

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PREFERRED INVESTMENT)	
SERVICES, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 5886-VCP
)	
T&H BAIL BONDS, INC., TED L.)	
PRIDGEN, ROBERT LUBACH,)	
JOANNE M. LUBACH, MELISSA)	
M. MATARESE, JERZY WIRTH and)	
WIRTH FINANCIAL SERVICES,)	
LLC,)	
)	
Defendants.)	

MEMORANDUM OPINION

Submitted: March 13, 2013
Decided: July 24, 2013

E. Calvin Harmon, Jr., Esquire, LAW OFFICE OF THEOPALIS K. GREGORY, SR.,
ESQ., Wilmington, Delaware; *Attorneys for Plaintiff.*

Neil R. Lapinski, Esquire, GORDON, FOURNARIS & MAMMARELLA, P.A.,
Wilmington, Delaware; *Attorneys for Defendants.*

PARSONS, Vice Chancellor.

This case arises from the soured relationship between two parties to an exclusive cash bail financing agreement. The parties to the agreement are a cash bail business and the financing company that would supply the cash. The agreement provided that the financing company would supply the cash bail business with a certain amount of cash and, in return, the cash bail business would provide customers and the resources to administer its business. The agreement precluded the financing company from assisting or financing any other cash bail business during the five-year term of the agreement. Likewise, the agreement precluded the cash bail business from accepting cash from any other source to post cash bails.

Both parties ultimately breached the agreement. This case turns largely on which party breached first, as there are claims and counterclaims for breach of contract. In addition, the financing company, which is the plaintiff in this action, claims that the cash bail business owes it for loans, cash bail refunds, and cash bail forfeitures. The plaintiff also asserts claims for tortious interference with contractual relations against individuals and entities that it alleges provided cash to the cash bail business in contravention of the agreement. The cash bail business defends on the ground that the plaintiff began financing or assisting other bail agents in violation of the agreement's exclusivity provision long before the cash bail business went outside of the agreement to secure financing from other sources. In addition to pressing that argument defensively, the cash bail business is pursuing damages under a breach of contract counterclaim. The cash bail business also has asserted a counterclaim against the plaintiff for abuse of process, and it

seeks to recover its attorneys' fees on that ground and under the bad faith exception to the American Rule. According to the cash bail business, the plaintiff knew from the outset of this action that the financing agreement was unenforceable against it due to the plaintiff's prior breach, but the plaintiff persisted in bringing and prolonging this litigation to drive the cash bail company out of business.

I presided over a three-day trial on the parties' claims and counterclaims and later heard oral argument after full post-trial briefing. Having carefully considered the evidence presented at trial and the parties arguments about that evidence, I rule predominantly in favor of the defendants. I find that the plaintiff is entitled to payment for certain loans, bail refunds, and bail forfeitures. But, I find in favor of the cash bail business on the plaintiff's breach of contract claim and the cash bail business's breach of contract counterclaim. The plaintiff materially breached the parties' exclusive financing agreement before the cash bail business engaged in the acts that the plaintiff alleges were in breach of that agreement. The cash bail business is entitled to recover damages from the plaintiff for that breach. I also find that the defendants who provided funding to the cash bail business did not tortiously interfere with the exclusive financing agreement. The cash bail business did not prove its counterclaim for abuse of process. Nevertheless, I find that the plaintiff's actions in this litigation clearly warrant the shifting of attorneys' fees, and I, therefore, award the defendants 80% of the attorneys' fees and expenses they reasonably incurred in this litigation.

I. BACKGROUND

A. The Parties

Plaintiff, Preferred Investment Services, Inc. (“PISI”), was the financier of Defendant T&H Bail Bonds, Inc.’s (“T&H”) cash bail business. Edwin Swan is the principal of PISI.

Defendant Ted Pridgen owns and operates T&H. T&H and Pridgen post cash bails for T&H customers. Defendants Robert and Joanne M. Lubach (the “Lubachs”), Melissa M. Matarese, Jerzy Wirth, and Wirth Financial Services, LLC (“WFS”) (collectively, the “Additional Defendants”) allegedly provided financing to T&H’s cash bail business.

B. Facts

1. T&H and PISI’s business relationship

Swan, the sole owner of PISI and a related business Preferred Tax Services, Inc., provides business consulting, tax preparation, and bookkeeping services to his clients.¹ Beginning in 1995, before Swan incorporated PISI, he provided tax preparation and bookkeeping services to T&H.² Swan later attempted to purchase T&H for approximately \$3,000,000, but was unable to arrange the financing for that transaction.³

¹ Tr. 11–12 (Swan). Citations in this form are to the trial transcript. When the identity of the testifying witness is not evident from the text, it is indicated parenthetically, as in this case.

² Tr. 14 (Swan).

³ Tr. 178 (Swan).

As an alternative, Swan and T&H discussed having Swan finance T&H's cash bail business. Then, shortly after Swan incorporated PISI in 2007, T&H and PISI entered into a Cash Bail Financing Agreement (the "Agreement").⁴

Over the course of the parties' business relationship, in addition to financing T&H cash bails, PISI or Swan also occasionally loaned T&H funds to cover its payroll expenses.⁵ According to Swan, Pridgen would request such a loan by telephoning Swan and, if Swan approved, Pridgen would pick up the loan at Swan's office.⁶ There was no formal agreement between Swan and Pridgen for the repayment of the loans.⁷ Swan said he typically did not charge any interest for "smaller amounts," but would charge interest in certain circumstances depending on what the money was borrowed for.⁸ Swan testified that Pridgen agreed to an interest rate of 9.75%.⁹

2. The Cash Bail Financing Agreement

By its terms, the Agreement was to span a five year period from May 21, 2007 to May 31, 2012.¹⁰ The Agreement required T&H to "provide cash bail customers and the

⁴ Tr. 176 (Swan).

⁵ Tr. 21, 82 (Swan).

⁶ Tr. 82–83.

⁷ Tr. 21.

⁸ Tr. 22.

⁹ Tr. 71.

¹⁰ Tr. 176; *see* JX 5, the Agreement.

office space, bail agents, bounty hunters, licensing, insurance and general support to administer its cash bail business.”¹¹ In return, PISI undertook to provide T&H funds as needed to post T&H’s cash bails up to \$1,000,000 (the “Bail Limit”).¹² Additionally, the Agreement provided that PISI must supply T&H with a sum of \$100,000 by May 24, 2007, and thereafter must maintain a minimum cash balance of \$100,000 on-hand with T&H.¹³

The Agreement also provided that T&H and PISI would deal with each other exclusively. Section II(f) of the Agreement states: “So long as T&H is not in default under the [A]greement, [PISI] shall not without the prior consent of T&H, *directly or indirectly provide cash or other cash bail financing or assistance to any person other than T&H.*”¹⁴ Similarly, Section II(e) provides that:

So long as the total amount of cash bails held by courts is less than the Bail Limit and so long as [PISI] is making the contributions specified in paragraph I, *T&H shall not directly or indirectly deal with any entity other than [PISI] for the cash to post cash bails.*¹⁵

¹¹ JX 5 § I(a)(1).

¹² *Id.* § I(a)(2).

¹³ *Id.* § I(b).

¹⁴ *Id.* § II(f) (emphasis added).

¹⁵ *Id.* § II(e)(2) (emphasis added). The Agreement contains two subsection “(e)”s in Section II. The first of those two provisions pertains to the periodic settlement meetings. I refer to that provision herein as Section II(e)(1). I refer to the second Section II(e), pertaining to T&H’s obligation to deal exclusively with PISI, as Section II(e)(2).

The Agreement defines “directly or indirectly” to include,

among other things, transactions done by or on behalf of immediate family members of or legal entities owned or controlled by [Pridgen] or [Swan] or legal entities owned or controlled by any [] immediate family member of [Pridgen] or [Swan], as the case may be, or any other method used for the purpose of circumventing this agreement.¹⁶

Under the terms of the Agreement, T&H would pay PISI one half of all cash bail fees that T&H charged to its customers. The Agreement required T&H to charge its customers a cash bail fee between 32% and 34%. T&H typically charged a fee of 33%, of which PISI was entitled to half, or 16.5%.¹⁷ The Agreement also provided that when cash bails funded by PISI were refunded or otherwise returned, those amounts should be collected by T&H and paid in full to PISI.¹⁸ If a cash bail was forfeited, the parties agreed to bear the loss equally.¹⁹ To reconcile the amounts owed, the Agreement provided that T&H and PISI “shall meet periodically but in no case less often than monthly to settle accounts of forfeited or refunded bails, [to divide] cash bail fees and [to divide] expenses” (each a “Settlement Meeting”).²⁰

The Agreement was to continue in effect until May 31, 2012, unless T&H or PISI terminated it earlier. The Agreement contemplated two circumstances under which the

¹⁶ *Id.* § II(g).

¹⁷ *Id.* § IV(b); *see also* Tr. 74 (Swan).

¹⁸ JX 5 § III.

¹⁹ *Id.* § VI(a).

²⁰ *Id.* § II(e)(1).

Agreement could be terminated. First, T&H could terminate the Agreement at any time if PISI failed “to provide cash as required by paragraphs I & II of the Agreement.”²¹ In addition, the Agreement provided that either party could terminate the Agreement “after giving the other party 10 days notice and [an] opportunity to cure if the other party materially breached th[e] [A]greement.”²² If the Agreement was terminated for any reason, the parties agreed that “the obligation of T&H to make payments to [PISI] . . . shall continue until all monies required to be paid or returned to [PISI] shall have been paid or returned.”²³

3. Cash bail application and business

To facilitate understanding of the details of this dispute, it may be helpful briefly to describe T&H’s usual process for completing a cash bail transaction. According to Swan, the first step in securing a cash bail from T&H is to fill out a cash bail application.²⁴ Before the customer completes the application, T&H and the customer agree on the fee for posting the bail. Once the application is complete, the customer pays the agreed upon fee in exchange for the cost of that particular cash bail and then receives a receipt indicating the amount of the cash bail being posted and the fee she paid.

²¹ *Id.* § VII(d). Paragraph I relates to PISI’s obligation to provide funding up to the \$1,000,000 Bail Limit and to maintain a minimum cash balance of \$100,000 on hand with T&H. Paragraph II sets forth, among other things, PISI’s obligation not to provide cash bail financing or assistance to any person other than T&H.

²² *Id.* § VII(e).

²³ *Id.* § VIII.

²⁴ Tr. 40.

Access to a reliable supply of cash on-hand is imperative to the success of T&H's business. Under the Agreement, PISI would provide T&H with an up-front bank of a combination of cashier's checks and cash so that T&H had ready access to cash when cash bail opportunities arose.²⁵ The Agreement required PISI to maintain with T&H a minimum cash balance of \$100,000 to fund T&H's cash bails.²⁶

PISI and T&H met every two, three, or four weeks to conduct a Settlement Meeting to determine, among other things, the fees T&H owed to PISI for the cash bails it posted during that time period and also to replenish T&H's cash supply.²⁷ At the Settlement Meetings, T&H would provide PISI with all the supporting documentation for the cash bails it posted in that particular time period. The number of cash bails to be settled could range from five to twenty-five at any given Settlement Meeting.²⁸

To reconcile the cash inventory that PISI provided to T&H, T&H kept a cash inventory list.²⁹ The list began with the amount of cash T&H had on hand. As T&H used the cash inventory to post its cash bails, T&H added line items for those amounts on the list. At the Settlement Meetings, Swan and Pridgen would calculate the remaining balance by deducting the line items from the beginning balance to arrive at a final figure.

²⁵ Tr. 35 (Swan); *see also* JX 5 § I(b).

²⁶ JX 5 § I(b).

²⁷ Tr. 35 (Swan).

²⁸ Tr. 36 (Swan).

²⁹ Tr. 37 (Swan).

Pridgen and Swan then compared the cash balance remaining at T&H's office with the final figure to ensure that the cash inventory was accurately reconciled. The cashier's checks were reconciled in the same manner as the cash inventory. Upon request from T&H, PISI would replenish T&H's cash inventory by delivering cash or cashier's checks to T&H. PISI would make the checks out to the State of Delaware for incremental amounts between \$1,500 and \$2,500.³⁰

4. T&H and PISI's rocky relationship

By 2009, Pridgen and Swan's relationship had become rocky. Around 2008 or 2009, Swan accused one of T&H's employees of miscalculating the settlement amount that Swan was entitled to from the cash bails posted during the settlement period.³¹ On multiple occasions, Pridgen told Swan to refrain from contacting his employees or customers.³² Nevertheless, without Pridgen's permission, Swan called one of T&H's customers to inform her that he would be withholding a portion of the collateral she had paid to T&H due to the long delay in resolving the customer's case.³³ In that case, the customer had requested financing from T&H for an unusually high cash bail amount. Due to the high amount, T&H asked the customer to provide some security or collateral before it could post the bail. As collateral, the customer gave T&H \$20,000 to secure the

³⁰ Tr. 37–38.

³¹ *See* Tr. 192 (Pridgen).

³² Tr. 193.

³³ Tr. 203; Tr. 292–95 (Harris).

cash bail.³⁴ Swan demanded to hold the \$20,000 for its safekeeping. After the case concluded, the customer telephoned Pridgen and requested that he return its collateral. Although Pridgen called Swan multiple times to request that he return the client's money to T&H's office, Swan refused.³⁵ Pridgen ultimately called his client's attorney.³⁶ The attorney contacted Calvin Harmon, Esquire and shortly thereafter, the collateral was returned to Pridgen's office.³⁷

In or around 2009, T&H began to encounter problems obtaining financing from PISI when cash bail opportunities arose. T&H claimed that it had the right under the Agreement to expect PISI and Swan to be available the entire day to finance T&H's cash bails, including nights and weekends.³⁸ According to Pridgen, it was typical within the cash bail industry to have bail requests at 3:00 am in the morning.³⁹ Swan refused to be available to finance cash bails in the middle of the night, but said he would be available at 9:00 am when the banks opened. Around the same time, T&H received complaints that

³⁴ Tr. 295.

³⁵ Tr. 205 (Pridgen).

³⁶ *Id.*

³⁷ Tr. 206. Harmon is PISI's attorney in this action. He also is a mutual friend of Pridgen and Swan and played a role in bringing about their business relationship. *See* Tr. 24 (Swan).

³⁸ Tr. 184 (Pridgen).

³⁹ Tr. 184–85.

PISI was interfering with operations in T&H's downtown offices.⁴⁰ In addition, T&H began to hear "industry rumors" that PISI was financing other cash bail agents besides T&H.⁴¹ Pridgen repeatedly approached Swan about these rumors, but Swan consistently denied that PISI was financing any other cash bail agents beside T&H.⁴² In January 2010, however, T&H learned that a cash bail was posted for Tybrie Briscoe using Swan's government issued driver's license.⁴³ Lorin Jones, an employee of T&H, told Pridgen that Swan posted the cash bail for Briscoe.⁴⁴ Swan initially denied that he posted the Briscoe bail, but later admitted to Pridgen that he had done so after Pridgen told Swan that the court clerk identified him as the individual who posted the bail for Briscoe.⁴⁵ Pridgen became aware of the Briscoe transaction in January 2010.⁴⁶

5. PISI's secret transactions

On or about January 20, 2009, a company called NC Cash Bails, Inc. ("NC Cash") was incorporated in Delaware by one of Swan's entities.⁴⁷ The owner of NC Cash was

⁴⁰ Tr. 191–94. T&H maintains offices in Wilmington, Dover, and Georgetown, Delaware.

⁴¹ Tr. 195 (Pridgen).

⁴² Tr. 196.

⁴³ Tr. 195–96.

⁴⁴ Tr. 196.

⁴⁵ Tr. 196–97.

⁴⁶ Tr. 195 (Pridgen).

⁴⁷ Swan Dep. 159.

Nickulas Maglaras.⁴⁸ According to Swan, NC Cash employed PISI to conduct the day-to-day transactions of its business, such as receiving calls from bail agents needing financing, providing cashier's checks to bail agents, maintaining NC Cash's books and records, and making bank accounts available to NC Cash in which cash bail refunds could be deposited and from which cashier checks could be purchased.⁴⁹

PISI also had arranged with Montanez Reed, owner of Mark Bail Bonds ("MBB") in November or December 2008 to have NC Cash finance MBB's cash bails in Delaware.⁵⁰ Before NC Cash began financing cash bails for MBB, however, Swan approached Pridgen to seek permission for PISI to enter into a cash bail financing agreement with Reed.⁵¹ Pridgen declined that request and, in turn, reminded Swan of the exclusive financing agreement that PISI had with T&H.⁵² The evidence shows, however, that Swan and PISI went ahead anyway with financing, or at least, assisting NC Cash and MBB in connection with their cash bail-related business.

As part of the arrangement with Reed, PISI provided \$10,000 in December 2008 to MBB to fund its cash bail operations.⁵³ PISI also made an arrangement with Top Bail

⁴⁸ Tr. 411 (Swan).

⁴⁹ Tr. 282–89 (Swan).

⁵⁰ Tr. 297–99 (Swan).

⁵¹ Tr. 188 (Pridgen).

⁵² Tr. 189.

⁵³ Tr. 300–02 (Swan) ("A. [W]hat came out of that [meeting] was an arrangement that I made with [Reed] and someone else to help him out with his cash bail

Bonds (“TBB”), similar to the arrangement it made with MBB, to have NC Cash finance TBB’s cash bail postings.⁵⁴

Additionally, PISI opened new bank accounts for other bail bond agents, in which it listed Swan as an authorized signor on the accounts.⁵⁵ Specifically, Swan was the signor for Just Bails LLC, an affiliate of MBB. Swan testified that he did not feel obligated to disclose to T&H that he was a signor on any of the new accounts because they were not Swan’s bank accounts.⁵⁶ Swan explained that he became a signor on the bank account so that he could facilitate the transfer of money between accounts.⁵⁷ As a signor, Swan admittedly transferred money from PISI accounts to accounts owned by cash bail agents other than T&H.⁵⁸ PISI also deposited check refunds that Delaware courts issued to other bail agents into PISI’s bank accounts.⁵⁹ Furthermore, Swan admitted that in PISI’s bank accounts, PISI commingled its own money with NC Cash’s

posting. Q: So when [Reed] needed a check, he would call you? A. Yes. Well, after the arrangement was set up. And the arrangement was set up with the company that I was assisting in that, yes.”).

⁵⁴ Tr. 322 (Swan).

⁵⁵ Tr. 305–06 (Swan).

⁵⁶ Swan Dep. 180.

⁵⁷ *Id.*

⁵⁸ Tr. 306 (Swan).

⁵⁹ Tr. 310 (Swan).

money.⁶⁰ In addition, on occasions when NC Cash did not have sufficient funds in its bank accounts to finance cash bails for MBB or TBB, Swan would transfer funds from PISI's accounts to cover the shortfall.⁶¹ This was done because NC Cash had only a narrow time frame within which to post its cash bails.⁶²

6. PISI's designs on T&H's business

On October 2, 2007, PISI reserved the name "T&H Cash Bails" on the New Castle County Registration of Trade Names Partnerships & Associations pursuant to the fictitious name statute.⁶³ On May 28, 2008, PISI also reserved the same name in Kent and Sussex Counties.⁶⁴ In early 2011, Swan also reserved the name "T&H Bail Bonds, Inc." with the Delaware Division of Corporations.⁶⁵ Swan admitted that he reserved this name because he was thinking about expanding into the bail bond business on a full-time basis.⁶⁶ Swan testified that it came to his attention that T&H Bail Bonds Inc. was available as a corporate name and, therefore, he reserved the name in Delaware.⁶⁷ PISI

⁶⁰ Tr. 318–19.

⁶¹ Tr. 328

⁶² Tr. 329.

⁶³ JX 10; *see also* 6 Del. C. ch. 31.

⁶⁴ JX 13, 14.

⁶⁵ Tr. 421 (Swan).

⁶⁶ *Id.*

⁶⁷ *Id.* PISI has suggested, without adducing competent evidence to that effect, that T&H's corporate existence had lapsed because it failed to maintain its corporate

knew that T&H was operating under the same name in Delaware when it reserved the name, but was not troubled by that fact. Indeed, Swan expressed indifference to the possibility that T&H might have to change its name, saying simply, “it’s a free market.”⁶⁸

7. T&H’s alternate source of financing and termination of the Agreement

In 2010, after learning that PISI was engaged in financing other cash bail operations, T&H began accepting cash financing from Defendant Matarese.⁶⁹ The cash bails that Matarese financed for T&H between 2010 and 2011 totaled \$495,925.⁷⁰ In late November 2010, T&H also entered into an agreement with Defendants Wirth and WFS whereby WFS funded cash bails for T&H.⁷¹ The cash bails Wirth and WFS financed for T&H totaled \$2,149,746.⁷²

On August 8, 2010, Pridgen advised PISI that he intended to terminate the Agreement on August 12, 2010.⁷³ T&H memorialized its purported termination in a letter to PISI on August 30, 2010. In the termination letter, T&H made seven requests to

franchise. Pl.’s Reply & Countercl. Answering Post-Trial Br. (“Pl.’s Reply Br.”)
1.

⁶⁸ Tr. 422.

⁶⁹ Tr. 199 (Pridgen).

⁷⁰ Tr. 47 (Swan).

⁷¹ Wirth Dep. 3–4.

⁷² Tr. 48 (Swan).

⁷³ JX 24. PISI states that it was as of August 10, 2010, not August 12, that T&H ceased funding cash bails through PISI. See First Am. and Supplemental Compl. (“Compl.”) ¶ 7.

PISI, one of which specifically asked PISI to refrain from doing any cash bail business with anyone, except T&H.⁷⁴ Evidently, PISI responded to the termination letter on September 9, 2010.⁷⁵ PISI's counsel and T&H's counsel exchanged emails thereafter regarding PISI's intention to file a complaint and T&H's intention to counterfile in the event of a lawsuit.⁷⁶

On September 22, 2010, T&H's counsel sent an email to PISI's counsel, informing him that T&H was aware that PISI was funding other cash bail agents.⁷⁷ PISI's counsel sent a copy of that email to Swan on September 27, 2010, and he told Swan that T&H allegedly had photocopies of canceled checks to support its claims that PISI was funding other bail agents beside T&H.⁷⁸ As discussed further, *infra*, PISI initiated this litigation on October 8, 2010.

8. Modifications made to PISI's accounting records before trial

Swan routinely reconciled by hand PISI's cash bail logs and the cashier's check log for the NC Cash and PISI accounts to ensure that he had accounted for all money handled by those companies.⁷⁹ Swan would input the amounts from his settlement sheet

⁷⁴ JX 25.

⁷⁵ See Pl.'s Reply Br. 10 (citing Pridgen Dep. Ex. 7.) It is not clear, however, that Exhibit 7 to Pridgen's deposition was ever made part of the trial record.

⁷⁶ See JX 26.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Tr. 278 (Swan).

into an Excel spreadsheet and also into QuickBooks to create journal entries to reflect the expected accounts receivable from those cash bails.⁸⁰ Swan kept the amounts in various forms in the Excel spreadsheet as well as QuickBooks to ensure that his books were accurate and that his balances would reconcile.⁸¹ During Swan's deposition on April 24 and 25, 2012, he indicated that all of PISI's accounting records were stored electronically.⁸² After this testimony, T&H requested that PISI produce its accounting records. In response, PISI produced hard copies of its records in portable document format, or "pdf," to T&H on August 30, 2012. T&H had requested that the documents be produced in electronic form, but PISI resisted production of the electronic files. T&H then filed a motion to compel and a motion for rule to show cause on July 30, 2012. On August 7, 2012, I ordered PISI to provide the electronic files to T&H in native format and awarded T&H the attorneys' fees it incurred in prosecuting the motion to compel that production.

Thereafter, T&H hired a forensic accounting expert, George Prenger, to review the electronic version of PISI's accounting records. Prenger produced an audit report that provided the following information: a list of each accounting transaction that had been altered in the course of PISI's production of the books of the Company; additions, deletions, and modifications that affected those transactions; the dates alterations were

⁸⁰ Tr. 276.

⁸¹ Tr. 277–78.

⁸² Swan Dep. 40–41.

made; and the account of the user who made the alterations.⁸³ Prenger’s expert report in this matter (the “Expert Report”) stated that, in 2012, 108 entries or alterations were made to entries from the 2009 and 2010 accounting records.⁸⁴ These alterations included changes to the memo fields of various entries, the reclassification of the account to which a certain transaction was posted, and even the elimination of several accounts, such as “Loan Receivable – MBB.” The changed entries involved transactions for “loans receivable” and “loans payable” between PISI and NC Cash, and between PISI and MBB.⁸⁵ In one instance, a journal entry recorded in December 2008 as pertaining to a “Loan Receivable – MBB” was reclassified in April 2012 to read “1075-Cash Bank – Sttlmnts/Escrows.”⁸⁶ Additionally, changes were made to at least nine entries for transactions reportedly involving money going from PISI to MBB in which the transaction originally was classified as a “Loan Payable – MBB.” The memo description lines for these nine transactions were modified in April 2012 to indicate only that the payment was to a “fiduciary” account.⁸⁷

⁸³ JX 74 at 2.

⁸⁴ *Id.* at 3.

⁸⁵ *Id.*; *see also* Tr. 337–38 (Swan); JX 75.

⁸⁶ JX 74 at 3.

⁸⁷ *Id.*

9. PISI's objections to Prenger's evidence

I interrupt the factual narrative briefly here to address PISI's motion in limine to exclude the testimony or related evidence presented by Prenger. Prenger is a Certified Public Accountant ("CPA") and Certified Information Systems Auditor ("CISA"). T&H called Prenger to provide testimony on whether PISI and NC Cash's accounting records were created contemporaneously with the transactions that PISI alleges they represent. Additionally, Prenger was to provide testimony on whether NC Cash had sufficient funds available in its bank accounts to fund the cash bails it purportedly financed. PISI seeks to exclude Prenger's evidence in its entirety. Specifically, PISI contends that Prenger has no certification on the functionality of the QuickBooks software, that he has little experience with its use, and that his analysis and conclusions are not based on current standards or generally accepted and reliable principles or methods.⁸⁸ In response, T&H argues that Prenger's expert testimony is proper because he has the requisite technical and specialized knowledge to analyze and opine on the accounting and bank records of a business such as PISI.⁸⁹

The principles governing the admissibility of expert testimony are set forth in Rule 702 of the Delaware Rules of Evidence ("D.R.E."):

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

⁸⁸ Pl.'s Mem. in Support of Third Mot. in Limine 1.

⁸⁹ Defs.' Response to Pl.'s Mot. in Limine 3.

knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The judge acts as a gatekeeper to ensure that the scientific testimony is not only relevant but reliable and must play an active role in ruling on the admissibility of evidence.⁹⁰ The proponent of the proffered expert testimony bears the burden of establishing its relevance, reliability, and admissibility by a preponderance of the evidence.⁹¹

PISI's arguments that Prenger is not qualified as an expert are not persuasive. Prenger is both a CPA and a CISA. He has over thirteen years of experience in his field. He has the technical knowledge and specialized skills necessary to review banking statements and perform forensic analysis of financial activities.⁹² As an investigator for Special Services International, Prenger also has recreated financial activities from original source documentation.⁹³ Here, the documents that Prenger reviewed were produced by PISI during the discovery process. Prenger did not look to outside activities

⁹⁰ *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. 2000).

⁹¹ *Id.* (citations omitted).

⁹² See D.I. No. 294 Ex. A, (Sept. 13, 2012) (providing a copy of Prenger's Curriculum Vitae ("CV")). All docket item numbers ("D.I. No.") refer to the docket in this case, C.A. No. 5886-VCP. Although Prenger referred to his CV in his expert report at JX 74, it was not attached to his report.

⁹³ D.I. No. 294 Ex. A.

within the bail industry or independent data to make his findings. The audit trail reports⁹⁴ that Prenger relied upon were produced using a standard function available on all QuickBooks software. In fact, it cannot be turned off on post 2010 versions of the software.⁹⁵ PISI's QuickBooks software is a post 2010 version. The audit trail report ("Audit Report") lists all the accounting transactions that have been altered and shows any additions, deletions, or modifications that would affect those transactions. Thus, any information presented to the Court by Prenger as it pertains to modifications made to PISI's QuickBooks records readily would have been discoverable by anyone that reviewed such an Audit Report. Moreover, PISI made no objection to Prenger's Expert Report in the joint exhibit list.⁹⁶

Furthermore, Prenger's analysis will assist the Court to understand the evidence regarding the accounting transactions that are recorded in QuickBooks and to determine whether they involved other cash bail agents beside T&H. Thus, T&H has met its burden of demonstrating that Prenger qualifies as an expert under D.R.E. 702 because of his specialized skill in forensic accounting and in recreating the details of financial activities from original source documentation. Hence, I consider Prenger to be a competent and credible expert witness to testify reliably about the modifications made to PISI's

⁹⁴ See JX 75; JX 76. Audit trail reports for PISI and NC Cash detailed the transactions within PISI and NC Cash's accounting records, showing the entered dates and the last modified dates for each transaction.

⁹⁵ See JX 74, Expert Report.

⁹⁶ See D.I. No. 327, Final Joint Exhibit List, at JX 74.

accounting records and the transactions that occurred between PISI and other cash bail agents. I therefore deny PISI's motion in limine to exclude Prenger's testimony.

10. Commingling of the funds of PISI and NC Cash

As stated above, PISI commingled the funds in its bank accounts with NC Cash's funds. Based on Prenger's review of NC Cash's balance sheets and income statements, he concluded that NC Cash did not maintain sufficient funds to finance the cash bails for MBB and another entity Just Bail Bond ("JBB").⁹⁷ To support his findings, Prenger reviewed PISI's Excel spreadsheet that contains information regarding the cash bails in which NC Cash was involved.⁹⁸ Based on his examination of NC Cash's bank statements, Prenger opined that an initial deposit of \$50,000 was made to NC Cash's account in April 2009. Of that amount, Prenger traced \$49,800 to an account owned by Swan called the "TS Tax bank account." Additionally, PISI made a deposit of \$38,000 into JBB's account in May 2009.⁹⁹ The Expert Report concluded that NC Cash could not have posted the bails listed on the bail logs for MBB and JBB without these initial deposits from PISI's accounts.¹⁰⁰

⁹⁷ JX 74 at 4.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

According to Swan, NC Cash essentially has only two clients: (1) MBB (and its affiliate JBB); and (2) TBB.¹⁰¹ NC Cash charged MBB a 15% fee to finance its cash bails and charged TBB 14%.¹⁰² Swan never disclosed the existence of NC Cash to T&H or Pridgen.¹⁰³ Swan said he “didn’t see a need to” disclose this information because NC Cash was PISI’s client. Instead, he asserted that “what I do with my clients is private, I don’t need to discuss it with anyone else.”¹⁰⁴ PISI currently finances cash bails for Axe Bail Bonds, Resto Bail Bonds, and Fast Bail Bonds, among others.¹⁰⁵

C. Procedural History

On October 8, 2010, PISI filed its original complaint against T&H, Pridgen, the Lubachs, and Matarese for breach of contract and tortious interference with contractual relations in connection with the Agreement. T&H filed its answer on November 5, 2010. The Lubachs and Matarese filed their answer on January 28, 2011. On October 8, 2010, PISI also moved for a temporary restraining order (the “TRO Motion”) to prohibit T&H from obtaining funding for its cash bails from anyone other than PISI. On November 8, 2010, I considered and denied PISI’s TRO Motion.

¹⁰¹ Swan Dep. 192.

¹⁰² *Id.* at 206.

¹⁰³ *Id.* at 204.

¹⁰⁴ *Id.* at 204–05.

¹⁰⁵ *Id.* at 210.

On August 26, 2011, T&H moved for sanctions pursuant to Court of Chancery Rule 11 against PISI and its initial counsel alleging that PISI had initiated a claim for breach of contract against T&H that PISI knew was not objectively reasonable because PISI previously had breached the contract at issue. On September 14, 2011, PISI responded to that motion and filed a motion for summary judgment on its breach of contract and tortious interference with contractual relations claims.¹⁰⁶ I denied both motions on January 5, 2012 but left open the possibility that the Court might consider sanctions at a future time.

On November 4, 2011, T&H filed a motion for leave to file first amended and supplemental answer with counterclaim (the “Counterclaim”). I granted T&H’s request on February 3, 2012, and it filed the Counterclaim on February 9, 2012. T&H asserts two Counts in its Counterclaim: (1) abuse of process and (2) breach of contract. On May 3, 2012, PISI filed a motion for leave to file a supplemental and amended complaint (the “Complaint”) to add Defendants Wirth and WFS as indispensable parties to this action. In addition, PISI requested leave to include in the Complaint a legal demand that T&H

¹⁰⁶ PISI characterized its motion for summary judgment as the equivalent of a cross motion in the sense that T&H’s motion for sanctions effectively sought the equivalent of a final judgment on the merits in favor of T&H. On that basis, among others, PISI criticizes the Court for not treating the co-pending motions for sanctions and for summary judgment as cross motions for summary judgment and proceeding to treat this action as having been submitted for decision on the record created at that time. *See* Ct. Ch. R. 56(h); Pl.’s Reply Br. 21–22. I do not consider Rule 56(h) to have been applicable in the context of those motions, however, because it was not clear from the parties’ competing motions that they agreed there were no genuine issues of material fact outstanding at that time.

pay PISI any bail refunds that were made available to them by the courts, but never paid to PISI. I granted PISI's request on May 15, 2012, and it filed the Complaint on May 17, 2012.

The Court held a three-day trial in this matter on September 24, 25, and 27, 2012. PISI and T&H submitted post-trial briefs and I heard the parties' final arguments on March 13, 2013. This Memorandum Opinion constitutes my post-trial findings of fact and conclusions of law in this matter.

D. Parties' Contentions

1. The Complaint

PISI claims that T&H breached the parties' exclusive Agreement when it obtained financing for its cash bails from Matarese in February 2010 and from the other Defendants thereafter.¹⁰⁷ PISI also contends that T&H's purported termination of the Agreement on August 10, 2010 was faulty and that, therefore, the Agreement remained in effect until its expiration date, May 31, 2012.¹⁰⁸ According to PISI, the Lubachs, Matarese, Wirth, and WFS all tortiously interfered with the Agreement when they provided financing to T&H for its cash bails.

PISI also alleges that T&H is liable to it for certain loans, cash bail refunds, and cash bail forfeitures.

¹⁰⁷ Pl.'s Opening Post-Trial Br. 2.

¹⁰⁸ Compl. ¶ 2.

In response to PISI's tortious interference claims, Matarese alleges that she did not know of the Agreement until after PISI commenced this litigation.¹⁰⁹ The Lubach Defendants deny that they provided financing to T&H during the time period that T&H was subject to the exclusive financing Agreement.¹¹⁰ For their part, Defendants Wirth and WFS deny that T&H was prohibited from obtaining cash financing from other sources. Regardless of their knowledge of the Agreement, all the Additional Defendants maintain that they did not induce T&H to breach the Agreement with PISI, and, therefore, that PISI's tortious interference claims must fail.

2. The Counterclaim

In defense of PISI's breach of contract claim, and in support of Count II of the Counterclaim, T&H argues that *PISI* materially breached the Agreement around January 2009—over a year before PISI alleges T&H breached the Agreement—when PISI began assisting NC Cash with financing for its cash bails. According to T&H, PISI's prior material breach relieved T&H of any obligation to perform under the Agreement going forward.¹¹¹ In support of its contention that PISI's breach was material, T&H alleges that the exclusivity requirement between the parties lies at the heart of the Agreement.¹¹²

¹⁰⁹ Defs.' Answering and Opening Countercl. Post-Trial Br. ("Defs.' Answering Br.") 32.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 7.

¹¹² *Id.* at 6.

In response to T&H's breach of contract counterclaim, PISI first denies that it materially breached the Agreement by financing other bondsmen.¹¹³ Specifically, PISI claims that it only provided tax services and bookkeeping services, not cash bail financing, to other small businesses, such as NC Cash. In addition, and in any event, PISI denies that any breach by it was material. PISI argues, second, that T&H's notice of termination was insufficient. According to PISI, the Agreement required T&H to give "the other party 10 days notice and opportunity to cure" before T&H could terminate the Agreement. It is undisputed that when T&H gave PISI notice of the alleged breach, it did not provide PISI an opportunity to cure that breach. T&H asserts, however, that providing an opportunity to cure would have been futile because there is no cure for breaching an exclusive agreement. Lastly, PISI challenges the adequacy of the termination notice, arguing that it was unclear, ambiguous, and bereft of any specific details about PISI assisting other bail agents.

T&H also asserts a counterclaim for abuse of process. That claim accuses PISI of unnecessarily prolonging the litigation, falsifying accounting records, and knowingly asserting frivolous claims, all for the purpose of driving T&H out of business and stealing its market share.

II. ANALYSIS

PISI main contention is that T&H breached the Agreement in August 2010 when it improperly terminated the Agreement before its expiration date of May 31, 2012.

¹¹³ Pl.'s Reply Br. 8.

Furthermore, PISI asserts that T&H materially breached the Agreement by obtaining cash financing from Matarese in February 2010, long before it purported to terminate the Agreement in August 2010. T&H denies that it was in material breach of the Agreement when it obtained financing from Matarese or later when it terminated the Agreement. The reason is that T&H contends that PISI's earlier material breach of the Agreement in 2009 excused T&H from any further obligation to perform its duties under the exclusive Agreement.

A. Complaint Count I: Breach of contract

1. Governing law

PISI bears the burden of proving each element of its claims by a preponderance of the evidence.¹¹⁴ Further, for PISI to be successful on its breach of contract claim it must prove: (1) the existence of a contract; (2) that Defendant T&H breached an obligation imposed by the contract; and (3) that PISI incurred damages as a result of the breach.¹¹⁵ To satisfy the final element, a plaintiff must show both the existence of damages provable to a reasonable certainty, and that the damages flowed from the defendant's violation of

¹¹⁴ *In re Mobilactive Media, LLC*, 2013 WL 297950, at *9 (Del. Ch. Jan. 25, 2013).

¹¹⁵ *Barkerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *19 (Del. Ch. Oct. 10, 2006).

the contract.¹¹⁶ T&H also bears the burden of proving each element of its Counterclaim by a preponderance of the evidence.¹¹⁷

It is established Delaware law that to recover damages for a breach of contract, the plaintiff must demonstrate that it substantially complied with all of the provisions of the contract.¹¹⁸ A breach of contract may be caused by non-performance, repudiation, or both.¹¹⁹ A slight breach of contract by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract.¹²⁰ Stated differently, non-performance by an injured party when the breaching party committed only a slight breach would constitute a breach of contract by the injured party.¹²¹ A breach of contract will terminate a contract, however, where “the failure of performance on the part of the other go[es] to the substance of the contract.”¹²²

¹¹⁶ *LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007).

¹¹⁷ *See Cornell Glasgow, LLC v. LaGrange Props., LLC*, 2012 WL 6840625, at *9 (Del. Super. Dec. 7, 2012).

¹¹⁸ *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916, at *19 (Del. Super. Aug. 31, 2006); *Frunzi v. Paoli Servs., Inc.*, 2012 WL 2691164, at *7 (Del. Super. July 6, 2012).

¹¹⁹ *Restatement (Second) of Contracts* (the “Restatement”) § 236 (1981).

¹²⁰ *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003).

¹²¹ *Id.*

¹²² *Shore Invs., Inc. v. Bhole, Inc.*, 2011 WL 5967253, at *6 (Del. Super. Nov. 28, 2011); *Matthew v. Laudamiel*, 2012 WL 2580572, at *9 (Del. Ch. June 29, 2012); *DeMarie v. Neff*, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005).

2. Breach of the Agreement

Neither party disputes the existence of the Agreement. The main issues in dispute are whether and in what order the parties breached obligations under Agreement. PISI claims that T&H breached its obligations under the Agreement (1) when, as early as February 2010, T&H accepted financing from other sources and (2) when it purported to terminate the Agreement in August 2010. T&H does not dispute that its acts in February 2010 were in violation of its obligations under the Agreement. Rather, T&H defends that its acts did not breach the Agreement because PISI had materially breached the Agreement in or around January 2009 by violating the Agreement's exclusivity obligation. T&H further contends that, as a result, at the time of the challenged events in February and August 2010, it was excused from performance under the Agreement.

I consider first, therefore, whether PISI materially breached the Agreement in or around 2009. In doing so, I consider: (1) whether the Agreement requires the parties to deal exclusively with each other; and (2) whether exclusivity is a material term of the Agreement. Answering both of these questions in the affirmative, I consider, lastly, whether PISI directly or indirectly provided cash bail financing or assistance to cash bail agents other than T&H in material breach of the Agreement.

A party is excused from performance under a contract when the other party materially breaches that contract.¹²³ “The question whether the breach is of sufficient importance to justify non-performance by the non-breaching party is one of degree and is

¹²³ *Endocare, Inc.*, 838 A.2d at 278.

determined by ‘weighing the consequences in the light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case.’”¹²⁴

A “material breach” is explained as a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the *essential purpose* of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must “go to the root” or “essence” of the agreement between the parties, or be “one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.”¹²⁵

Section 241 of the *Restatement* sets forth several factors to consider when determining whether “a failure to render or offer performance is material.” The following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.¹²⁶

¹²⁴ *Id.*

¹²⁵ *Bhole, Inc.*, 2011 WL 5967253, at *5 (emphasis added).

¹²⁶ *E. Elec. & Heating, Inc. v. Pike Creek Prof'l Ctr.*, 1987 WL 9610, at *4 (Del. Super. Apr. 7, 1987) (citing *Restatement* § 241).

The party first guilty of a material breach of contract cannot complain if the other party subsequently refuses to perform.¹²⁷ To demonstrate that PISI materially breached the Agreement, T&H relies on Section II(f) of the Agreement. That Section states:

So long as T&H is not in default under this agreement, [*PISI*] shall not without the prior consent of T&H, *directly or indirectly provide cash or other cash bail financing or assistance to any person other than T&H.*¹²⁸

Section II(g) defines “directly or indirectly” to “include, among other things, transactions done by or on behalf of immediate family members of or legal entities owned or controlled by [Pridgen] or [Swan] or legal entities owned or controlled by any [] immediate family member of [Pridgen] or [Swan], as the case may be, or any other method used for the purpose of circumventing this agreement.”¹²⁹

a. Did the Agreement obligate the parties to deal with each other exclusively?

T&H contends that exclusivity lies at the heart of the Agreement.¹³⁰ In exchange for the exclusive financing it obtained from PISI, T&H paid PISI a premium fee of 16.5%. Indeed, the exclusive nature of the Agreement was essential, according to T&H, to its agreement to pay PISI a premium fee. Had T&H not relied on PISI’s promise to finance only T&H, it could have obtained cheaper financing elsewhere to post its cash

¹²⁷ *Braxton v. Adirondack Gp., Inc.*, 2003 WL 22938542, at *4 (Del. Com. Pl. Aug. 11, 2003).

¹²⁸ JX 5 § II(f) (emphasis added).

¹²⁹ *Id.*

¹³⁰ Tr. 178 (Pridgen).

bails.¹³¹ PISI disagrees, however, arguing that the purpose of the Agreement was to ensure that T&H had sufficient cash financing available up to the \$1,000,000 Bail Limit to post its cash bails.¹³² In that sense, PISI would be released from the exclusivity clause only when T&H reached \$1,000,000 of outstanding cash bail financing.¹³³ Section II(e) of the Agreement, however, states that:

So long as the total amount of cash bails held by the courts is less than the Bail Limit [of \$1,000,000] and so long as [PISI] is making contributions specified in paragraph I, T&H shall not directly or indirectly deal with any entity other than [PISI] for the cash to post cash bails.

Thus, the Agreement imposed exclusivity obligations on both parties.

The parties apparently disagree as to the meaning of the exclusivity obligation imposed on PISI under the Agreement. PISI claims the Agreement required it to provide exclusive *cash bail financing* for T&H's cash bails up to \$1,000,000, but did not prohibit it from providing other forms of assistance to cash bail agents other than T&H.¹³⁴ According to PISI, the Agreement uses the terms "cash," "cash bail financing," and "assistance" as "three ways to say the exact same thing."¹³⁵ On the other hand, T&H interprets the Agreement to mean that PISI was not permitted to finance any cash bail

¹³¹ Tr. 667–69 (Moye).

¹³² Tr. 457–58 (Swan).

¹³³ Tr. 458 (Swan).

¹³⁴ See Pl.'s Reply Br. 6.

¹³⁵ *Id.* at 13.

agents other than T&H or to assist cash bail agents related to their cash bail business, and that T&H was required to obtain its financing only from PISI. For the reasons explained below, I find that T&H's interpretation is the only reasonable interpretation of the Agreement. Therefore, the provision is not ambiguous.

“When the language of a . . . contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented to.”¹³⁶ Ambiguity does not exist where a court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends.¹³⁷ “Contract language is not ambiguous simply because the parties disagree on its meaning.”¹³⁸ “Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.”¹³⁹

Here, the Agreement in Section II(e) and (f) specifically states that T&H and PISI, respectively, should not deal directly or indirectly with any other entity in terms of cash bail financing. In return for exclusivity on the part of PISI, T&H agreed to pay a high

¹³⁶ *Shore Invs., Inc. v. Bhole, Inc.*, 2011 WL 5967253, at *4 (Del. Super. Nov. 28, 2011) (citation omitted).

¹³⁷ *Id.*

¹³⁸ *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

¹³⁹ *Id.*

premium and undertook to use only PISI to obtain cash financing for its bails. The Agreement effectively prohibits T&H and PISI from working with other entities in the field of cash bail financing. Moreover, the Agreement broadly defined the phrase “directly and indirectly” so as to avoid any confusion about the limits the Agreement placed on the parties’ ability to deal with other persons or entities.

The express contract language indicates the parties’ intent that at least one purpose of the Agreement was to create an exclusive relationship between PISI and T&H. Hence, if PISI “provide[d] cash or other cash bail financing or assistance to any person other than T&H” while T&H was not in default of the Agreement, then its actions would be a breach of the Agreement.¹⁴⁰ T&H undertook a similar obligation. If T&H accepted cash financing directly or indirectly from an entity other than PISI, then it, too, would be in breach of the Agreement.

I reject as unpersuasive PISI’s argument that the Agreement did not prohibit PISI from providing the assistance it provided to, for example, NC Cash. The Agreement provides that PISI must not “directly or indirectly provide cash or other cash bail financing or assistance to any person other than T&H.”¹⁴¹ According to PISI, the Agreement uses the terms “cash,” “cash bail financing,” and “assistance” interchangeably to mean only that PISI cannot *finance* cash bails. PISI contends that any other reading of the Agreement would lead to the absurd result that the Agreement would prohibit first-aid

¹⁴⁰ See JX 5 § II(f).

¹⁴¹ *Id.*

assistance or assisting Swan’s daughter with her homework.¹⁴² PISI’s hyperbole makes little sense considering the Agreement is between two entities and such forms of assistance plainly are not precluded by the Agreement. Furthermore, the phrase “cash or cash bail financing or assistance to any person,” in the context of this Cash Bail Financing Agreement, reasonably can be read to mean “cash or cash bail financing or [cash bail] assistance to any person.” The same cannot be said with respect to PISI’s interpretation that these three terms must have the same meaning. Indeed, PISI’s interpretation would render the term “assistance” redundant and mere surplusage, contrary to a well-recognized canon of contract construction.¹⁴³ Thus, I conclude that T&H’s is the only reasonable interpretation of the Agreement. Specifically, I find that the Agreement prohibits PISI from providing to any cash bail agent other than T&H (1) cash for cash bail financing, (2) other cash bail financing, or (3) other cash bail assistance. This interpretation comports with Swan’s own understanding of the Agreement.¹⁴⁴ Hence, I conclude that the Agreement required T&H to obtain financing

¹⁴² See Pl.’s Reply Br. 13.

¹⁴³ See *NAMA Hldgs., LLC v. World Market Ctr. Venture, LLC*, 948 A.2d 411, 419 (2007) (“Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court.”).

¹⁴⁴ See Swan Dep. 109–10 (“Q. What if an unaffiliated, again, third-party were to ask you or Preferred—they’re interchangeable for the purpose of these questions— . . . to take certain of its monies and help them to invest it in the cash bail business . . . and you or Preferred acted as a conduit through which that invested money could flow into the hands of bail agents other than T&H for the purpose of posting cash bails, would that be a breach of this contract? A. Yes.”).

for its cash bails from PISI exclusively, and that the Agreement required PISI to provide cash bail financing or cash bail assistance to T&H exclusively.

b. Did exclusivity touch upon the essential purpose of the Agreement?

Having determined that the Agreement mandated an exclusive relationship between PISI and T&H, I consider next whether a breach of the exclusivity provisions would constitute a material breach of the Agreement. If a breach of the Agreement's exclusivity requirement was material, then the injured party would be excused from performing under the Agreement after the breaching party committed the material breach.¹⁴⁵ On the other hand, if a breach of the exclusive nature of the Agreement is only a "slight breach," the obligations of the injured party to perform under the contract would not necessarily terminate.¹⁴⁶

PISI's breach of the exclusivity provisions implicates several of the factors listed under Section 241 of the *Restatement*.¹⁴⁷ The first factor is whether the injured party will be deprived of the benefit it reasonably expected. T&H entered the Agreement with the expectation that PISI would finance only its cash bail operations in Delaware. T&H paid a 16.5% premium fee to obtain such exclusivity from PISI. T&H could have obtained cheaper financing from other financiers had it not been bound by the Agreement.¹⁴⁸ This

¹⁴⁵ See *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003).

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* note 126 and accompanying text.

¹⁴⁸ See Tr. 668–69 (Moye).

exclusivity touched on a fundamental purpose of the Agreement, and when PISI assisted other bail agents, its actions essentially defeated the purpose for entering into the Agreement. Thus, T&H was deprived of the benefit it reasonably expected.

The second factor is whether the injured party can be compensated adequately for the part of the benefit of which it was deprived. The market rate for cash bail financing is lower than what T&H was paying PISI under the Agreement. T&H was approached by another Delaware financier, Ken Moye, to supply T&H cash financing to post its cash bails. The market rate that Moye would have charged ranged from 13% to 15% between 2008 and 2010. As such, T&H can be compensated to some extent for the benefit it lost in the form of the difference between what it paid PISI and the lower rate T&H could have paid an alternate source of financing. T&H also lost the benefit of not having to compete against another cash bail company supported by PISI. The loss of that benefit may be more difficult to quantify.

Another factor to consider in determining whether a breach is material is the likelihood that the breaching party will cure its failure to perform. It is unlikely that PISI would have cured any failure to perform under the Agreement. PISI and Swan repeatedly denied that PISI had been financing other bail bond agents beside T&H. Swan denied, for example, that he financed the cash bail for Briscoe even though Pridgen had evidence that Swan's government issued identification was used to post that bail. Swan also resisted admitting that assisting other agents beside T&H is a violation of the Agreement. Therefore, I am not convinced that PISI would have been willing to cure its failures under the Agreement by refraining from funding or assisting other cash bail agents.

The last factor is the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing. Based on Swan's actions on behalf of PISI and with regard to T&H, discussed elsewhere in this Memorandum Opinion, I find that PISI's behavior did not comport with the standards of good faith and fair dealing.

Based on these facts, I conclude that exclusivity was a material purpose of the Agreement. Thus, if PISI breached the exclusivity provisions in the Agreement, as T&H alleges, it was in material breach of the Agreement.

c. PISI materially breached the Agreement by directly or indirectly providing cash bail financing or assistance to other persons

Having concluded that exclusivity was an essential purpose of the Agreement between PISI and T&H, I now consider whether PISI's relationship with NC Cash and MBB constituted a breach of the exclusivity provisions in the Agreement.

In 2008, PISI entered into an arrangement with Reed to have NC Cash, owned by Maglaras, finance MBB's cash bail postings. PISI provided cash financing to MBB in December 2008. A cashier's check was drawn on one of PISI's bank accounts for \$10,000. PISI's accounting records described the withdrawal as a "loan receivable" from NC Cash. NC Cash, however, was not even incorporated until January 2009. Moreover, according to T&H's expert Prenger, there is no record of any activity by NC Cash before April 2009.¹⁴⁹

¹⁴⁹ JX 74 at 4.

Additionally, PISI opened bank accounts at two separate financial institutions for other cash bail agents. One such bank account was opened for JBB at TD Bank. Swan was listed as a “signor” on the account. The arrangement PISI had with JBB was similar to the arrangement that it made with MBB. That is, PISI would provide cash financing to assist JBB with its cash bail postings through NC Cash. Swan also was listed as a “signor” for TBB. PISI made arrangements to pick up check refunds from the courts for TBB, and later would deposit them into one of PISI’s bank accounts.

Preliminarily, I note that PISI does not assert that T&H was in default of the Agreement in late 2008 when T&H contends PISI began materially breaching the Agreement. Furthermore, PISI admitted that it had a cash financing arrangement with Reed in late 2008 and that it first provided cash financing to MBB in December 2008.¹⁵⁰

PISI’s main contention is that the arrangements it entered into in late 2008 and early 2009 did not breach the Agreement. The Agreement provides that “[PISI] shall not without the prior consent of T&H, directly or indirectly provide cash or other cash bail financing or *assistance* to any person other than T&H.”¹⁵¹ PISI argues that the term “assistance” cannot be given its most expansive meaning. PISI maintains that, under the Agreement, “assistance” had “to do with [PISI’s] money, not NC Cash’s money.”¹⁵² Based on that premise, PISI denies that it was *directly* involved in financing MBB cash

¹⁵⁰ Tr. 297, 300–01(Swan).

¹⁵¹ JX 5 § II(f) (emphasis added).

¹⁵² Post-Trial Arg. Tr. (“Arg. Tr.”) 13.

bails. PISI asserts that it only acted as a middle man between NC Cash and other bail agents such as MBB and JBB. According to PISI, NC Cash, not PISI, provided the cash financing to other bail agents.

PISI's argument in this regard is creative but unpersuasive. Even if NC Cash provided the actual funding to MBB, PISI's involvement in the arrangement, even if it only was to provide the cashier's checks used to finance MBB's cash bails, still constitutes at least providing "assistance" to other entities in the cash bail business. At a minimum, PISI loaned money to cash bail agents other than T&H or loaned money to NC Cash, which in turn loaned money to other bail agents. Moreover, NC Cash was not incorporated until January 2009 and the Expert Report stated that NC Cash did not have sufficient cash in December 2008 to fund MBB's cash bails. This evidence shows that PISI, not NC Cash, provided "cash and other cash bail financing" directly or indirectly to MBB in violation of Section II(f) of the Agreement.

Section II(f) prohibited PISI from "directly or indirectly" providing any type of financing or assistance to other cash bail agents. In addition, the Agreement expressly prohibited the parties from engaging in "any other method used for the purpose of circumventing this agreement."¹⁵³ Therefore, the Agreement prohibited PISI from using another entity, whether a corporation or another form of business entity that PISI organized and owned or one already in existence, or even the commingling of funds in

¹⁵³ JX 5 § II(g).

PISI's own bank accounts to engage in forbidden business.¹⁵⁴ PISI's arrangements with MBB, TBB, and JBB provided "assistance" to those entities in carrying out their cash bail business. PISI's indirect relationship with these entities through NC Cash appears to have been intended to circumvent the purpose of the Agreement to maintain an exclusive cash bail financing relationship between PISI and T&H.

Furthermore, PISI knew that the activities it was engaged in were prohibited under the Agreement. Swan admitted that if Swan or PISI provided financing to another entity owned by someone else and that entity gave the money to another cash bail agent besides T&H, that action would be a breach of the Agreement.¹⁵⁵ Swan also admitted that if a third party gave money to Swan or PISI and PISI in turn gave that money to other cash bail agents beside T&H for the purpose of posting cash bails, that also would be a breach of the Agreement.¹⁵⁶

The fact that PISI may have complied with some of its obligations under the Agreement, such as providing cash financing to T&H, does not excuse non-compliance with other provisions.¹⁵⁷ The fact that PISI may have had money available on hand to

¹⁵⁴ See *Cramer v. Lewes Sand Co.*, 140 A. 803, 806 (Del. Ch. 1928).

¹⁵⁵ Tr. 334–35 (Swan).

¹⁵⁶ *Id.*

¹⁵⁷ See *Shore Invs., Inc. v. Bhole, Inc.*, 2011 WL 5967253, at *7 (Del. Super. Nov. 28, 2011) (stating that complying with one provision of a lease by paying the rent, does not excuse non-performance of the other provisions).

finance T&H's cash needs, which T&H apparently disputes,¹⁵⁸ does not relieve PISI of its other obligations under the Agreement. The Agreement called for mutual exclusivity between the parties. PISI, however, argues for a narrower reading of the Agreement by suggesting that otherwise it improperly might restrain cash bail competition. But that argument lacks merit. The Agreement limits the ability of PISI and T&H to participate in the cash bail business independently of one another. The Agreement does not hinder, however, the ability of others unrelated to PISI or T&H from engaging in the cash bail business.

Furthermore, if PISI honestly believed that it was not prohibited from interacting with other bail agents beside T&H in late 2008 and 2009, as it did, Swan presumably would not have gone to the lengths he did to hide the transactions between PISI and MBB that were reflected in PISI's accounting records. Swan deleted the notations that indicated transactions were occurring between PISI and other bail agents and replaced them with uninformative general terms, such as, "fiduciary." Had T&H not hired a consultant to review PISI's accounting records, the changes Swan made shortly before trial to the entries in the original QuickBooks records more than two years after they were entered probably would have gone unnoticed. PISI's argument that Swan's actions were the result of a "spontaneous act of thoroughness" to ensure that the accounting records

¹⁵⁸ See Tr. 184–85 (Pridgen) ("And then at nights, at 3:00 in the morning, I had a \$60,000 bail I lost, a \$55,000 bail I lost, a \$30,000 bail I lost. I should have had that amount of money. And Bubby's birthday one day in the office, I had an \$80,000 bail . . . [Swan] wouldn't answer the phone. He wouldn't even respond. And I called him so much my finger hurt.").

were accurate is not credible.¹⁵⁹ More likely than not, Swan was attempting to cover his tracks and hide from T&H and this Court the fact that money made available by PISI was being loaned to other cash bail agents.

In sum, I find that the language of the Agreement unambiguously indicates the parties' intent to create an exclusive cash bail financing arrangement. The exclusive nature of the agreement was an essential term. By providing assistance to NC Cash and to other cash bail agents beginning in December 2008, PISI materially breached the Agreement. As a result, T&H was excused from performance under the Agreement from that time forward and PISI's breach of contract claim based on T&H's acts in February and August of 2010 is without merit. Therefore, I find in favor of T&H on Count I of the Complaint.

B. Complaint Count II: Tortious interference with contractual relations

1. Elements of a tortious interference claim

There are five elements of a tortious interference claim. The tort requires proof of (1) a contract (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification, (5) which causes injury.¹⁶⁰ When a contract has been terminated lawfully, a defendant still

¹⁵⁹ See Tr. 363 (Swan).

¹⁶⁰ See *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987) (citing *Restatement (Second) of Torts* § 766).

can be liable for tortious interference “where a defendant utilizes ‘wrongful means’ to induce a third party to terminate a contract.”¹⁶¹

2. No valid contract between T&H and PISI existed at the time of T&H’s alleged breach

There is no evidence that the non-T&H Defendants engaged in any wrongful conduct to cause T&H to breach or terminate the Agreement. As an initial matter, PISI adduced no evidence that the Lubachs ever provided financing to T&H.¹⁶² Defendants Matarese, Wirth, and WFS, on the other hand, did finance T&H’s cash bails. Nothing in the record, however, suggests that Matarese, Wirth, or WFS engaged in any wrongful conduct or attempted to induce or cause T&H to breach the Agreement.¹⁶³

Moreover, I have concluded that no enforceable contract continued to exist between PISI and T&H as of mid-December 2008 because of PISI’s prior material breach. PISI alleges that Matarese, the Lubachs, Wirth, and WFS tortiously interfered with the contractual relations between PISI and T&H memorialized in the Agreement. Swan asserted that Matarese provided financing to T&H from February 2010 until May 31, 2011 and that Wirth and WFS provided financing from about December 1, 2010 to

¹⁶¹ *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749, 751 (Del. 2010).

¹⁶² In its post-trial briefing, PISI asserts that the Lubachs knew of the Agreement, but it makes no argument that the Lubachs financed T&H cash bails or interfered with the Agreement in any other way.

¹⁶³ *See* Tr. 164 (Pridgen) (testifying that, around March 2010, T&H had no one to finance its cash bails “until I went to Melissa [Materese] and talked her into doing it”); Tr. 213 (Pridgen) (testifying that T&H began financing cash bails using Jerzy Wirth in late November 2010, after T&H and PISI had ceased working together).

May 31, 2012.¹⁶⁴ T&H used Matarese's financing to post a cash bail for S. Cross on February 22, 2010 for \$250.¹⁶⁵ Wirth's first cash financing of T&H was for Cosme on December 3, 2010.¹⁶⁶ Because these alleged wrongs all occurred after PISI's material breach of the Agreement in December 2008, they cannot provide the basis for a cognizable claim for tortious interference with the underlying contract. Therefore, I also find in favor of Defendants on Count II of the Complaint.

C. Complaint Count III: Breach of contract for loans

In Count III of the Complaint, PISI alleges that it made eight loans to T&H that T&H has failed to repay. PISI also alleges that T&H is required to pay a 9.75% interest rate on all outstanding loans. T&H counters that it is not liable for these loans because the loans were not made by PISI, but instead were made by Swan, who is not a party to this litigation. As the claimant, PISI has the burden of proving by a preponderance of the evidence that the eight loans to T&H and Pridgen were made by PISI, not by Swan. PISI also has the burden of proving that it is entitled to receive the interest rate of 9.75% that it claims was due on the loans to T&H. To determine whether T&H is obligated to repay the alleged loans and the claimed interest, I address each loan in turn.

First, PISI alleges that T&H owed \$5,000 for a loan PISI made in November 2009. Swan testified that PISI wrote a check to Pridgen for \$5,000. Importantly, Swan testified

¹⁶⁴ Tr. 46 (Swan). Swan derived this information from a list of T&H's posted cash bails produced during discovery. *See* JX 72; JX 73.

¹⁶⁵ JX 73.

¹⁶⁶ JX 72.

that the check was drawn on PISI's Wachovia bank account.¹⁶⁷ Swan testified that PISI retains check stubs in the ordinary course of its business and that he had retained the check stub for the \$5,000 loan to Pridgen.¹⁶⁸ According to Swan, Pridgen agreed to repay the \$5,000 at a 9.75% interest rate.¹⁶⁹ T&H did not provide evidence to contradict Swan's testimony that Pridgen owed PISI this \$5,000 loan and did not dispute that T&H agreed to repay loans at a 9.75% interest rate. Instead, to discredit the \$5,000 loan, T&H provided evidence that Swan modified PISI's accounting record related to the loan on April 29, 2012.¹⁷⁰ Swan changed the memo description for the \$5,000 from "Loan to Ted" to "Loan to Ted @ 9.75."¹⁷¹ PISI did not modify the "account numbers" where the

¹⁶⁷ Tr. 71. At trial, PISI introduced a demonstrative exhibit, "PX-1," to demonstrate that PISI made the asserted loans to Pridgen and T&H. PX-1 included a spreadsheet summary of the loans, created by Swan for this litigation, and supporting documentation for the eight loans, such as check stubs and handwritten reconciliations from Settlement Meetings. These documents apparently never were produced in discovery and PISI did not provide the documents comprising PX-1 to T&H until the morning of Swan's testimony. *See* Tr. 69 (colloquy among counsel and the Court). T&H objected to PX-1 at trial but did not pursue its objection in the post-trial briefing, presumably because PISI did not rely explicitly on the exhibit in PISI's briefing. Instead, PISI cited only to Swan's testimony regarding the loan amounts listed in Count III. Moreover, T&H defended on the sole ground that it was nonparty Swan, not PISI, who made these loans. Under these circumstances, I have considered Swan's testimony as evidence of the loans, but I have not considered PX-1 as evidence.

¹⁶⁸ Tr. 71.

¹⁶⁹ *Id.*

¹⁷⁰ *See* Tr. 244 (Swan).

¹⁷¹ *Id.*; *see also* JX 75 at 61.

transaction was recorded.¹⁷² Although Swan changed the description to reflect a 9.75% interest rate, the change is consistent with Swan's testimony that Pridgen agreed to a 9.75% interest rate, which Pridgen did not dispute. In addition, T&H did not deny receiving a loan from PISI for \$5,000. When the original receivable was recorded in PISI's accounting records, it was recorded as a loan receivable from Pridgen. Because Defendants did not provide any evidence to contradict Swan's testimony or its accounting records, I find that Swan's testimony is sufficient to prove that PISI, not Swan, made this loan to Pridgen and that Pridgen agreed to repay the loan at 9.75% simple interest.¹⁷³

Second, PISI contends that T&H owes it \$3,125. PISI arrived at this amount by converting a cash bail receivable balance from the parties' Settlement Meeting to a loan receivable, and adding to this amount additional miscellaneous adjustments that PISI maintains T&H owed. According to PISI, T&H owed PISI \$9,377 for the cash bails that T&H posted in its Dover and Wilmington offices for the period covered by "Settlement 16."¹⁷⁴ Swan testified that T&H paid PISI \$7,040 of the \$9,377 balance.¹⁷⁵ PISI

¹⁷² JX 75. The account number for a loan receivable was 1884.

¹⁷³ The evidence indicates that this loan and the fifth loan, discussed *infra*, were made to Pridgen in his personal capacity. They were not loans to T&H.

¹⁷⁴ Tr. 74.

¹⁷⁵ Tr. 80. The document Swan was referencing when he described these transactions showed that T&H paid a lesser amount of \$7,000, not \$7,040. According to Swan, T&H might have paid him \$7,040, or Swan's math might have been off. *Id.* In either case, the remaining balance of \$2,337 appears to be correct because this amount was recorded on Swan's settlement sheet and in PISI's accounting records. *See id.*; JX 75 at 62.

converted the remaining balance of \$2,337 from the Settlement Meeting to a loan.¹⁷⁶ PISI also made additional miscellaneous adjustments to the settlement balance to arrive at \$3,125.¹⁷⁷ Initially, PISI recorded the \$2,337 remaining balance from the Settlement Meeting as a “Bail Fees Receivable – NSF Chks” with the memo line “Ret’d chk from Khalif sttlmt #14.”¹⁷⁸ T&H highlighted at trial that PISI initially recorded the \$2,337 as a NSF, or non-sufficient funds, from Khalif, and not as a loan receivable from Pridgen.¹⁷⁹ Even after Swan changed the account from “Bail Fees Receivable” to “Loan Receivable – Ted,” however, the memo line continued to reference the returned check from Khalif.

Swan admitted that he did not communicate to Pridgen that he converted the cash bail receivable to a loan receivable in PISI’s accounting records.¹⁸⁰ Swan testified that “Bail Fee Receivable” and “Loan Receivable – Ted” are used interchangeably.¹⁸¹ According to Swan, “if there are bail fees that are due to PISI from T&H, we’ll initially

¹⁷⁶ *Id.*; JX 75.

¹⁷⁷ The \$3,125 loan balance includes: a \$2,337 balance from Settlement Meeting 16, \$28 for not-sufficient-funds fees from PISI’s bank for the returned check from Settlement Meeting 16, a \$105 balance from Settlement Meeting 17, \$250 from a payment that Pridgen received from Mr. Martelli that Pridgen should have paid to PISI, \$450 in bounty hunter fees, and finally, an offset of \$45 that PISI owed to T&H. *See* Tr. 78–81.

¹⁷⁸ JX 75 at 62.

¹⁷⁹ Tr. 240–41.

¹⁸⁰ Tr. 242–43.

¹⁸¹ Tr. 243.

book it as a bail fee receivable.”¹⁸² If PISI does not receive the bail fees from T&H or if PISI and T&H mutually agree, PISI will “convert it to a loan.”¹⁸³ Under the Agreement, T&H is required to pay PISI one half of all bail fees collected from its customers. Thus, whether PISI initially classified the transaction as a “Bail Fee Receivable” and later modified it to reflect a “Loan Receivable – Ted,” Pridgen nonetheless was obligated under the Agreement to pay PISI its portion of the bail fees collected.¹⁸⁴ The only rebuttal T&H offered to its obligation to repay PISI these amounts was to demonstrate that Swan had changed the account under which the \$2,337 was booked. T&H did not rebut the miscellaneous adjustment amounts made by PISI. I find Swan’s testimony, which is supported by PISI’s accounting records, to be sufficient to prove that T&H owed PISI \$2,337. The change from a bail fee receivable to a loan fee receivable appears to have been done in the ordinary course of business and does not appear sufficiently suspicious to defeat this aspect of PISI’s claim. Furthermore, because T&H did not rebut

¹⁸² Tr. 251.

¹⁸³ *Id.*

¹⁸⁴ This bail fee receivable was recorded in November 2009, after PISI materially breached the Agreement. As discussed in more detail, *infra*, I find that T&H is entitled to damages in the amount of the difference between the fee PISI charged to T&H under the Agreement and the market fee T&H would have paid if it was not bound by the Agreement. *See infra* Part II.F.1. To calculate these damages, I use the total volume of cash bails that PISI financed for T&H in 2009 and 2010 and award T&H the difference between PISI’s fee and the market rate. In doing so, I assumed that this cash bail fee receivable of \$2,337 was included in the 2009 “Total Volume” amount that T&H provided and, thus, the damage amount I awarded to T&H accounts for damages due to it related to this \$2,337 and to the \$500 receivable that Swan referred to as loan number eight.

PISI's evidence effectively regarding the additional miscellaneous amounts, I find that T&H owes PISI the entire \$3,125.

The next question is whether T&H is obligated to pay an interest rate of 9.75% on the \$3,125 amount it owes to PISI. This was a cash bail fee receivable that PISI converted to a loan receivable from Pridgen. Although Swan presented evidence that Pridgen agreed to pay 9.75% on loans PISI made to Pridgen, PISI presented no evidence that Pridgen agreed to have PISI convert outstanding cash bail fee receivables to a loan that would accrue interest at that rate. Furthermore, there is no evidence that Swan ever advised Pridgen that PISI converted the bail fee receivable to a loan. According to Swan, he was "not obligated to tell anything to Ted about [his] bookkeeping."¹⁸⁵ Based on this evidence, I find that T&H owes PISI the \$3,125 bail fee receivable, but that PISI is not entitled to receive 9.75% interest on that amount.¹⁸⁶

The next two loans T&H allegedly owes PISI are cash loans for \$2,000 and \$3,000 that Swan avers PISI loaned to Pridgen. According to Swan, in each instance, Pridgen picked up the loan amount in cash at PISI's office. PISI presented no evidence other than Swan's testimony that PISI made these cash loans to Pridgen. At trial, T&H highlighted that PISI's accounting records did not reflect a loan receivable from T&H or Pridgen for

¹⁸⁵ Tr. 247.

¹⁸⁶ As discussed in Part II.F.3 *infra*, in instances where no interest rate was agreed upon by the parties, the Court will apply the legal rate compounded quarterly.

either of these amounts.¹⁸⁷ I find Swan's testimony that T&H received cash loans from PISI in the amounts of \$2,000 and \$3,000, in the absence of any corroborating evidence, to be insufficient to satisfy PISI's burden of proof as to its claim based on these alleged loans. Thus, I find for Defendants on this aspect of PISI's claim.

The fifth loan was a check for \$4,000 drawn on PISI's Wachovia bank account on January 14, 2010. This amount initially was recorded in PISI's accounting records as a "Temporary Distribution."¹⁸⁸ Four days later, PISI changed the classification from the "Temporary Distribution" account to its "Loan Receivable – Ted" account.¹⁸⁹ Swan explained that, although one of PISI's employees wrote the check to Pridgen, the employee did not know the correct account for the transaction and mistakenly recorded the receivable to a "temporary" account.¹⁹⁰ Swan apparently made this correction to PISI's accounting records in the ordinary course of business. T&H presented no credible evidence to rebut this alleged loan amount. I, therefore, find that PISI has proven the existence of a \$4,000 loan from PISI to Pridgen. Similar to the first loan discussed above, the evidence demonstrates that the money for this loan came out of PISI's bank account and that PISI, not Swan personally, made this loan. Regarding interest, as noted above, Swan testified that Pridgen agreed to the 9.75% interest rate on the loans he

¹⁸⁷ Tr. 247–48 (Swan).

¹⁸⁸ Tr. 247 (Swan); *see also* JX 75 at 67.

¹⁸⁹ Tr. 247.

¹⁹⁰ *Id.*

received.¹⁹¹ Therefore, I find that PISI is entitled to repayment of the \$4,000 loan it made to Pridgen plus simple interest from the date payment was due at a rate of 9.75% per year.

The sixth loan was another in the amount of \$4,000 that PISI alleges T&H owed from Settlement Meeting number five. Swan did not testify as to this loan or its amount. Therefore, I find that PISI has not met its burden of proof on this loan and will dismiss this aspect of its claim with prejudice.

The seventh claimed loan was a cash loan for \$500 that PISI allegedly made to Pridgen. Other than Swan's testimony that the cash loan was "dropped off" at Pridgen's office, PISI adduced no additional evidence of this loan at trial. Similar to alleged cash loans number three and four, discussed above, Swan was unable to identify any entry in PISI's accounting records that reflected a cash or loan receivable from Pridgen or T&H corresponding to this alleged loan.¹⁹² Accordingly, I find that PISI has not presented sufficient evidence to prove that T&H owed this \$500, and deny this aspect of PISI's claim.

The eighth, and last, loan was for an amount of \$525 that PISI alleges T&H owed from Settlement Meeting number eight. According to Swan, T&H paid the settlement balance in cash, except for \$500. T&H paid the remaining \$500 with a personal check

¹⁹¹ Tr. 71.

¹⁹² Tr. 250 (Swan).

that it received from one of its customers.¹⁹³ PISI deposited the check into its bank account, but the check was returned due to lack of funds in the T&H customer's bank account.¹⁹⁴ PISI was charged a \$25 fee for the returned check. T&H did not dispute seriously that it owed PISI this \$525 amount. Based on the limited evidence available, I find that PISI has shown that T&H owed PISI the amount of the bounced \$500 check and the associated \$25 not-sufficient-funds fee. Consistent with my finding regarding loan number two, however, I decline to award PISI the 9.75% interest rate it seeks on this amount because it appears to be a bail fee receivable, rather than a "loan."

In sum, T&H must repay PISI loans numbered one and five, for \$5,000 and \$4,000, respectively, together with 9.75% simple interest on these amounts. PISI is entitled to repayment of the amounts it styled as loans number two for \$3,125 and eight for \$525, but is not entitled to 9.75% interest on these amounts, which the evidence shows are bail fee receivables not loans. Finally, PISI has not proven that T&H owes it anything for the alleged cash loans denominated as loans three, four, six, and seven. Thus, PISI's claims for those amounts will be dismissed with prejudice.

D. Complaint Count IV: Breach of contract for payments

Count IV alleges that T&H has failed to pay PISI for numerous cash bail refunds that T&H received from the courts. PISI also asserts that T&H owes PISI for cash bails that were forfeited. Under the Agreement, "[c]ash bails funded by [PISI] that are

¹⁹³ Tr. 84–85.

¹⁹⁴ Tr. 85.

refunded or otherwise returned shall be collected by T&H and paid to [PISI] at the next Settlement Meeting.”¹⁹⁵ In addition, the Agreement provides that “T&H shall pay [PISI] one half of any forfeited bails.”¹⁹⁶ PISI contends that various courts in Delaware released cash bail refunds to T&H totaling \$26,600, which PISI had funded and for which PISI is entitled to a return of the entire amount. PISI also claims that four cash bails totaling \$7,500 were forfeited.¹⁹⁷ According to PISI, T&H owes it one half of this amount, or \$3,750, under the terms of the Agreement. PISI’s business records demonstrate that it funded the cash bails for which refunds were released and that PISI funded three of the four cash bails that were forfeited, totaling \$7,000.¹⁹⁸ For its part, T&H denies that it has any obligation to pay PISI for these refunds and forfeitures due to PISI’s prior material breach of the Agreement.

A party who first commits a material breach of a contract cannot enforce the contract going forward.¹⁹⁹ A non-breaching party, however, is not entitled to a

¹⁹⁵ JX 5 § III.

¹⁹⁶ *Id.* § VI(a).

¹⁹⁷ In Count IV of the Complaint, Paragraph 33 alleges that T&H owes PISI for a \$500 check that was returned for non-sufficient funds. Swan clarified at trial that the amount listed in Paragraph 33 was accounted for elsewhere in the Complaint and should be disregarded in Count IV. Tr. 85 (Swan).

¹⁹⁸ JX 71.

¹⁹⁹ *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003).

windfall.²⁰⁰ “[T]he party in breach is entitled to restitution for any benefit that he has conferred by way of part performance.”²⁰¹

The cash refunds and forfeitures at issue here were for cash bails T&H posted in 2009 with financing from PISI. We now know that PISI materially breached the Agreement in December 2008. Because of its prior material breach, PISI is not entitled to enforce the Agreement against T&H. If T&H were permitted to keep PISI’s cash that the courts refunded, however, it would receive a windfall. As to the forfeitures, the parties agreed that each would bear one half of the burden of a forfeited bail. “Although the contract price is evidence of the benefit, it is not conclusive.”²⁰² Moreover, there is no indication that the parties’ arrangement was unreasonable. I consider it reasonable to infer, therefore, that in a cash bail arrangement, the financier and the cash bail company

²⁰⁰ *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009).

²⁰¹ *Restatement* § 374 (“It is often unjust to allow the injured party to retain the entire benefit of the part performance rendered by the party in breach without paying anything in return. The party in breach is, in any case, liable for the loss caused by his breach. If the benefit received by the injured party does not exceed that loss, he owes nothing to the party in breach. If the benefit received exceeds that loss, the rule stated in this Section generally gives the party in breach the right to recover the excess in restitution.”); *see also Restatement (Third) of Restitution and Unjust Enrichment* § 36(1) (2011) (“A performing party whose material breach prevents a recovery on the contract has a claim in restitution against the recipient of performance, as necessary to prevent unjust enrichment.”).

²⁰² *Restatement* § 374 cmt. b. Notably, the parties’ Agreement anticipated this issue. The parties agreed that upon termination of the Agreement, “the obligation of T&H to make payments to [PISI] pursuant to paragraphs III, IV, V and VI shall continue until all monies required to be paid or returned to [PISI] shall have been paid or returned.” JX 5 § VIII.

would agree to share the risk of a bail forfeiture. Arguably, the cash bail business is in a better position to determine the risk of a forfeiture because it meets the customer and chooses whether to issue a bail to a particular customer after collecting information regarding that customer's likelihood of complying with the terms of the bail. I also note that, unlike with the bail fee arrangement, T&H presented no evidence that its forfeiture arrangement with PISI was different from the market or that T&H would not have made a similar arrangement with another financier. Instead, T&H defended Count IV solely on the ground that the Agreement was unenforceable against it because of PISI's prior material breach.

Having considered the evidence and the parties' competing arguments, I conclude that it would be unjust to allow T&H to retain the full amount of the bail refunds and to bear no loss for the forfeitures.²⁰³ Given the nature of the cash bail business, I find that PISI is entitled to the return of its cash for the refunded bails and to one half of the forfeited bails that it has proven, notwithstanding its prior material breach of the Agreement. I therefore award PISI \$30,100 based on Count IV, which includes the full amount of the six cash bail refunds listed in Paragraphs 23–28 of the Complaint and one half of the three forfeited cash bails listed in Paragraphs 29, 31, and 32. I deny PISI's request for one half of the forfeited \$500 cash bail identified in Paragraph 30 because PISI did not satisfy its burden of proof on that item.

²⁰³ See *Restatement* § 374 cmt. b (“It is often unjust to allow the injured party to retain the entire benefit of the part performance rendered by the party in breach without paying anything in return.”).

E. T&H's Counterclaims

I turn now to T&H's Counterclaims, beginning with Count II for breach of contract.

1. Count II: breach of contract

As discussed *supra*, I find that PISI materially breached the parties' Agreement when it provided cash bail financing assistance to MBB in December 2008. PISI defends against T&H's breach of contract Counterclaim on two grounds. First, PISI argues that T&H's reason for terminating the Agreement was a pretext and that T&H's termination had nothing to do with any prior breach by PISI. Section 237 comment (c) of the *Restatement*, however, provides that "[i]f [a] party is discharged as the result of an unjustified material failure of which he is ignorant, he has a claim for damages for total breach."²⁰⁴ Therefore, it is immaterial whether T&H knew at the time it purported to terminate the Agreement in August 2010 that PISI already was in material breach of the Agreement. Regardless of T&H's knowledge, PISI's prior material breach provided T&H with a valid claim for damages.

PISI's second argument is that T&H's termination was invalid because the termination notice was insufficient and T&H did not give PISI an opportunity to cure its breach. But these arguments are without merit. Independently of T&H's purported termination of the Agreement, PISI's prior material breach excused T&H from having to

²⁰⁴ *Restatement* § 237 cmt. c.

perform under the Agreement. Hence, PISI's challenges to the adequacy of the termination notice and the absence of an opportunity to cure are beside the point.

Having determined that PISI breached the Agreement, I need to consider what damages T&H has proven that it suffered to as a result of that breach. Before discussing the issue of damages, however, I first address the merits of T&H's counterclaim for abuse of process.

2. Count I: abuse of process

In Count I of the Counterclaim, T&H accuses PISI of abuse of process. The elements of a claim for abuse of process are: (1) an ulterior motive; and (2) a willful act in the use of the legal process that is not proper in the regular conduct of the proceedings, *i.e.*, the current litigation.²⁰⁵ In explaining these elements, Prosser notes that some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required. Merely carrying out the process to its authorized conclusions, even though with bad intentions, will not result in liability.²⁰⁶ Some form of coercion to obtain collateral advantage, not properly involved in the proceeding itself, must be shown, such as obtaining the surrender of property or the payment of money by the use of the process as a threat or club. In other words, a form of extortion is required,

²⁰⁵ *Nix v. Sawyer*, 466 A.2d 407, 412 (Del. Super. 1983) (citing Prosser, *The Law of Torts* § 121 (4th ed. 1971)).

²⁰⁶ *See D.R. Horton, Inc. v. Wescott Land Co.*, 730 S.E.2d 340, 352 (S.C. Ct. App. 2012).

and what is done in the course of negotiation is what typically constitutes the tort.²⁰⁷ Abuse of process is concerned with “perversion of the process after it has been issued,” in comparison to malicious prosecution which focuses on the initiation of that process.²⁰⁸

To support its abuse of process claim, T&H argues that PISI unnecessarily prolonged or delayed the litigation, falsified accounting records, and knowingly asserted frivolous claims, all for the purpose of driving T&H out of business and stealing its market share.

Of the arguments advanced by T&H the only colorable argument that PISI committed “a willful act in the use of the process not proper in the regular conduct of the proceedings” is that PISI falsified accounting records.²⁰⁹ Swan admitted that he made modifications to PISI’s accounting records during the course of this litigation, but maintains that he did so to clarify the memo descriptions to make it easier for others to understand the accounting transactions reflected in the records.²¹⁰ He testified that employees of Preferred Business Services, another entity owned by Swan, originally recorded the transactions in question.²¹¹ Swan claims that he altered the accounting records to better reflect what actually occurred.

²⁰⁷ *See id.*

²⁰⁸ *Pfeiffer v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 7062498, at *16 (Del. Super. Dec. 20, 2011).

²⁰⁹ *See Nix v. Sawyer*, 466 A.2d at 412.

²¹⁰ Tr. 362–63.

²¹¹ Tr. 398–99.

I am skeptical of Swan's explanation. His "spontaneous act of thoroughness" came at an odd time in the proceedings, *i.e.*, after Swan testified at his deposition about the accounting history maintained by PISI and before trial. It is possible that, as Swan asserted, he modified the accounting records in an attempt to make the records conform to his testimony and clarify what occurred. But, the failure of Swan and his counsel to advise opposing counsel that he had made changes to the accounting records casts doubt on his credibility. I am not convinced, however, that T&H has proven that PISI's conduct not only represented a serious and sanctionable breach of the rules of discovery, but also amounted to abuse of process. T&H's accounting expert did not demonstrate convincingly that the only explanation for the changes in question is that Swan was attempting to "cook the books" or to commit a fraud on the Court. At the same time, I certainly do question Swan's good faith in deciding, after two years, and in the days immediately after his deposition, to check the accuracy of PISI's accounting records and to fine tune Preferred Business Service's work.

In explaining his conduct, Swan testified that, under normal circumstances, no one would read the memo lines of PISI's accounting records. As part of this litigation, however, those records were under scrutiny and Swan wanted the memo lines to be more clear. The changes he made to the records indeed were almost exclusively to the memo fields. The fact that money was moving in and out of PISI through certain accounts was not changed. Instead, the modifications related to how the activity was "described." For example, instead of indicating in the memo line "loan payable to NC Cash," one memo

line was changed to state “to fiduciary account NCCB I and II.”²¹² T&H’s expert, Prenger, described the fiduciary accounts as basically “clean up” accounts where Swan put all the adjusting entries for MBB or JBB.²¹³ That is, Swan appears to have modified entries that related to other bail agencies, besides T&H, to delete reference to those agencies and replace those references with a notation regarding a “fiduciary account.”

T&H’s additional arguments regarding PISI’s intention to drive T&H out of business do not support its claim for abuse of process. Unlike with a claim for malicious prosecution, the fact that PISI allegedly harbored a hope when it initiated this action against T&H that T&H might fail and PISI then could use its name in the cash bail business is not relevant to an abuse of process claim.²¹⁴ T&H demonstrated that Swan attempted to purchase T&H for \$3,000,000 but the deal fell through due to a lack of financing. PISI registered under the name “T&H Cash Bails” in the fictitious names registers in all three counties in Delaware and later, in 2011, reserved the corporate name “T&H Bail Bonds, Inc.,” after T&H reportedly failed to “maintain its corporate

²¹² Tr. 526 (Prenger).

²¹³ *Id.*

²¹⁴ *See Toll Bros., Inc v. Gen. Accident Ins. Co.*, 1999 WL 744426, at *5–6 (Del. Super. Aug. 4, 1999); *D.R. Horton, Inc. v. Wescott Land Co.*, 730 S.E.2d 340, 352 (S.C. Ct. App. 2012); *see also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 121, at 897 (5th ed. 1984) (“Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.”).

franchise.”²¹⁵ Nevertheless, I do not believe that the evidence supports a reasonable inference that Swan’s failed attempt to purchase T&H is what caused PISI to initiate this litigation against T&H. In any event, T&H has not demonstrated that PISI perverted the Court’s *process* to accomplish some result that the process was not intended by law to accomplish. PISI filed its claim for breach of contract and pursued that claim legally, although certain of its conduct may be sanctionable on other grounds and PISI did not succeed on much of its claim.

PISI entered into the Agreement with T&H to provide financing for T&H’s cash bails and it was content to continue with that arrangement until T&H terminated the Agreement in August 2010. I have found that PISI earlier went outside of its Agreement with T&H when it provided cash financing to other bail agents, but I am not convinced that there was any form of extortion or coercion on PISI’s part during this litigation to obtain a collateral advantage over T&H. T&H’s business is currently in operation and it still receives financing from other financiers to assist with its cash bail postings.

Because Swan did not delete any transaction from QuickBooks that would erase any pending accounts receivable or accounts payable between PISI and other bond agents and he advanced a plausible, albeit dubious, explanation for modifying the memo fields, I conclude that T&H has not shown by a preponderance of the evidence that Swan’s or PISI’s conduct warrants the imposition of liability for abuse of process. Swan’s acts were misguided, inappropriate, and, as explained *infra* in Part II.F.2, sanctionable, but

²¹⁵ Tr. 420–21 (Swan); Pl.’s Reply Br. 1.

they do not amount to a willful perversion of the process. In sum, I conclude that T&H has failed to prove that PISI undertook a willful and improper act in the use of the process or any form of coercion to drive T&H out of business, as T&H alleges. Therefore, I find in favor of PISI on Count II of T&H's Counterclaim.

F. Damages

Damages for breach of contract are to be measured as of the time of the breach.²¹⁶ A remedy for a breach should seek to give the non-breaching party the benefit of its bargain by putting that party in the position it would have been but for the breach.²¹⁷ The traditional measure of damages is that which is utilized in connection with an award of compensatory damages, whose purpose is to compensate a plaintiff for its proven, actual loss caused by the defendant's wrongful conduct; to achieve that purpose, compensatory damages are measured by the plaintiff's "out-of-pocket" actual loss.²¹⁸ "[T]he non-breaching party is entitled to recover 'damages that arise naturally from the breach or that were reasonably foreseeable at the time the contract was made.'"²¹⁹

1. Reasonable estimate of damages

T&H asserts that it was damaged by PISI's breach of the Agreement in several ways. Specifically, T&H lost business opportunities, faced increased competition in the

²¹⁶ *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003).

²¹⁷ *Cenencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000).

²¹⁸ *Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000).

²¹⁹ *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009).

market place, had to compete at a disadvantage against companies having access to lower financing rates, and generally experienced downward price pressure on cash bail fees due to an increased supply of cash bails. To be entitled to compensatory damages, T&H must show that the injuries it suffered are not speculative or uncertain.²²⁰ T&H must have adduced sufficient proof for the Court to make a reasonable estimate as to an amount of damages. T&H need not demonstrate damages with mathematical accuracy, but rather must lay a reasonable foundation by which the Court may estimate its loss.²²¹

T&H further argues that restitution, under the theory of unjust enrichment, is available as a remedy for a breach of contract when a court declares that future performance is excused as a result of a material breach.²²² Unjust enrichment occurs in the event of “the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.”²²³ The existence of an express contract governing the relationship between the parties, however, generally precludes a party from seeking restitution through unjust enrichment.²²⁴ Consequently, as a matter of law, T&H may not recover

²²⁰ *LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007).

²²¹ *Id.*

²²² Arg. Tr. 64–65.

²²³ *Segovia v. Equities First Hldg., LLC*, 2008 WL 2251218, at *20 (Del. Super. May 30, 2008).

²²⁴ *Id.* Compare *id.*, with *supra* note 201 and accompanying text (discussing rights of the breaching party).

here on a claim of unjust enrichment. Instead, its proper recourse is to prove the damages it suffered as a result of PISI's breach of contract.

T&H argues first that it suffered damages based on lost profits. As stated above, damages begin at the time a party breached and continue in this case until T&H terminated the Agreement. The damage calculation for T&H, therefore, begins on the date PISI breached the exclusive Agreement on December 12, 2008 and ends when the Agreement was terminated in August 2010. The fact that T&H obtained financing from Matarese in the interim, *i.e.*, February 2010, affects the damage calculation only indirectly in the sense that T&H may be precluded as a practical matter from seeking damages as to cash bails financed by Matarese to the extent that the fees she charged were at or below the market rates. As an injured party under the Agreement, T&H had a legal incentive to make some attempt to avoid any further loss.²²⁵ Under Section 350 of the *Restatement*, damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation or by reasonable efforts.²²⁶

Here, T&H became aware in January 2010 that PISI posted a cash bail for Briscoe. It was not unreasonable, therefore, for T&H to mitigate its damages by obtaining alternate financing from other sources. Once PISI disturbed the exclusive financing arrangement, T&H was permitted to minimize its loss by going outside of the Agreement to obtain a more favorable fee arrangement. This remedial action taken by T&H will not

²²⁵ *Restatement* § 350 cmt. a.

²²⁶ *Id.* cmt. b.

diminish the damages to which T&H is entitled except that T&H has not shown that it is entitled to any damage award for the cash bails it made with funds from others, such as Matarese, beginning in February 2010.

As to its more general damages claim, T&H has not proven that it suffered reasonably quantifiable damages as a result of PISI's financing of other bail agents and a resultant increase in competition within the market. T&H has demonstrated, however, that it was damaged by the high premium fees PISI continued to charge to finance T&H's cash bails under the Agreement after PISI materially breached the exclusivity requirements of that Agreement. T&H proved that it could have obtained, and did obtain alternative financing for its cash bails for a lower fee. For example, Ken Moyer, owner of American Funding, approached T&H's Pridgen on numerous occasions to request that they enter into a financing arrangement.²²⁷ Presumably, unaware of PISI's breach, T&H declined to enter into a contract with Moyer because it was bound by the exclusive Agreement with PISI.²²⁸ Moyer's company initially charged a financing fee in 2009 of approximately 14% or 15%, but in 2010 the fee fell to 13%.²²⁹ T&H paid PISI a 16.5% fee throughout 2009 and 2010. Therefore, T&H lost profits and was damaged to the extent it paid PISI a fee higher than the current market rate charged by other financiers.

²²⁷ Tr. 667–68 (Moyer).

²²⁸ Tr. 669.

²²⁹ *Id.* at 668–69.

Based on the premium fee amount of 16.5% charged by PISI and the market rates of approximately 14.5%²³⁰ in 2009 and 13% in 2010 that T&H could have obtained from Moye to finance its cash bails, I find that T&H is entitled to a damage award from PISI based on the difference between PISI's rate under the Agreement and the prevailing market rates. I have determined that T&H's damages on this basis are \$45,924.88. The chart below depicts this damage calculation based on the cash bails posted by T&H during the relevant time period.²³¹

Office Location	2008²³²	2009	2010	Grand Total
Wilmington	\$45,750	\$811,042	\$332,250	\$1,189,042
Dover	\$0	\$443,828	\$236,678	\$680,506
Sub-total	\$45,750	\$1,254,870	\$568,928	\$1,869,548
PISI fees at 16.5%	\$7,548.75	\$207,053.55	\$93,873.12	\$308,475.42
Market rate fees at 14.5%	\$6,633.75	\$181,956.15		\$188,589.90
Market rate fees at 13%			\$73,960.64	\$73,960.64
Difference between PISI and market rates	\$915	\$25,097.40	\$19,912.48	\$45,924.88

²³⁰ Moye was unsure of the exact fee his company charged in 2009; therefore, I have used the median rate.

²³¹ JX 71. The figures used in this chart are undisputed.

²³² This amount represents the cash bails posted by T&H in December 2008.

2. Is T&H entitled to attorneys' fees?

Under the American Rule, Delaware courts do not generally award attorneys' fees to prevailing parties in litigation.²³³ There are recognized exceptions, however, to this rule, which invoke equitable principles as a matter of common law. One exception to the American Rule is where the “losing party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’”²³⁴ This “bad faith” exception applies in cases where the court finds the litigation to have been brought in bad faith or finds that a party conducted the litigation process itself in bad faith, thereby unjustifiably increasing the costs of litigation.²³⁵ “There is no single standard of bad faith that warrants an award of attorneys' fees, rather, bad faith is assessed on the basis of the facts presented in the case.”²³⁶ The purpose of the bad faith exception is to “deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.”²³⁷ Thus, Delaware courts have awarded attorneys' fees for bad faith when “parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims.”²³⁸

²³³ *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005).

²³⁴ *Id.*

²³⁵ *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850–51 (Del. Ch. 2005).

²³⁶ *Id.* at 851.

²³⁷ *Id.*

²³⁸ *Id.*

The bad faith exception applies in this case. First, PISI conducted the litigation process in bad faith. PISI engaged in delay tactics, including refusing to provide copies of its bank statements and canceled checks, and, most egregiously, resisting production of its accounting records. After learning at Swan's deposition that Swan kept his records in QuickBooks, Defendants requested the QuickBooks records for PISI and NC Cash. PISI produced copies of the records in pdf when it knew or should have known that production in that format would be unacceptable. After the production of the pdf files, T&H demanded that PISI produce those files in their native format. PISI resisted this production and T&H ultimately filed a motion to compel, which I granted. Before PISI produced its accounting records in native format, and after Swan's deposition, however, Swan clandestinely modified those records.

Swan's actions were misguided and wholly inappropriate. Indeed, his actions reflect a flagrant disregard or inexcusable ignorance of a litigant's obligation to preserve its documents, including its electronically stored information.²³⁹ In addition, because most of the changes Swan made helped to mask PISI's prior dealings with other cash bail agents, they are highly suspicious. And, perhaps most egregiously, neither Swan nor PISI disclosed that the accounting records had been modified when they produced those records to Defendants. This deception undercuts Swan's explanation that his actions were taken with an innocent purpose to make the records better reflect the historical transactions so that an outsider could understand the transactions as they actually

²³⁹ See *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009).

occurred. Rather, I am persuaded that Swan actions—in, for example, deleting references to the other bail agents with whom he was dealing—were done at least in part to strengthen PISI’s case. Moreover, Swan’s tampering with the evidence would have gone undiscovered had T&H not incurred the expense of hiring a forensic accountant to review the accounting records. Although these modifications were not sufficient, on their own or in combination with Defendants other evidence, to establish Defendants’ claim for abuse of process, they do evidence PISI’s bad faith in prosecuting this litigation. That is, PISI’s actions were improper, but they were undertaken to strengthen its case in this litigation, not to gain a collateral advantage.

In addition to this specific instance of PISI’s bad faith litigation tactics, PISI’s actions at various points throughout its prosecution of this case have prolonged the litigation and delayed its resolution. For example, this matter originally was scheduled for trial in January 2011 but, in fact, was not tried until September 2012. The majority of this delay is attributable to PISI.

Moreover, PISI knew that the activities it engaged in while in a contract with T&H were a violation of the Agreement. Swan was asked three hypotheticals during his deposition and at trial regarding whether certain types of “assistance” would constitute a breach of the Agreement. For each hypothetical, Swan admitted that the actions described would violate the Agreement.²⁴⁰ The hypothetical questions involved exactly the type of activities that PISI was engaged in while it was a party to the exclusive

²⁴⁰ Tr. 334–35 (Swan).

Agreement with T&H. Thus, at least by the time of his deposition in April 2012, Swan knew that PISI had breached the Agreement before T&H's first alleged breach in early 2010. Indeed, I find that Swan and PISI, through its counsel, probably knew about PISI's prior material breach well before his deposition.²⁴¹ Nevertheless, PISI pressed on with its defective primary claim.

In addition, after beginning this litigation in October 2010, Swan took steps to position PISI to take over T&H's name. Swan looked at the corporate name registry, determined that the name "T&H Bail Bonds, Incorporated" was available, and proceeded to reserve the name "T&H Bail Bonds, Inc." with the Delaware Division of Corporations. Swan explained that he took those actions because he intended to expand into the bail bond business on a full-time basis and he wanted to have the name of a company that had been in the business for over twenty years.²⁴² Swan also stated that he expected Pridgen to have to change the name of Pridgen's business once Swan began operating a cash bail business because Pridgen "would be using my name."²⁴³

²⁴¹ When PISI brought this litigation, if it did not know, it probably should have known that its claims were frivolous. PISI's initial counsel advised Swan shortly before PISI filed its Complaint that T&H planned to raise the defense of prior material breach due to PISI's actions in assisting cash bail companies other than T&H. *See* JX 26. Moreover, T&H brought a Rule 11 motion against PISI and its prior counsel in August 2011 seeking sanctions for knowingly asserting frivolous claims. Thus, the apparent shortcomings in PISI's breach of contract claims were brought to the forefront relatively early on in this litigation.

²⁴² *See* Tr. 421 (Swan).

²⁴³ Swan Dep. 213–14. Indeed, Swan's attorneys sent a letter to T&H's attorney on March 23, 2012 informing him that "[i]t has come to PISI's attention that T&H is

Considering this evidence, I find that PISI knew or should have known from very early in this litigation, if not before it filed suit, that its principal claims were frivolous, yet it persisted. I am not convinced that PISI knew when it brought this action that it had *no* chance of success on its claims, or that its only intention and purpose in bringing this lawsuit was to drive T&H out of business. At the same time, however, Swan displayed a disregard for T&H's business and an eagerness to capitalize on T&H's financial difficulties.²⁴⁴ In addition to planning to use the name T&H Bail Bonds for its own cash bail business, PISI began assisting T&H's competitors in violation of the Agreement. Swan also hid his relationship with NC Cash and MBB from Pridgen and T&H. When Pridgen confronted Swan about his financing other cash bails, Swan denied those actions. Similarly, PISI and Swan's actions in delaying and unduly complicating the production of an electronic version of PISI accounting records unnecessarily prolonged this litigation. I therefore conclude that PISI's actions both in initiating this litigation and in prosecuting it through trial amounted to "bad faith" conduct that supports shifting the cost of Defendants' attorneys' fees to PISI. Specifically, I find that PISI's conduct in this regard was so egregious that it warrants holding PISI liable for 80% of the attorneys' fees

using the name 'T&H Cash Bails'. This letter is to advise you that PISI is the owner of that name (as shown on the attached registration copies) and has not given T&H permission to use it. T&H is to immediately cease and desist in its use of that name or legal action will ensue." JX 43.

²⁴⁴ PISI knew that "Defendants Pridgen and T&H have substantial debt, including large tax liabilities." Compl. ¶ 10. It is reasonable to infer in the circumstances of this case that PISI knew, and indeed anticipated, that it would not take much to put T&H out of business.

and expenses that Defendants reasonably incurred in this litigation. I have awarded Defendants only 80% of their fees and expenses, rather than 100%, because PISI prevailed on the merits of certain secondary aspects of its claims, for example, in Counts III and IV and on Count II of Defendants' Counterclaim. PISI also prevailed on some, but far less than a majority, of the procedural disputes that arose during the pretrial phase of this case.

3. Prejudgment interest

In Delaware “[a] successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues.”²⁴⁵ Generally, the legal rate of interest has been used as “the benchmark for pre-judgment interest.”²⁴⁶ Nevertheless, this Court “has broad discretion, subject to principles of fairness, in fixing the [interest] rate to be applied.”²⁴⁷

Prejudgment interest is appropriate in this case. Thus, I award PISI prejudgment interest at the legal rate compounded quarterly on the damage award of \$3,650 under Count III, for which I find the higher rate of 9.75% does not apply, and of \$30,100 under Count IV. The parties may decide to set off at least the \$30,100 due to PISI under Count IV against the damages awarded to T&H for breach of contract. To simplify the interest calculation, interest on a given loan, bail refund, or bail forfeiture shall be considered to

²⁴⁵ *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 755 (Del. Ch. 2007) (quoting *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988)).

²⁴⁶ *Summa Corp.*, 540 A.2d at 409.

²⁴⁷ *Id.*

begin accruing on the first day of the quarter following the date on which the loan was made, the bail refund was received by T&H, or the bail forfeiture was recognized by T&H.

I also award T&H prejudgment interest at the legal rate compounded quarterly for the damage award to it of \$45,924.88. The damages from December 2008 shall begin accruing interest as of January 1, 2009, the damages attributable to the year 2009 shall accrue interest as of July 1, 2009, and the damages attributable to 2010 shall accrue interest as of July 1, 2010.

III. CONCLUSION

For the foregoing reasons, I find for PISI on Counts III and IV of the Complaint. I award PISI a total of \$12,650 under Count III, \$9,000 of which is against Defendant Pridgen personally and is subject to 9.75% simple interest from January 2010, while the remainder is against Defendant T&H with prejudgment interest at the legal rate compounded quarterly. I award PISI \$30,100 against T&H under Count IV. PISI is entitled to prejudgment interest on this amount as set forth *supra*. I dismiss with prejudice T&H's Counterclaim Count I for abuse of process.

I find for Defendants on Counts I and II of the Complaint and dismiss those claims with prejudice. I find for T&H on its Counterclaim Count II for breach of contract and award T&H \$45,924.88 in damages on that claim with prejudgment interest as set forth *supra*. I also award Defendants 80% of the attorneys' fees and expenses they reasonably incurred in connection with this litigation. Counsel for T&H promptly shall submit an

affidavit setting forth, in detail, the basis for its claimed reasonable attorneys' fees and expenses in this action.

Counsel shall work cooperatively to prepare and file promptly a proposed form of final judgment.