-25 at ¶ 102, B-27 at ¶ 114.

The Current Action

40. On June 15, 2018, Windsor filed the Original Complaint in this action containing a single breach of contract claim, arguing that the April and May 2017 emails concerning the Proposed Transaction had resulted in an enforceable agreement. A-1.

41. The Superior Court dismissed the Original Complaint on December 12, 2018 but granted Windsor leave to replead in tort. A-11.

42. Windsor filed its Amended Complaint on December 21, 2018 asserting promissory estoppel and unjust enrichment. B-3-36.

43. On February 1, 2019, the Defendants filed their Motion to Dismiss. A-13.

44. On February 7, 2019, Judge Davis "So Ordered" a stipulation setting deadlines of March 18, 2019 for Windsor's Answering Brief and April 15, 2019 for the Defendants' Reply. A-16.

45. By docket entry dated April 22, 2019, the Superior Court scheduled the hearing on the Defendants' Motion to Dismiss for June 7, 2019 at 1:30 pm. A-.

46. On June 6, 2019, at 4:30 pm Windsor filed the affidavit of Robert Stella claiming that he did not recall agreeing to the Auction T&C. A-31-35.

Argument

I. Applicable Law.

A. Question Presented.

What is the appropriate standard of review for the Motion to Dismiss where the Superior Court's decision is based in part on a General Release disavowed by the Plaintiff in a document filed after the Amended Complaint? B-123-160.

B. Scope of Review.

"The scope and standard of review for an order granting or denying a motion to dismiss depends on whether the order turned on the facts, the law or both." Delaware Appellate Handbook, § 6.06(d), 2d. ed. 1996. Matters of law are reviewed de novo. *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 936 (Del. 1982). Findings of fact are left undisturbed "so long as they are the product of an orderly and logical deductive process and are sufficiently supported by the record." *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004) (Addressing findings of fact made by a trial court on a motion to dismiss for lack of personal jurisdiction); *Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972).

C. Merits of Argument - Substantive and procedural law applicable to the Motion to Dismiss.

The Superior Court will grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) where the complaint does not assert facts which, if proven, would entitle the plaintiff to relief. *Cent. Mortg. Co v. Morgan Stanley Mortg.*

Capital Holdings, LLC, 27 A.3d 531, 537 (Del. 2011). The Court must accept all well-pleaded factual allegations in the Complaint as true. *Id.* However, the Court need not "accept conclusory allegations unsupported by specific facts or ... draw unreasonable inferences in favor of the non-moving party." *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).

While typically restricted to consideration of the pleadings and attachments, when ruling on a motion to dismiss under Rule 12(b)(6) the Court may consider documents outside the pleadings which are integral to the plaintiff's claim and incorporated in the complaint. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995); *Highland Capital Mgmt., L.P. v. T.C. Grp., LLC*, 2006 WL 2128677, at *3 (Del. 2006). Where the Plaintiff has previously executed a release, the Court may consider the terms of the release under Rule 12(b)(6). *Geier v. Mozido, LLC*, 2016 WL 5462437 at *6 (Del. Ch. 2016). Where a plaintiff makes supplemental factual allegations against dismissal which are not included in the complaint, those facts are not entitled to a presumption of truth. *See In re General Motors (Hughes) Shareholder Litigation*, 897 A.2d 162, 170-1 (Del. 2006) ("[T]he record supports the Court of Chancery's determination that there are no allegations ***in the Complaint*** that challenge whether the condition necessary to consummate the transaction were actually met…") (emphasis supplied, internal quotes omitted). In

addition, the Court may consider any facts entitled to judicial notice under Delaware Rule of Evidence 201. *Id.*

II. The Superior Court's Conclusion that Windsor Executed the General Release is Supported by the Record.

A. Question Presented.

Is the Superior Court's finding that Robert Stella executed the Auction T&C supported by the record? B-510-561.

B. Scope of Review.

Findings of fact are left undisturbed "so long as they are the product of an orderly and logical deductive process and are sufficiently supported by the record." *Plummer*, 861 A.2d at 1242.

C. Merits of Argument.

Windsor's principal argument against dismissal is that Judge Davis "did not take into account Stella's Affidavit, which attests he did not execute the Auction T&C prior to participating in the Auction." Windsor's argument (i) misconstrues the Stella Affidavit; (ii) disregards the transcript showing that Judge Davis gave full consideration to the affidavit; and (iii) assumes that the Court was obligated not only to consider the affidavit, but to give it the same presumption of truth as the Amended Complaint. However, as an unauthorized sur-reply filed less than a day before the original hearing date, Judge Davis was not required to give the affidavit any consideration at all. *See Xcell Energy & Coal Co., LLC v. Energy Inv. Grp., LLC*, 2014 WL 2964076, at *5 (Del. Ch. 2014) ("[T]hat the Court may consider certain extrinsic documents does not mean that it must consider them.").

Rather than attesting that he "did not execute the Auction T&C" what Mr. Stella's affidavit actually says is that he does not "recall… being required to accept the terms and conditions." A-32-3. "I do not recall" and "I did not" and are not the same thing. Mr. Stella's lack of memory stands in contrast with the Gutierrez Affidavit stating that a prospective bidder cannot place a bid on the website without scrolling through and accepting the Auction T&C.[17] B-560.

The credibility of the Stella Affidavit suffers further in light of his sudden recollection (or lack of recollection) less than a day before the scheduled hearing. In fact, the timing of Mr. Stella's affidavit calls into question whether it was entitled to any weight at all. The Defendants filed their Motion to Dismiss on February 1, 2019 arguing, *inter alia*, that Windsor's agreement to the General Release as a condition of participating in the Auction constituted grounds for dismissal. B-146-148. Windsor filed its Answering Brief on March 18, 2019 without any affidavit. B-468-509. The Defendants filed their Reply Brief on April 15, 2019, stating that Mr. Stella could not have bid without scrolling through the Auction T&C and clicking "I accept." B-427. Despite the clarity of the threat posed by the General Release, an additional 7 weeks passed before Mr. Stella suddenly failed to remember registering to bid. A-31.

[17] Judge Davis referenced the qualitative difference in the two affidavits during oral argument. A-98-102.

Regardless of the weight given to the Stella Affidavit, it is beyond dispute that Judge Davis considered the document when ruling on the Motion to Dismiss. Windsor itself points out that the Court discussed the issue of dueling affidavits during oral argument. Opening Brief at pg. 31. In fact, the first 20 pages of the transcript are concerned almost exclusively with the Stella and Gutierrez Affidavits. A-84-103.

Given this level of attention, it appears that Windsor's real argument is not that Judge Davis failed to consider the Stella Affidavit, but that he did not give it a presumption of truth. Windsor cites the hornbook law that "requires all reasonable inferences to be drawn in favor of the non-moving party" but this rule applies only to inferences drawn from facts ***in the complaint***. *See In re General Motors,* 897 A.2d at 170-1. Nothing in the Delaware law or rules suggest that Mr. Stella's 11th hour affidavit is entitled to the same deference.

Finally, putting aside questions of credibility, the Superior Court entered a So-Ordered Stipulation with a deadline of March 18, 2019 for Windsor's Answering Brief. The Stella Affidavit was filed nearly 3 months later, 7 weeks after the Reply Brief and less than 24 hours before the scheduled hearing.[18] Accordingly, the Stella Affidavit is an unauthorized sur-reply that Judge Davis was not required to consider

[18] The hearing was rescheduled at the last moment due to an unforeseen conflict. A-19.

at all. *See Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1225 (Del. 1989) ("[T]he Delaware Superior Court has 'inherent power' to enforce its own orders."); *Gunzl v. One Off Rod & Custom, Inc.*, 106 A.3d 1049 (Del. 2015) (Upholding Superior Court's dismissal of case for failure to comply with scheduling order); *Diversified Prop. Sols., LLC v. Spectrum Tax Consultants USA, Inc.*, 2016 WL 3681141 (Del. Super. 2016) (Denying permission to file a sur-reply); *see generally* Del. Super. Ct. Civ. R. 107 (no automatic right to file a sur-reply).[19]

[19] Upon reading this Answering Brief, Windsor may seek to argue alternatively that the Superior Court should not have considered the Auction T&C or the Gutierrez Affidavit at all under Rule 12(b)(6). However, Windsor has waived this argument by failing to include it in the Opening Brief. *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) ("The rules of this Court specifically require an appellant to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief. If an appellant fails to comply with these requirements on a particular issue, the appellant has abandoned that issue on appeal irrespective of how well the issue was preserved at trial."); Del. Supr. Ct. R. 14 (b)(vi)(3) ("The merits of any argument that is not raised in the body of the opening brief ***shall be deemed waived and will not be considered by the Court on appeal***.") (emphasis supplied).

III. The General Release is Clear and Applies to the Claims in this Case.

A. Question Presented.

Did the Superior Court properly dismiss the Amended Complaint based on the language of the General Release? B-146-148.

B. Scope of Review.

The Superior Court's interpretation of written agreements is reviewed *de novo*. *Cent. Mortg.*, 27 A.3d at 535, *citing Gotham Partners, L.P., v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002). However, to the extent the "trial court's interpretation of the contract rests upon findings extrinsic to the contract, or upon inference drawn from those findings", the Court is required "to defer to the trial court's findings…". *Honeywell Intern. Inc. v. Air Products & Chemicals, Inc.*, 872 A.2d 944, 950 (Del 2005).

C. Merits of Argument.

Delaware courts have long recognized the validity of general releases. *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1163 (Del. 2010); *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981) (en banc). A clear and unambiguous release will only be set aside where there is fraud, duress, coercion, or mutual mistake concerning the existence of a party's injuries. *Deuley*, 8 A.3d at 1163.

In February 2018, Windsor's principal owner Robert Stella participated in the in the Auction through FCS, an affiliate of Windsor, and agreed to the Auction T&C.

B-21 at ¶ 84, A-22 ("The submission of a Bid serves as Verification that the Bidder accepts and agrees to the terms and conditions posted on the Property's webpage at the time of the Bid."). The Auction T&C identify the "Bidder" as the bidding entity together with its "agents, principals and affiliates" thereby expressly including Windsor within their scope. A-22.

Once he placed a bid, Robert Stella, on behalf of FCS, its agents, principals and affiliates, executed a broad general release of all claims against "CW REDS, RI AND THEIR EMPLOYEES, AGENTS, ***AFFILIATES***, DIRECTORS AND SUBSIDIARIES…". A-27. Windsor correctly alleges that CWCAM is an affiliate of CWFS-REDS, the entity which received the buyer's premium. B-23 at ¶ 93. Consequently, Windsor has released CWCAM from these claims and the Amended Complaint should be dismissed. *Geier*, 2016 WL 5462437 at *6 (Dismissing claims based on a release executed by affiliates of the parties before the court).[20] As a sophisticated commercial investor represented by highly capable Delaware counsel, there is no reason to excuse Windsor from the consequences of this release.

Further, as a matter of law the release of CWCAM also extends to the Trust. The allegations against the Trust are entirely vicarious – no act is attributed to the

[20] There is no question that Mr. Stella was fully aware of the claims pled in this case when he executed the Auction T&C since Windsor had already posed the same arguments as affirmative defenses in the Foreclosure Action. B-276-285.

U.S. Bank and the Trust is included in the complaint based solely on the actions of its alleged agent, CWCAM. B-6 at ¶ 12, B-30 at ¶¶ 128-129, B-32 at ¶¶ 139-140. It is settled under Maryland law that "absent independent wrongdoing by the principal, a release of an agent will also release the principal as a matter of law".[21] *Anne Arundel Medical Center, Inc. v. Condon*, 102 Md.App. 408, 421 (1994) ("The release of an agent removes the only basis for imputing liability to the principal"); *see also, Mamalis v. Atlas Van Lines, Inc.*, 522 Pa. 214, 221, 560 A.2d 1380, 1383 (1989) ("We hold that absent any showing of an affirmative act, or failure to act when required to do so, by the principal, termination of the claim against the agent extinguishes the derivative claim against the principal."); *Hill v. McDonald*, 442 A.2d 133, 138 (D.C. 1982) ("Certainly, as a matter of logic, it is hard to see how a principal could still be held vicariously liable after the release of its agent, the only real wrongdoer."); Restatement (Second) of Agency § 217A (1958) ("Thus, a release given to the agent, without reserving rights against the principal, may discharge the latter."). Here, where the release of the agent (the Trust) is total, no independent wrongdoing is attributed to the principal (U.S. Bank) and the language of the release does not include any reservation of rights, the principal (U.S. Bank) is released as a matter of law.[22]

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[21] The Auction T&C contain a Maryland choice of law provision. A-28.

[22] Windsor does not offer any contrary Maryland Law in the Opening Brief.

Windsor argues that because the Auction T&C refer to additional terms and conditions (the "Property T&C"), it was not presented with a complete set of terms and therefore should not be bound by the General Release. *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 287 (2d Cir. 2019), the primary case relied on by Windsor, does not support this proposition. In *Starke*, the critical language (an arbitration agreement) was not present on the web page presented to the plaintiff. *Starke*, 913 F.3d at 286-7. Here, the General Release appeared in bold, capital letters in a document that Mr. Stella was forced to scroll through and accept in order to bid. A 27. There is little doubt that if the arbitration agreement had been in bold, capital letters on the page viewed by the plaintiff in *Starke*, it would have been enforced. Moreover, *Starke* involved a consumer class action suit. *Id*. at 281. Mr. Stella is a sophisticated commercial investor who has repeatedly emphasized his business experience with distressed assets and on-line auctions. A-51 at ¶¶ 2, 3; A-60 at ¶ 54. Accordingly, the facts of this case bear little resemblance to *Starke*.

IV. Windsor's Claims are Barred by the PNA.

A. Question Presented.

Where the Chancery Court and Superior Court each held that the PNA was enforceable to govern settlement negotiations, did the PNA also apply to negotiations to sell the Loan to an affiliate of Windsor at a discount? B-66-71.

B. Standard and Scope of Review.

The Superior Court's interpretation of the PNA and the prior Chancery Court decision is reviewed *de novo*. *Cent. Mortg. Co.*, 27 A.3d at 535. The Supreme Court is free to affirm the Superior Court's decision based on any argument presented to the lower court. *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del.. 2015.)

C. Merits of Argument.

Promissory estoppel requires reasonable reliance. *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000). Unjust enrichment requires a violation of the "principles of justice or equity and good conscience." *Nemec*, 991 at 1130. Neither promissory estoppel nor unjust enrichment is available if a contract governs the relationship between the parties. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 348 (Del. 2013) ("Promissory estoppel does not apply, however, where a fully integrated, enforceable contract governs the promise at issue."); *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009) ("A claim for unjust enrichment is not

available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim.").

The PNA states unambiguously:

> Borrower acknowledges and agrees that ***Borrower may not in any way rely on, or claim reliance on, the Negotiations***. B-110 at ¶ 6 (emphasis supplied).

Further, the PNA requires that any settlement must be (i) be approved by senior management at CWCAM; and (ii) memorialized by a "definitive, formal written agreement prepared and signed by Holder". B-110 at ¶ 5. Windsor admits that neither of these things happened and acknowledges that settlement discussions among counsel remained subject to credit committee approval. B-13 at ¶ 44, B-15.

The freedom of contract jealously guarded by Delaware Courts would count for little if a sophisticated commercial investor could, with the advice and assistance of counsel, acknowledge that it may not claim reliance on negotiations and then file suit claiming it relied on the negotiations or assert that it is somehow unjust for the PNA to mean what it says. *NACCO Industries, Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) ("Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties."). In fact, allowing these claims to stand in the face of the PNA would be nothing short of condoning fraud by Windsor. *See HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 201, 941 N.Y.S.2d 59, 70 (2012) (Permitting a plaintiff to claim reasonable reliance

when it certified it was not make such a claim would "in effect condone [plaintiff's] own fraud in deliberately misrepresenting [its] true intention when it disclaimed reliance.") (internal quotations omitted).

The Superior Court declined to find that the PNA barred Windsor's claims "because the PNA is a contract which exclusively governs the negotiations between the parties rather than the sale of the Loan." B-498. Respectfully, Judge Davis's holding on this point is not reconcilable with the PNA which states:

> [N]o agreement reached with respect to ***any matter*** (including, without limitation, any waiver of any right or remedy) ***shall have any effect whatsoever*** unless such agreement is reduced to writing, signed and delivered by all parties' authorized representatives.

B-109 at ¶ 2 (emphasis supplied). There is no language in the PNA limiting its effect to loan modifications and since the sale of the loan is "any matter," the discussions concerning the Proposed Transaction cannot have "any effect whatsoever" unless memorialized in a written agreement signed by the parties' authorized representatives. Further, the discounted sale of the Loan to a Windsor-affiliate is in every meaningful way a modification since it permits Windsor to satisfy the debt at a discount.[23]

[23] Stated differently, if the Proposed Transaction was not yet an enforceable agreement, what could discussions about the proposal possibly be other than "negotiations"?

Finally, Windsor argues that the PNA did not apply to the Proposed Transaction because by April 2017, it had already been terminated. However, Windsor has never alleged that either party sent a written notice of termination, as required by the PNA. Moreover, for nearly a year after the negotiations, Windsor continued to represent to the Chancery Court, the Superior Court and the Supreme Court that the PNA remained "a binding contract between the parties" subject to specific performance. B-219.[24] *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, 1050 (3d Cir. 1993) ("[A] reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations."). Finally, the PNA itself makes clear that even if negotiations terminate, the terms of the PNA survive. B-110 at ¶ 8.

[24] The "Proposed Transaction" negotiations took place in April and May 2017. Windsor filed the Opening Brief in its appeal of Chancellor Bouchard's decision on November 7, 2017 and filed its Reply Brief on January 31, 2018.

V. Windsor Fails to State a Claim for Promissory Estoppel Because It Does Not Allege a Firm and Definite Promise or Reasonable Reliance.

A. Question Presented.

Where a settlement offer is made explicitly subject to further approval, does the offer constitute a firm and definite promise upon which a plaintiff can reasonably rely? B-155-158.

B. Standard and Scope of Review.

The Superior Court's interpretation of the Amended Complaint is reviewed *de novo*. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument.

To prove promissory estoppel, Windsor must show by clear and convincing evidence that (1) CWCAM made a promise; (2) CWCAM reasonably expected to induce action on the part of Windsor; (3) Windsor reasonably relied on the promise and took action to its detriment; and (4) an injustice can be avoided only by enforcing the promise. *Lord*, 748 A.2d at 399.

To support a claim for promissory estoppel, courts have unanimously held that a promise must be "***definite and certain.***" Contingent promises will not suffice. *Id.*; *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1233 (Del. Ch. 2000); *1 Oak Private Equity Venture Capital Ltd. v. Twitter, Inc.*, 2015 WL 7776758, at *12 (Del. Super. 2015); Restatement (Second) Contracts § 91 (1981) (Where a promise is conditional, "performance becomes due only upon the occurrence of the condition");

see also, Andersons, Inc. v. Consol, Inc., 185 F. Supp. 2d 833, 840 (N.D. Ohio 2001) ("To be 'clear and unambiguous,' the promise cannot be conditional."), *aff'd*, 348 F.3d 496 (6th Cir. 2003); *Advanced Marine Tech., Inc. v. Burnham Sec., Inc.*, 16 F.Supp.2d 375, 381 (S.D.N.Y.1998) (Promissory estoppel claim fails because any obligation to proceed was conditional upon the execution of a written contract.); *Frutico S.A. de C.V. v. Bankers Tr. Co.*, 833 F. Supp. 288, 299 (S.D.N.Y. 1993) (same).

Here, Windsor acknowledges that the proposed settlement was not "definite and certain," but was instead explicitly subject to credit committee approval. B-13 at ¶ 44. The Superior Court previously held that the conditional nature of the emails prevented the formation of a contract. B-1-2. The same infirmity prevents Windsor from stating a claim for promissory estoppel. To hold otherwise would subvert the purpose of promissory estoppel, which is an equitable tool to permit enforcement of clear promises which are not supported by consideration or do not satisfy the statue of frauds. *See Lord*, 748 A.2d at 400 ("Promissory estoppel is more accurately viewed as a consideration substitute for promises which are reasonably relied upon, but which would otherwise not be enforceable."); Restatement (Second) of Contracts § 139 (1981).

Although the Delaware Courts do not appear to have addressed the question directly, other courts have also found that reliance on a conditional promise is

unreasonable as a matter of law. *See, e.g., Consol, Inc.*, 185 F. Supp. 2d at 845, fn 1 (unreasonable to rely on a contingent promise); *G & F Assocs. Co. v. Brookhaven Beach Health Related Facility*, 249 A.D.2d 441, 443, 671 N.Y.S.2d 510 (1998) (unreasonable to rely on promise to sell nursing home which was contingent on department of health approval).

The case of *1 Oak Private Equity Venture Capital Ltd. v. Twitter, Inc.*, No. 2015 WL 7776758 (Del. Super. 2015), cited in the Amended Complaint, is instructive. In *1 Oak*, this Court held that a plaintiff's allegation of an oral promise that it was an approved buyer was sufficiently definite and certain to defeat a motion to dismiss. *Id.* at * 12. There is no comparable promise in this case. Windsor alleges that it ***subjectively believed*** credit committee approval was a formality. B-13 at ¶¶ 44-48. There is no allegation of any promise that approval had already been given or was a formality, which distinguishes these facts from *1 Oak*. Substituting the long-held standard of a "firm and definite" promise for the subjective belief of a plaintiff would essentially eliminate multiple elements of promissory estoppel, conflict with settled Supreme Court precedent and render Rule 12(b)(6) meaningless as a check on plaintiffs.

Lacking Delaware case law to support a generalized covenant of good faith and fair dealing, Windsor cites *Int'l Minerals & Min. Corp. v. Citicorp N. Am., Inc.*, 736 F. Supp. 587 (D.N.J. 1990) for the proposition that the Defendants were

obligated to consider the Proposed Transaction in good faith. However, as noted by Judge Davis at oral argument, *International Minerals* is a contract case. A-148. It lends no support to the revolutionary idea that an implied covenant of fair dealing exists where the courts have already held that the parties had not formed a contract and had no obligation to negotiate in good faith.[25]

[25] Windsor's reliance on the "forthright negotiator principal" is also misplaced. The forthright negotiator principal is a tool for interpretation of ambiguous contracts when extrinsic evidence does not clarify their meaning. *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007). The doctrine has no utility where a court has already held that no contract exists, and it does not appear that any Delaware court has ever cited this principal in support of a tort claim.

VI. Windsor Fails to State a Claim for Unjust Enrichment Because It Does Not Allege Impoverishment, Enrichment or Injustice.

A. Question Presented.

Can a claim for unjust enrichment lie where the Defendants sold a validly held loan at a substantial loss, Windsor repaid what it had borrowed, and its only other "damages" are due diligence expenses for a prospective sale? B-158-160.

B. Standard and Scope of Review.

The Superior Court's interpretation of the Amended Complaint is reviewed *de novo*. *Cent. Mortg. Co.*, 27 A.3d at 535.

C. Merits of Argument.

Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Nemec*, 991 A.2d at 1130 (internal quotation omitted). "The elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Id*.

Windsor's claim of unjust enrichment rests on an astonishingly myopic view of its own allegations. The Defendants absorbed a loss of more than a million dollars

when the Loan was sold to WM. B-27 at ¶¶ 114-116.[26] Windsor, the party best able to judge the value of the Property, borrowed $7.4 million when the Loan was originated, paid $7.4 million to WM in satisfaction of the debt and continues to hold title. In other words, Windsor repaid what it borrowed and got what it paid for.

WM, the real winner in this transaction, purchased the Loan for $5.75 million and received $7.4 million a month later. B-27 at ¶ 114, B-28 at ¶ 120. Windsor could have purchased (and essentially repaid) the Loan a month earlier for $6,200,000 but chose not to because "it was not comfortable with this post-auction proposal". B-23 at ¶¶ 92, 94. While that may be difficult for Windsor to accept, poor business judgment does equate to injustice. *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011) ("Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights. Broadly speaking, an ineffective transaction for these purposes is one that is *nonconsensual*.") (emphasis in original); *see also Nemec*, 991 A.2d at 1128 ("Delaware's implied duty of good faith and fair dealing is not an equitable remedy

[26] Windsor also cites CWCAM's receipt of servicing fees and CW-REDS receipt of an auction commission as "enrichment". However, there is not nexus between this alleged enrichment and Windsor's impoverishment because Windsor did not pay these fees. Further, there is no law suggesting that enrichment is unjust when received as payment for services performed.

for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract.").

Here, CWCAM was obviously correct to be skeptical of the Proposed Transaction and was well within its rights to sell the Loan at Auction. B-8 at ¶ 24 fn. 2, 76. As a result of its efforts, CWCAM increased the sale price from $5,288,000 to $5,750,000. B-19 at ¶ 74, B-27 at ¶ 114. Windsor's suggestion that $5,750,000 is less than $5,288,000 does not stand up to even basic math. If the Defendants had received $5,288,000 on June 1, 2017 and invested the proceeds risk free at the one year Treasury Bill rate of 1.18%, 10 months later when the loan was sold to WM it would have been worth approximately $5,340,000.[27] Even in the unlikely event that the Defendants accrued $410,000 expenses in 10 months, Windsor's success in driving up costs through frivolous litigation hardly seems like a basis for unjust enrichment.

More broadly, the Defendants' business judgment in rejecting the proposed settlement is not an appropriate area of inquiry for Windsor or the Court. Windsor is not a partner or shareholder in either of the Defendants and does not have standing to raise questions about the governance of the Trust. *Toelle v. Greenpoint Mortg. Funding, Inc.*, 2015 WL 5158276, at *4 (Del. Super. 2015) (Borrower lacks standing

[27] The 1-year T-Bill rate as of May 24, 2017 was 1.18 %. https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yieldYear&year=2017.

to assert non-compliance with a pooling and servicing agreement), *see also N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007) (Holding that shareholders alone have derivative standing to question the business judgment of directors while a corporation is solvent.).

VII. Windsor Fails to State a Claim for Unjust Enrichment Because It Does Not Allege Impoverishment, Enrichment or Injustice.

A. Question Presented.

Can a plaintiff/borrower plead "injustice" when it has fraudulently concealed information from the lender to artificially depress the value of its collateral so that it can repurchase the loan at a discount? B-534-537.

B. Standard and Scope of Review.

The Superior Court's interpretation of the Amended Complaint and is reviewed *de novo*. *Cent. Mortg. Co.*, 27 A.3d at 535. Findings of fact are left undisturbed "so long as they are the product of an orderly and logical deductive process and are sufficiently supported by the record." *Plummer*, 861 A.2d at 1242.

C. Merits of Argument

Windsor acknowledges in its pleadings that CWCAM's credit committee turned down the Proposed Transaction in part because of its belief that Mr. Stella had not been forthcoming about his prospects for leasing the Property. B-506. Its suspicions were proven correct when, two months later, ***Mr. Stella was featured on the cover of the Delaware News Journal with his new tenant, Planet Fitness***.[28] B-539-541.

[28] Mr. Stella now admits that the Planet Fitness lease was signed on June 15, 2017 and a subsequent lease with Aldi was signed on July 20, 2017. A-52 at ¶ 1, fn. 1.

Windsor's claim that CWCAM did not request information about prospective tenants until January 19, 2018 is an outright fabrication. CWCAM commissioned an updated appraisal in April 2017, in the middle of the negotiations at the heart of this case. B-554. The appraiser conducted a personal interview with Mr. Stella, who refused to provide any information about leasing prospect because of the on-going litigation. B-553. Consequently, the resulting June 8, 2017 appraisal makes no mention of Planet Fitness or the forthcoming lease with Aldi and the appraiser was deprived of the ability to incorporate these leases into the value. After publication of the News Journal article, on September 15, 2017 CWCAM asked Mr. Stella by email for a copy of the Planet Fitness lease. B-558. Windsor refused to provide the lease and steadfastly refused to answer any discovery concerning when and how the negotiations for the new leases took place. B-440.

Windsor had an affirmative obligation under the Mortgage to obtain written consent from CWCAM prior to executing a lease for more than 5000 sq. ft and 60 months. B-59 at § 8(c). Obviously, compliance with this provision would have alerted CWCAM to the Planet Fitness lease prior to June 15, 2017. Windsor also ignored its obligation to provide updated financial information to the Defendants within 45 days of the end of each calendar quarter. B-74 § 18(b).

Seen in this light, the true nature of Windsor's grievance is revealed - that it was unfairly prevented from defrauding the Defendants by repurchasing the Loan at

an artificially depressed price, achieved through the active concealment of leasing information which it was obligated to provide. This is a poor example of unjust enrichment in any jurisdiction.

Conclusion

The decision of the Superior Court should be affirmed in its entirety.

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