IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SHARON L. MEDEK, individually and as guardian for Ryan Stevens, Plaintiff, v. JOHN W. MEDEK, CMH, Inc. (f/k/a Medek, Inc.), a Delaware Corporation, PCCW, INC. (f/k/a Car Wash of Prices Corner, Inc.), a Delaware Corporation, and COLLEEN HARBISON, Defendants.	)	Civil Action No. 2559-VCP

MEMORANDUM OPINION

Submitted: February 9, 2009
Decided: July 1, 2009

Rick S. Miller, Esquire, FERRY, JOSEPH & PEARCE, P.A., Wilmington, Delaware; *Attorneys for Plaintiff*

Leo John Ramunno, Esquire, LEO JOHN RAMUNNO, ATTORNEY AT LAW, Wilmington, Delaware; *Attorneys for Defendants Colleen Harbison, CMH, Inc. and PCCW, Inc.*

Mr. John W. Medek, Tavernier, Florida; *Pro Se Defendant*

PARSONS, Vice Chancellor.

In this unfortunate set of circumstances, two former spouses of the same derelict man are scrapping over the assets, debts, and two Delaware corporations he left in his wake. Plaintiff, who is the man's earlier ex-wife, entered into an unusual settlement agreement upon the dissolution of their marriage, consisting of several documents. This arrangement required the ex-husband's companies to pay Plaintiff a weekly consulting salary and to provide health and dental insurance for fifteen years until 2014. The ex-husband also was required to maintain life insurance to fund a trust benefiting Plaintiff's son and his daughter. One of the companies also allegedly guaranteed the debts of the ex-husband and the other company. The man remarried and divorced a second woman, who after the ensuing property settlement owned 100% of the two companies. Perhaps not surprisingly, the ex-husband abandoned his obligations to the first ex-wife and set sail for Florida. He refused to participate in these proceedings, seemingly leaving the second ex-wife in the lurch. In 2006, the same year the second ex-wife entered into a property settlement related to her divorce, the companies ceased making salary payments and providing insurance to the first ex-wife, about eight years short of the term contemplated in the agreements with the first ex-wife. Based on those agreements, the first ex-wife brought this action against the man, the second ex-wife, and the two companies, seeking damages for breach of contract or, in the alternative, appointment of a receiver to take control of the companies for the purpose of liquidating them to satisfy creditor claims. The second ex-wife asserted a crossclaim against her ex-husband for indemnification for any liability to the first wife that the companies incurred.

This is my opinion on those claims and crossclaim after having presided over a full trial on the merits and considered extensive post-trial briefing and argument. For the reasons stated herein, I conclude that the two companies are liable to Plaintiff for all of the unpaid salary due to her under the agreements and that one of those companies is also liable to Plaintiff for appropriate damages resulting from the failure to pay the health and dental insurance as required by the agreements and for Plaintiff's attorneys' fees and expenses related to the claims on which she prevailed. I find, however, that Plaintiff failed to carry her burden of proof on her claim for payment of the costs of the life insurance policy. In addition, the companies are entitled to judgment in their favor and against the ex-husband on their crossclaim to the full extent they may be liable to Plaintiff.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Sharon L. Medek ("Sharon" or "Plaintiff"), resides in New Castle County, Delaware. Sharon purports to sue both in her individual capacity and as guardian for her disabled son, Ryan Stevens.

Defendant John W. Medek, also known as Wes Medek, is an individual who currently resides in Florida.

Defendant Colleen Harbison is an individual who resides in New Castle County, Delaware. Harbison is the sole shareholder of Defendants CMH, Inc. ("CMH") and

PCCW, Inc. ("PCCW"), two Delaware corporations that were known formerly as Medek, Inc. and Car Wash of Prices Corner, Inc. ("Car Wash"), respectively.[1]

B. The History

Plaintiff and Wes Medek married on February 20, 1987, and were divorced by decree of the Family Court of the State of Delaware on October 29, 1998.[2] Before their divorce, Sharon and Wes Medek each owned a 50% interest in Medek, Inc. and Car Wash. Medek, Inc. owned the real estate and equipment of three car washes located in New Castle County, while Car Wash operated the car washes and paid rent to Medek, Inc.[3]

In connection with their divorce, on June 25, 1999, Plaintiff and Wes Medek entered into a Settlement Stipulation and Order ("SSO"), in which Plaintiff transferred to Wes Medek her 50% interest in Medek, Inc. and Car Wash.[4] Under the SSO, Wes Medek agreed, among other things, to cause Medek, Inc. to enter into a Consulting/Employment Agreement (the "Consulting Agreement") with Plaintiff, entitling her to an annual salary of $66,667, payable at $1,282.06 per week for fifteen

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1 As used in this opinion, "Defendants" refers only to Defendants Harbison, CMH, and PCCW. Wes Medek is not included in this defined term because he has failed to participate in these proceedings and Plaintiff already procured a default judgment against him. Instead, he is referred to throughout as "Wes Medek."

2 Pretrial Stipulation and Order ("PSO") at 3, ¶ 1.

3 Trial Tr. ("T. Tr.") at 103 (Plaintiff). The identity of the witness is indicated parenthetically, unless it is clear from the text.

4 PSO at 3, ¶ 2.

years, in exchange for "such services to the corporation as directed and required by its officers and directors."[5] Further, in the SSO, Plaintiff agreed to sign a noncompetition agreement "barring her from any interest or relationship with any car wash business in New Castle County both as to self service and full service car washes for fifteen (15) years."[6] The SSO also contains a buyout provision for the Consulting Agreement, under which Wes Medek "shall have the right to prepay or buy out Medek, Inc.'s and his obligation under [Plaintiff's fifteen-year Consulting Agreement]."[7] If that right were exercised, the SSO provides that Medek, Inc. would have to pay Plaintiff the future cost of the Consulting Agreement discounted to present value at a rate of seven percent.[8]

In addition to the provision relating to the Consulting Agreement, the SSO in paragraph X requires Wes Medek to cause Car Wash to provide health and dental insurance to Plaintiff for up to fifteen years from August 4, 1999, "as long as [Plaintiff] qualifies for such coverage pursuant to the terms of the Plan."[9] Paragraph X also provides:

> In the event that the corporation is sold, the parties shall compute the future cost of such insurance based on the costs of such insurance the month the corporation is sold, which total future costs shall be reduced to present value using such

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5 Pl.'s Ex. ("PX") A, SSO, ¶ VII.

6 *Id.* ¶ VII.3.

7 *Id.* ¶ VII.4.

8 *Id.*

9 *Id.* ¶ X.1.

> monthly health insurance costs for such benefit to [Plaintiff] as of the date of closing on the sale of corporate assets. In light of the termination of such benefit to [Plaintiff], the corporation shall pay to [Plaintiff] the calculated, discounted present value of the costs of such insurance for the balance of the fifteen year term computed at a discount rate of 7%.[10]

Further, in the SSO Wes Medek undertook a separate obligation to maintain a life insurance policy, taken out on his life, for the Irrevocable Trust of John W. Medek (the "Trust") benefiting Plaintiff's son, Stevens, and Wes Medek's daughter.[11]

This litigation implicates at least two additional clauses of the SSO. One pertains to guarantying debt and provides: "As to Wes's obligations under this Settlement Stipulation and Order, Wes agrees to cause Car Wash of Prices Corner, Inc., to guarantee such obligations and in addition he shall personally guarantee such obligations."[12] The other provision specifies that if a party breaches the SSO, it will be liable to the nonbreaching party for its reasonable legal fees and costs to enforce his or her rights.[13]

On August 4, 1999, Plaintiff and Medek, Inc. entered into a Consulting Agreement consistent with the terms outlined in the SSO. The Consulting Agreement contains a "Successors and Assigns" provision, which states: "All the terms and provision of this

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10 *Id.*

11 *Id.* ¶ IX.2. Both Plaintiff and Curtis Bounds, the attorney for Plaintiff in the divorce proceeding, referred at trial to a $1.5 million AIG life insurance policy in benefit of the Trust. Neither this policy nor any documentation that the premiums have lapsed were introduced into evidence. *See, e.g.*, T. Tr. at 78-79 (Bounds); Post-trial Arg. Tr. at 10.

12 SSO ¶ XII.

13 *Id.* ¶ XIV.9.

[Consulting] Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their heirs, personal representative, transferees, successors and assigns."[14] The Consulting Agreement, however, does not refer to Car Wash or to insurance coverage for Plaintiff. Plaintiff received a weekly salary under the Consulting Agreement and health and dental coverage from August 1999 until the end of August 2006, except for a brief interruption of her health and dental coverage in 2005.[15]

At trial, Plaintiff testified that her preference in the divorce proceeding was to buy out Wes Medek's shares in Medek, Inc. and Car Wash or have him buy out her shares for a lump sum amount.[16] Wes Medek, however, could not obtain financing to purchase Plaintiff's interests and did not want to sell his shares.[17] Thus, the purpose of the Consulting Agreement was to enable Wes Medek to buy out Plaintiff's shares in Medek, Inc. and Car Wash and to prevent Plaintiff from competing with either of those

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14 PX B, Consulting Agreement, § 9.

15 Wes Medek allowed the insurance obligations to lapse in 2005. In response, Plaintiff filed a rule to show cause petition in Family Court. As a result of that litigation, Plaintiff was reinstated under Car Wash's health care insurance and the parties reached a settlement regarding the dental insurance, changing Wes Medek's obligation from providing dental coverage to reimbursing Plaintiff a set amount, up to $860 annually, for her out-of-pocket dental expenses. T. Tr. at 53, 74 (Bounds); PX U, Fam. Ct. Stipulation and Order, ¶ 3.

16 T. Tr. at 105.

17 *Id.* at 106 (Plaintiff). Gregory Crump, who attended the meeting at which Plaintiff and Wes Medek agreed upon the terms of their divorce settlement, confirmed that the Consulting Agreement was a mechanism for Wes Medek to buy out Plaintiff's shares in Medek, Inc. and Car Wash. PX U, Fam. Ct. Stipulation & Order, ¶ 3; T. Tr. at 310.

companies.[18] As Bounds testified, the parties understood when they drafted the Consulting Agreement that Wes Medek was not likely to consult Plaintiff with regard to running the car wash.[19] In fact, neither Wes Medek nor any other employee of Medek, Inc. or Car Wash ever asked Sharon to perform any tasks under her Consulting Agreement.[20]

On September 29, 1999, Plaintiff, Wes Medek, Medek, Inc. and Car Wash entered into a Guaranty, as required by the SSO.[21] The Guaranty named Car Wash and John W. Medek, collectively as the "Guarantor," and was executed in favor of Plaintiff.[22] The Guaranty defines indebtedness as "all indebtedness of Medek, Inc. to [Plaintiff] incurred or existing from time to time pursuant to the [SSO] and the [Consulting Agreement],"[23] and SSO as the agreement "between [Plaintiff] and Medek, Inc."[24] At trial, Bounds testified that he intended the Guaranty to apply to all of Wes Medek's obligations to

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18 T. Tr. at 44 (Bounds).

19 *Id.* at 93.

20 *Id.* at 106 (Plaintiff).

21 PX C, Guaranty.

22 *Id.* ¶ 1.1.

23 *Id.* ¶ 1.2.

24 *Id.* at 2.

Plaintiff under the SSO, as well as the obligations of Medek, Inc. under the Consulting Agreement.[25]

On April 7, 2000, Wes Medek married Defendant Harbison.[26] The couple separated in April 2003. On April 12, 2005, Wes Medek transferred 50% of his total interest in Medek, Inc. and Car Wash to Harbison in exchange for her personal guaranty of a $900,000 loan taken out by the entities from Sterling Bank and secured by the entities' assets.

Wes Medek and Harbison divorced on September 27, 2006.[27] As part of their divorce settlement, they entered into a Property and Financial Matters Settlement Agreement ("PFMSA") on March 17, 2006, which, *inter alia*, transferred Wes Medek's remaining 50% interest in Medek, Inc. and Car Wash to Harbison.[28] In addition, under the PFMSA Harbison assumed responsibility for "payroll payments" to Plaintiff, Plaintiff's health and dental coverage, and payments of insurance premiums to Allianz and AIG, from March 17, 2006 through August 31, 2006.[29]

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25 *Id.* at 47-49. Indeed, Bounds testified that Wes Medek's attorney originally drafted the Guaranty to include obligations under the SSO, and Bounds added language to make sure the Consulting Agreement was listed among the guaranteed obligations. *Id.* at 50.

26 PSO at 4, ¶ 10.

27 *Id*. ¶ 11.

28 *Id*. ¶¶ 12, 13.

29 PX D, PFMSA, at 3.

Before acquiring 100% ownership in Medek, Inc. and Car Wash, Harbison contacted the companies' accountant, Gregory A. Crump, in February 2006.[30] Crump's files contained both the SSO and the Consulting Agreement at all relevant times, but neither Harbison nor any representative of Harbison asked to review those files.[31] After Harbison acquired 100% ownership, she caused Medek, Inc. and Car Wash to change their names to CMH, Inc. and PCCW, Inc., respectively.[32]

The weekly payments to Plaintiff ceased after August 31, 2006.[33] PCCW also stopped providing Plaintiff health insurance coverage after that date.[34]

C. Procedural History

Plaintiff filed her First Amended Complaint (the "Amended Complaint") in this Court on July 27, 2007, naming Wes Medek, CMH, PCCW, and Harbison as Defendants. On August 16, 2007, Defendants Harbison, CMH, and PCCW answered and filed a crossclaim against Defendant Wes Medek.[35]

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30 T. Tr. at 366 (Crump).

31 *Id.* at 342-44, 353 (Crump). Harbison did not retain an attorney or other advisor to assist her in the transfer of the companies from Wes Medek to her.

32 PSO at 4, ¶ 15.

33 T. Tr. at 106 (Plaintiff).

34 *Id.* at 107 (Plaintiff); PSO at 3.

35 On December 3, 2007, Plaintiff moved for a default judgment against Wes Medek on Count III of the Amended Complaint, which I granted and entered on December 21, 2007. Wes Medek never answered Defendants' crossclaim or otherwise participated in this action.

On October 12, 2007, Plaintiff moved for partial summary judgment as to Count II of the Amended Complaint and Defendants' affirmative defenses. Defendants Harbison, CMH, and PCCW filed an answering brief on January 7, 2008, and concurrently moved to dismiss this case for lack of subject matter jurisdiction. On September 19, 2008, I denied Defendants' motion to dismiss in all respects and Plaintiff's motion for partial summary judgment in large part.[36] I granted summary judgment, however, in favor of Plaintiff on Defendants' affirmative defenses of laches and waiver.[37]

Trial was held on October 2, 3 and 6, 2008, and the Court heard post-trial argument on February 9, 2009.

D. Parties' Contentions

Plaintiff contends that she entered into a Consulting Agreement with Medek, Inc., the predecessor of CMH, which CMH breached when it ceased making weekly salary payments to her. She asserts that CMH's breach manifests a repudiation of the Consulting Agreement and entitles her to damages for total breach. Per the Amended Complaint, Plaintiff seeks payment of the salary due her since September 2006, as well as the present value of her salary from now until the expiration of the Consulting Agreement in August 2014. Further, Plaintiff contends that, under the Guaranty, PCCW guaranteed the obligations of CMH under the Consulting Agreement, and, thus, PCCW is jointly and severally liable for damages resulting from the breach of that agreement. According to

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[36] *Medek v. Medek*, 2008 WL 4261017 (Del. Ch. Sept. 10, 2008).

[37] *Id.* at *10.

Plaintiff, the Guaranty, although ambiguous on its face, when properly construed also secures Wes Medek's obligations under the SSO to provide health and dental insurance to Plaintiff. In addition, Plaintiff asserts a claim against Wes Medek and PCCW, as guarantor, on behalf of the Trust for the benefit of her son and Wes Medek's daughter for losses stemming from Wes Medek's failure to comply with his obligation under the SSO to maintain a life insurance policy to fund the Trust.

As to the Consulting Agreement, Defendants argue that CMH should not be responsible for Wes Medek's personal obligations stemming from his divorce from Plaintiff. Defendants also deny that PCCW guaranteed Wes Medek's obligations under the SSO, including the provision of health and dental insurance and the maintenance of life insurance for the benefit of the Trust. According to Defendants, the Guaranty, by its express terms, guarantees only the obligations of CMH under the SSO and the Consulting Agreement, not the obligations of Wes Medek.

In the alternative, Plaintiff seeks relief under the Delaware Uniform Fraudulent Transfer Act ("UFTA").[38] She contends that Wes Medek fraudulently transferred his stock in Medek, Inc. and Car Wash to Harbison with the sole intent to hinder, delay, or defraud Plaintiff, and extricate himself from the burdens of his divorce settlement with her. Plaintiff requests that this Court appoint a receiver to liquidate the corporations to

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[38] 6 *Del. C.* §§ 1301 to 1311.

satisfy Wes Medek's debts to her and other creditors.[39] Defendants deny the stock was fraudulently transferred, and contend that, even if it were, Wes Medek received more than a reasonable equivalent value for the stock. Further, according to Defendants, Harbison has an affirmative defense under the UFTA in that she acted in good faith in acquiring the companies.

Because I find in favor of Plaintiff on her breach of contract claims against CMH and PCCW, and that she failed to satisfy her evidentiary burden on her life insurance claim, entry of judgment in her favor on those claims will provide Plaintiff all the relief to which she is entitled. Accordingly, I need not examine her claims under the UFTA.[40]

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[39] PSO at 8; Pl.'s Opening Br. ("POB") at 38. The parties' other post-trial briefs will be referred to in similar fashion, *i.e.*, "DAB" for Defendants' answering brief and "PRB" for Plaintiff's reply.

[40] Count I of Plaintiff's Amended Complaint seeks relief in the form of the avoidance of Wes Medek's February 2006 transfer of his 50% interest in CMH and PCCW to Harbison pursuant to the PFMSA. The claim emanates from the UFTA and essentially seeks an alternative form of relief to monetary damages. I need not examine Count I or Defendants' liability under the UFTA, however, because I granted Plaintiff all the relief to which she is entitled under the breach of contract theory set forth in Count II. Plaintiff also abandoned her prayer for relief in the form of avoidance of the transfer and imposition of a constructive trust in favor of a request for appointment of a receiver. POB at 37 n.9. Furthermore, during post-trial oral argument, Plaintiff's counsel confirmed that the UFTA claim would be moot in the event that PCCW and CMH were found liable for damages in connection with the Consulting Agreement salary and health and dental insurance. *See* Post-trial Arg. Tr. at 24-25. Plaintiff stated that analysis of the claims under the UFTA "is academic, because at that point . . . my client would have a judgment against the corporations which she could directly execute on. As corporate debt, she could sell the corporations at that point. . . . And that would be the full amount of her damages." *Id.* at 25. Therefore, without deciding whether Plaintiff ultimately would succeed on her claims under the UFTA, I dismiss Count I of the Amended Complaint without prejudice as moot.

II. ANALYSIS

A. Standard of Review

To succeed on her various claims against Harbison, CMH, and PCCW, Plaintiff must prove liability by a preponderance of the evidence. "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[41] Under this standard, Plaintiff is not required to prove her claims by clear and convincing evidence or to exacting certainty. Rather, Plaintiff must prove only that it is more likely than not that she is entitled to relief.

B. Consulting Agreement Claims

Plaintiff argues that CMH breached the Consulting Agreement by ceasing to pay her salary in September 2006. According to Plaintiff, CMH, formerly known as Medek, Inc., is obligated to pay her $1,282.06 per week until August 3, 2014. By failing to pay her salary, CMH has breached the Consulting Agreement, and Plaintiff claims the right to receive the full amount now. Plaintiff also contends that PCCW, under the terms of the Guaranty, is liable for the unpaid and future salary. Defendants deny that CMH has an obligation to pay a salary to Plaintiff under the Consulting Agreement because that obligation is a personal undertaking of Wes Medek. Defendants further argue that, because Harbison was not aware of the Consulting Agreement or the Guaranty when she

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

acquired CMH and PCCW under the PFMSA, she is not required to honor their obligations under either of those agreements.

Plaintiff and Medek, Inc. entered into the Consulting Agreement, effective on August 4, 1999. The agreement provides that Medek, Inc. shall pay Plaintiff "a consulting fee in the amount of [$66,667] per year payable in fifty-two (52) equal weekly installments commencing on August 4, 1999, and continuing on a weekly basis thereafter until the pay period ending August 3, 2014."[42] In consideration for the weekly payments, Plaintiff agreed to serve as a "general advisor and consultant to management on all matters pertaining to the business of [Medek, Inc.], and to render such services as are pertinent thereto" and to "devote her best efforts at such times as shall be necessary to perform her duties and to advance the interests of Medek, Inc."[43] Plaintiff also agreed to a general noncompetition clause, which restricted her from, *inter alia*, directly or indirectly acting against Medek, Inc.'s interests, soliciting or recruiting its employees, revealing its confidential information or trade secrets, or competing in the car wash industry.[44] In the Guaranty, dated September 29, 1999, Car Wash and Wes Medek guaranteed all indebtedness and liabilities of Medek, Inc. pursuant to the Consulting Agreement. Wes Medek executed the Consulting Agreement and the Guaranty, as the president of Medek, Inc. and Car Wash, and in his individual capacity.

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42 Consulting Agreement § 3.

43 *Id*.

44 *See id.* at § 4.

Defendants do not dispute that Medek, Inc. and Car Wash entered into the Consulting Agreement and Guaranty, respectively. Instead, Defendants argue that CMH and PCCW, the successors of Medek, Inc. and Car Wash, should not be obligated under those documents because the corporations only executed them to secure Wes Medek's personal obligations to Plaintiff under the SSO. The evidence does not support this argument.

The Consulting Agreement is clear on its face. Medek, Inc. agreed to pay a weekly salary to Plaintiff in exchange for her promises to perform any advisory or consulting duties requested by management and not to compete. Defendants presented no evidence that Plaintiff failed to live up to her side of the bargain. Thus, I find that Plaintiff complied with her obligations under the Consulting Agreement, including the noncompetition clause.

Defendant proved, and Plaintiff admitted, that she, in fact, has not performed any advisory or consulting work for CMH during the term of the Consulting Agreement. Nevertheless, Plaintiff has not breached the Consulting Agreement because, as all parties testified, Plaintiff was never asked or directed by CMH, Wes Medek, Harbison, or any other CMH employee to perform any work. Rather, as Bounds testified, neither Plaintiff nor Wes Medek expected that Plaintiff would perform any services under the agreement. The fact that Plaintiff never provided any services under the Consulting Agreement, however, does not render the agreement between CMH and Plaintiff illusory or relieve CMH of its obligation to pay Plaintiff's salary due to an absence of consideration. Even if Defendants were correct in assigning no value to Plaintiff's promise to provide

advisory or consulting services, if asked, there still would exist ample consideration for CMH's obligation to pay her salary. Plaintiff, in addition to promising to perform consulting services upon request, agreed to refrain from competing with CMH under section 4 of the Consulting Agreement. The fifteen-year duration of this restriction is far longer than what generally is legally permissible, but is presumptively enforceable, because CMH's obligation to pay Plaintiff's salary continues for an equally long period and the agreement effectively was made in connection with Plaintiff's sale of her interest in the companies. Thus, CMH received adequate consideration in exchange for Plaintiff's promises made to Medek, Inc. under the Consulting Agreement.

Defendants further contend that CMH is not liable to pay Plaintiff's salary because Harbison was not aware of the Consulting Agreement when she accepted full ownership of CMH under the PFMSA. This argument lacks merit. The evidence shows Harbison has no one to blame for her alleged ignorance of the Consulting Agreement and the Guaranty but herself. Parties to business transactions of the size reflected in the PFMSA generally perform due diligence before entering into proposed transactions. The record shows, however, that Harbison did not even engage a lawyer or any other expert to represent her own personal interests in connection with the PFMSA. Instead, Harbison averred that she did not know about the liabilities under the Consulting Agreement or the

Guaranty because Wes Medek avoided answering questions about CMH's and PCCW's liabilities and because her accountant failed to reveal the contracts to her.[45]

Once a party to a transaction is put on inquiry notice of a potential problem with respect to the transaction, the party cannot claim ignorance of the problem later, if a reasonable investigation at the time would have revealed the relevant circumstances.[46] A party is on inquiry notice if she is in possession of facts sufficient to make her suspicious, or that ought to have made her suspicious.[47]

In this case, Harbison, at the very least, was on inquiry notice as to the nature of CMH's obligations under the Consulting Agreement. Harbison asserts Wes Medek avoided answering questions regarding the liabilities of the corporations. Such evasiveness also would lead a reasonable purchaser to inquire further into the corporate obligations before acquiring those corporations. When a buyer possesses information

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[45] Harbison avers that Crump, the accountant tasked with divulging the corporate liabilities to her, failed to inform her about the Consulting Agreement and Guaranty. T. Tr. at 195-96 (Harbison). Regardless, any dereliction of duty by an agent of Harbison does not relieve those corporations of their obligation to perform under those agreements. Finding otherwise would shift the burden to another party without the consent of Plaintiff, who had no knowledge of the PFMSA between Harbison and Wes Medek. In addition, Harbison may pursue an action against her agent for negligence if she believes that to be the case.

[46] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 5757762, at *9 (Del. Ch. Jan. 24, 2005) (emphasizing that once put on inquiry notice, a buyer has reason to suspect a problem and is "not entitled to lean back in the recliner" and choose not to investigate whether obligations and liabilities exist).

[47] *Smith v. McGee*, 2006 WL 3000363, at *3 n.9 (Del. Ch. Oct. 16, 2006) (citation omitted).

suggesting potential corporate problems, such information would prompt a reasonable investor to inquire about those problems.[48] Harbison knew Wes Medek owed a debt to Plaintiff. During Harbison's marriage to Wes Medek, she knew that he and Plaintiff were engaged in litigation over that debt.[49] Moreover, under the PFMSA dated March 17, 2006, which transferred Wes Medek's 50% interest in CMH and PCCW to her, Harbison agreed to make "payroll" payments to Plaintiff until August 31, 2006. Assuming responsibility for "payroll" payments, regardless of whether the buyer believed they were personal obligations of the seller, would have created a suspicion in the mind of any reasonable buyer. In addition, Harbison had access to CMH's files and, upon investigation, could have discovered the Consulting Agreement.[50] Thus, Harbison was on, at least, inquiry notice of CMH's liability to Plaintiff before she acquired 100% ownership of the companies. I, therefore, hold CMH liable to pay Plaintiff's salary under the Consulting Agreement.

Moreover, PCCW is jointly and severally liable for Plaintiff's salary pursuant to the Consulting Agreement by operation of the Guaranty. The Guaranty, executed on

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48 *See Certainteed Corp.*, 2005 WL 5757762, at *9.

49 *See Stevanov v. O'Connor*, 2009 WL 1059640, at *9 (Del. Ch. Apr. 21, 2009) (noting that knowledge of third-party's interest coupled with knowledge of litigation over that interest provided reason to inquire into that subject before entering into transaction).

50 *See VGS, Inc. v. Castiel*, 2004 WL 876032, at *3 (Del. Ch. Apr. 22, 2004) (emphasizing the inadequacy of buyer's due diligence when the buyer had access to files, which included the corporate contract, from which the buyer was attempting to distance itself).

September 29, 1999, expressly provides that PCCW, formerly known as Car Wash, shall guaranty the indebtedness and liabilities of CMH, formerly known as Medek, Inc., to Plaintiff. The Guaranty defines indebtedness, in part, as "all indebtedness of [CMH] to [Plaintiff] incurred or existing from time to time pursuant to . . . the Consulting/Employment Agreement . . . ."[51] Under the plain and unambiguous terms of the Guaranty, PCCW is liable to Plaintiff for the salary CMH undertook to pay her under the Consulting Agreement. Defendants do not dispute that proposition; instead, they deny that CMH has any liability under the Consulting Agreement.[52] As discussed *supra*, however, I have rejected that argument. Therefore, because the terms of the Guaranty unambiguously commit PCCW to guarantee CMH's obligations under the Consulting Agreement, I find PCCW jointly and severally liable to Plaintiff for any damages arising from CMH's breach of its obligations to pay Plaintiff's salary under that Agreement.

C. Health and Dental Benefits Claims

Plaintiff seeks compensation for the loss of her health and dental benefits previously provided by Car Wash, now PCCW. According to the SSO, Wes Medek undertook to require PCCW to provide health and dental insurance coverage to Plaintiff until she died or PCCW was sold. The contract provides a formula to be used to calculate the present value of the total future costs of the insurance if PCCW is sold, and require

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[51] Guaranty ¶ 1.1.

[52] *See* DAB at 12. Defendants state "[u]nder the terms of the Guaranty, PCCW guaranteed the obligations of CMH under the [C]onsulting [A]greement and that is the extent of the [G]uaranty. *Id.*

PCCW to pay that figure to Plaintiff in the event of a sale. Only Wes and Sharon Medek signed the SSO. In the Guaranty, PCCW guaranteed the debts of Medek, Inc., or CMH, arising under the SSO. Arguing that PCCW effectively was sold to Harbison, Plaintiff contends she is entitled to receive the present value of the health insurance from PCCW. Alternatively, Plaintiff asserts that the SSO is ambiguous. Specifically, Plaintiff contends that, contrary to Defendants' argument, PCCW guaranteed the debts of Wes Medek, as well as CMH, under the Guaranty, and, therefore, PCCW is liable for Wes Medek's obligations to provide health and dental benefits.

Defendants counter with several defenses. First, they deny that in the Guaranty PCCW guaranteed the obligations of Wes Medek, including those to provide health and dental coverage. Second, Defendants aver that PCCW is not obligated to provide insurance coverage to Plaintiff because it was not a party to the SSO. Defendants further argue that, by virtue of their October 12, 2005 Family Court Stipulation and Order, Plaintiff and Wes Medek effectively removed the obligation to provide dental benefits from the Guaranty. Finally, Defendants argue that Plaintiff is not entitled to either health or dental coverage because she does not qualify under the employee insurance plan to which PCCW subscribes.

Plaintiff's primary theory of liability depends on a finding that PCCW guaranteed Wes Medek's debts, as well as CMH's, under the Guaranty. As a preliminary matter, therefore, I must determine whether that interpretation of the Guaranty is correct. Defendants contend it is not, raising the question whether the Guaranty is ambiguous and, therefore, subject to construction using extrinsic evidence.

The court's ultimate goal in contract interpretation is to determine the parties' shared intent.[53] "A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law."[54] Delaware adheres to the objective theory of contracts.[55] In that respect, "the court looks to the most objective indicia of that intent: the words found in the written instrument."[56] A contract is not rendered ambiguous solely because parties do not agree as to its construction.[57] Contract language must be susceptible to two or more reasonable interpretations to be deemed ambiguous.[58] Moreover, parol or extrinsic evidence cannot be used to manufacture an ambiguity in a contract that facially has a single reasonable meaning.[59]

Under the parol evidence rule, where the written contractual language is susceptible to more than one reasonable interpretation, the court will consider proffered admissible evidence bearing upon the objective circumstances relating to the background

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53 *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453, 461 (Del. Ch. 2008).

54 *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007).

55 *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007).

56 *Sassano*, 948 A.2d at 461.

57 *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

58 *Rossi v. Ricks*, 2008 WL 3021033, at *2 (Del. Ch. Aug. 1, 2008).

59 *United Rentals*, 937 A.2d at 830 (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

of the contract.[60] "In some cases, determining whether a contract is susceptible to more than one interpretation requires an understanding of the context and business circumstances under which the language was negotiated; seemingly unequivocal language may become ambiguous when considered in conjunction with the context in which the negotiation and contracting occurred."[61] Such extrinsic evidence may include overt statements and acts of the parties, the business context, prior dealings between the parties, and business custom and usage in the industry.[62] Upon examination of the relevant extrinsic evidence, "a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of [the] negotiation."[63]

Under the Guaranty, PCCW and Wes Medek assumed responsibility for the indebtedness and liabilities of CMH to Plaintiff. The Guaranty defines indebtedness as:

> all indebtedness of [CMH] to [Plaintiff] incurred or existing from time to time pursuant to the Settlement Stipulation and Order and the Consulting/Employment Agreement, or any instrument or document delivered to [Plaintiff] in connection therewith or incurred or existing from time to time in connection with such Order . . . .[64]

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60 *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *10 (Del. Ch. June 6, 1996).

61 *Id.* at *10 n.10.

62 *United Rentals*, 937 A.2d at 834-35.

63 *U.S. West*, 1996 WL 307445, at *10.

64 Guaranty ¶ 1.1.

The divorce proceeding between Wes Medek and Plaintiff provides the backdrop to the negotiation of the Guaranty. Bounds represented Plaintiff during those divorce proceedings and in the negotiation of three contemporaneous documents related to it: the SSO, the Consulting Agreement, and the Guaranty. He testified that the parties entered into the Guaranty with the intent that PCCW and Wes Medek would assume responsibility for Wes Medek's obligations under the SSO and CMH's obligations under the Consulting Agreement. According to Bounds, Wes Medek's attorney initially drafted the Guaranty to include only those obligations incurred under the SSO. Consequently, Bounds insisted that obligations under the Consulting Agreement also be incorporated. Before the SSO, Wes Medek and Plaintiff jointly owned CMH and PCCW. After the SSO, Wes Medek owned 100% of both entities. In his capacity as owner and president of those entities, he signed the Guaranty and Consulting Agreement. It is in this context that I find the Guaranty to be poorly drafted and susceptible to more than one reasonable interpretation.

On its face, the Guaranty clearly obligates PCCW and Wes Medek to secure the indebtedness and liabilities of CMH to Plaintiff. Yet, the Guaranty also expressly includes the indebtedness incurred under the SSO. CMH, however, neither signed the SSO nor incurred any debts or liabilities under it. Therefore, the language in the Guaranty regarding the SSO is either superfluous or was intended to include the

indebtedness of Wes Medek, as well. I do not find the language superfluous.[65] Instead, based on the circumstances surrounding the negotiation of the Guaranty, *i.e.*, the divorce settlement between Wes Medek and Plaintiff and the fact that Wes Medek owned 100% of the entities bound by the Guaranty and Consulting Agreement, I find the parties intended the Guaranty to secure the debts of Wes Medek under the SSO as well as the debts of CMH under the Consulting Agreement.

According to Plaintiff and Bounds, the parties intended the Guaranty to make PCCW and Wes Medek liable for the debts of Wes Medek as well as CMH. Earlier drafts of the Guaranty did not refer to the Consulting Agreement, only to the SSO. Without reference to the Consulting Agreement, the Guaranty would have been completely meaningless as CMH only incurred liabilities under the Consulting Agreement. Yet, the reference to the Consulting Agreement did not appear in Wes Medek's counsel's initial draft and was added later at the insistence of Plaintiff's counsel. In this context, I find that the Guaranty is ambiguous and, when properly construed, was intended to guarantee the debts of both Wes Medek and CMH under the SSO and the Consulting Agreement.

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65 *See, e.g.*, *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 2007 WL 2088851, at *6 (Del. Ch. July 20, 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."); *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("[A] court must construe the agreement as a whole, giving effect to all provisions therein.").

Additional extrinsic evidence buttresses this conclusion. Under the SSO, Wes Medek took 100% ownership of CMH and PCCW in exchange for, among other things, promises to cause CMH to enter the Consulting Agreement with Plaintiff and PCCW to provide health and dental insurance to Plaintiff. The SSO also requires that Wes Medek personally guarantee his obligations under that document and cause PCCW to guarantee such obligations.[66] This portion of the SSO supports my finding that the parties intended the Guaranty to obligate PCCW to guarantee Wes Medek's debts under the SSO, including the health and dental insurance debts incurred upon the transfer of PCCW from Wes Medek to Harbison through the PFMSA.

Defendants also argue that Plaintiff is not entitled to receive health and dental insurance coverage from PCCW because she does not qualify under the terms of PCCW's employee insurance plan. According to the SSO, PCCW "shall continue to provide coverage for [Plaintiff] as long as she qualifies for such coverage pursuant to the terms of the plan."[67] PCCW provided insurance for Plaintiff pursuant to the terms of the PFMSA through August 31, 2006. When Wes Medek transferred his remaining 50% interest in the companies to Harbison, that triggered Wes Medek's and PCCW's obligation under paragraph X.1 of the SSO to pay Plaintiff the discounted present value

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66 Section XII of the SSO, entitled "Guarantees," provides: "As to [Wes Medek]'s obligations under this Settlement and Stipulation and Order, [he] agrees to cause [PCCW] to guarantee such obligations and in addition he shall personally guarantee such obligations."

67 SSO ¶ X.1.

of the future costs of the insurance until August 2014. Defendants' answering brief fails to point to any evidence that Plaintiff did not qualify for the insurance coverage when Wes Medek transferred control of PCCW to Harbison or before that time. Moreover, the indebtedness of Wes Medek and PCCW already had been triggered by the sale of PCCW to Harbison, effective in February 2006.

Defendants next argue that Wes Medek assumed all responsibility for Plaintiff's dental insurance and coverage costs in the October 12, 2005 Family Court Stipulation and Order. That Order provides in paragraph 3 that:

> [B]eginning August 4, 2005, and continuing for each twelve (12) month period thereafter [Wes Medek] shall reimburse [Plaintiff] for her out of pocket dental expenses up to $860 per twelve (12) month period, through and to August 4, 2015. [Wes Medek] shall reimburse [Plaintiff] within thirty (30) days of her providing to him a copy of her dental invoice showing charges for dental work performed on her."[68]

The Order, however, does not release Wes Medek or PCCW from their obligations under the Guaranty or the SSO. Instead, it quantifies the value of the dental insurance coverage to Plaintiff and caps Wes Medek's exposure for Plaintiff's dental expenses. The Family Court Stipulation and Order does not otherwise affect Wes Medek's obligation to provide such coverage through PCCW or cause PCCW to pay for the total future cost of the coverage. Indeed, the Guaranty expressly provides that it is "independent of and in

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[68] Fam. Ct. Stipulation and Order ¶ 3. I note that this Order obligates Wes Medek to provide dental expense reimbursement until August 2015. PCCW's obligation to provide dental insurance, however, stems from the SSO and the Guaranty, which provide for dental insurance coverage until August 2014. Accordingly, I have awarded damages up to that earlier date.

addition to any other guaranty, endorsement, collateral or agreement" and "absolute and unconditional and shall not be changed or affected by any representation, oral agreement, act or thing whatsoever."[69]

Because I find that the Guaranty obligates PCCW to guarantee the indebtedness and liabilities of Wes Medek under the SSO, PCCW must compensate Plaintiff for her health and dental insurance coverage. Wes Medek agreed to cause PCCW to cover Plaintiff until she died or PCCW was sold. The PFMSA effectively sold PCCW to Harbison. This triggered Wes Medek's obligation to cause PCCW to compensate Plaintiff for the total future costs of such benefits under the formula provided in the SSO. Because Wes Medek failed to satisfy this obligation, PCCW must now pay the discounted present value of the total future costs of Plaintiff's health and dental insurance until August 2014.

D. Life Insurance Claims

Plaintiff argues that Defendant PCCW is liable as guarantor for the life insurance policy Wes Medek was required to maintain for the benefit of the Trust under the terms of the SSO. According to Plaintiff, PCCW guaranteed the policy under the Guaranty, and is liable to Plaintiff for the present value of obtaining new insurance on Wes Medek's life. I find that Plaintiff has failed to prove damages, and, therefore, dismiss all claims for relief based on the life insurance policy against Defendants Harbison, CMH, and PCCW.

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[69] Guaranty ¶¶ 3.1, 3.2.

Paragraph IX.2 of the SSO obligates Wes Medek to "maintain [the Trust] and its related life insurance policy for the benefit of the [T]rust's named beneficiaries . . . ."[70] Plaintiff avers that the pertinent policy is a $1.5 million insurance policy on the life of Wes Medek. She further alleges that Wes Medek allowed the policy to lapse sometime after 2005. Plaintiff failed, however, to place the actual life insurance policy in evidence or otherwise prove by admissible evidence the terms and conditions of the policy, despite several complaints about its absence from the record. During Plaintiff's expert's testimony, Defendants objected to the absence of the life insurance policy.[71] I noted the objection and provisionally allowed Plaintiff's expert, William C. Santora, to testify about his damages calculations.[72] At that time, Plaintiff claimed a copy of the policy had been provided to Defendants' former counsel.[73] Yet, Plaintiff made no effort to prove that allegation or otherwise shift to Defendants the burden of proof as to the nature and scope of the policy or its terms. Defendants argued in their post-trial briefing that

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70 SSO ¶ IX.2.

71 T. Tr. at 264-65, 267.

72 In permitting Santora to testify about his reliance on the life insurance policy in his determination of damages, I found that an insurance contract constitutes the type of facts or data reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. *See* D.R.E. 703. I also observed that "[i]f what we are talking about is replacing a particular insurance policy, an AIG insurance policy, one might think that the insurance policy would be put into evidence . . . ." T. Tr. at 265.

73 T. Tr. at 266-67.

Plaintiff failed to prove essential elements of the life insurance contract.[74] Nevertheless, in her reply brief, Plaintiff made no reference to exhibits showing the purportedly missing elements and did not rebut Defendants' argument. Indeed, Plaintiff's counsel admitted at post-trial argument that the policy had not been admitted into evidence.

Plaintiff testified that, after the companies were transferred to Harbison, she "was notified [the policy] was about to lapse for nonpayment."[75] Harbison stated: "[Plaintiff] told me that a friend of hers had told her that the policy had lapsed."[76] Still, the record adduced at trial contains no documentary evidence that corroborates Plaintiff's averment that the policy lapsed. During Harbison's testimony, Plaintiff's counsel presented her with a copy of a document purporting to be a contract certificate, or one-page summary, of the policy in an apparent effort to show that the face amount of the policy was $1.5 million. Plaintiff never attempted to introduce this document into evidence or authenticate it.

Plaintiff's expert, Santora, testified that he relied on the actual insurance contract in his damages calculations. Although technically Santora could rely on the life insurance contract to formulate an expert opinion on damages, Plaintiff cannot use his

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74 DAB at 14. For example, Defendants argue that the SSO does not list the premiums or the amount of the insurance coverage and that Plaintiff failed to "present[] the Court with a copy of the policy or proof that it lapsed." *Id.*

75 T. Tr. at 121.

76 T. Tr. at 227.

opinion to prove underlying facts about the life insurance policy.[77] Santora calculated two different damages figures by relying, first, on a set of assumptions purportedly reflecting the original conditions of the insurance policy, and, second, on a new set of assumptions intended to take into account certain assumptions about Wes Medek's current age and health. Even if the contract certificate had been authenticated and admitted into evidence, it would not establish the conditions relied upon by Santora. In fact, virtually nothing is known about the life insurance policy. Plaintiff presented no

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[77] Delaware Uniform Rule of Evidence 703 provides in relevant part:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Under Rule 703, Santora properly could rely on the insurance contract to formulate his opinion on damages. The contract did not necessarily have to be admitted into evidence, but it should have been produced to Defendants. Further, Plaintiff had the burden of proving her case by a preponderance of the evidence. Santora's testimony and Plaintiff's averments about the terms of the life insurance constitute inadmissible hearsay evidence. *See* DRE 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Plaintiff essentially asks this Court to find that a life insurance policy existed for $1.5 million on the life of Wes Medek and to award over half a million dollars in damages without entering the life insurance contract into evidence or proving what the nature and terms of that contract were as of 2006. Moreover, D.R.E. 1002 and 1003 require an original writing or an admissible duplicate to prove the contents of that writing. Plaintiff produced neither, but nevertheless attempts to rely on the contents and terms of the life insurance contract in its prayer for relief. Plaintiff also failed to argue that any exception to the hearsay or best evidence rules applies to permit reliance on Santora's testimony to prove the terms of the contract.

evidence regarding, for example, the nature of the insurance (term, whole life, or some other variant), or the term of the policy, assuming it is term insurance, nor did Plaintiff prove the amount of the insurance premiums or whether those premiums were guaranteed or subject to increase or decrease. In fact, the record is devoid of any admissible evidence establishing the terms, conditions, future premiums, or any other details about the life insurance policy. Accordingly, I find that Plaintiff has failed to satisfy her burden of proving by a preponderance of the evidence that she is entitled to damages based on the alleged lapse of life insurance.[78]

E. Damages

Delaware law does not require certainty in the award of damages in cases where the plaintiff has proved that a defendant committed a wrong and established that an injury occurred.[79] Nevertheless, a plaintiff must demonstrate that the defendant caused the injury and present a reasonable and factually supported basis for determining damages.[80]

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78 Because Plaintiff provided no reliable factual basis for this Court to award damages based on the alleged lapse in life insurance, I need not examine further her claims for such relief. *See Acierno v. Goldstein*, 2005 WL 3111993, at *6 (Del. Ch. Nov. 16, 2005) (holding that Delaware law does not permit the fact finder to supply a damages figure based on "speculation or conjecture" where the plaintiff has failed to meet its burden of proof on damages) (citing *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1950)).

79 *EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595, at *13 (Del. Ch. Dec. 12, 2006) (citation omitted).

80 *Cf. Henne*, 146 A.2d at 396 (holding that proof of injury is insufficient, in and of itself, to allow an award of damages without some other evidence of the amount of damages); *Frontier Oil v. Holly Corp.*, 2005 WL 1039027, at *39 (Del. Ch. Apr. 29, 2005) ("A prevailing party must prove its damages by preponderance of

1. Damages related to the Consulting Agreement

Plaintiff proved by a preponderance of the evidence that CMH breached the Consulting Agreement by ceasing her salary payments in September 2006. Plaintiff also demonstrated that PCCW is liable for any damages flowing from that breach under the Guaranty. According to Plaintiff, CMH repudiated and is in total breach of the Consulting Agreement and must pay the present value of her salary through August 2014. Defendants urge this Court to exercise its equitable powers to restore Plaintiff's back salary and permit CMH to pay her future salary on a weekly basis through August 2014.

"A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions."[81] A party acts at his peril if he refuses to perform his duty based on a mistaken belief that he is within his rights to do so.[82] The traditional rule with respect to repudiation is that when one party repudiates a contract, the nonrepudiating party is discharged from its obligation to perform, and can immediately seek damages for the repudiatory breach.[83]

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the evidence; absolute precision is not required but the proof may not be speculative either.").

81 *PAMI-LEMB I Inc. v. EMB-NHM, L.L.C.*, 857 A.2d 998, 1014 (Del. Ch. 2004) (citing *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 931 (Del. 2000)).

82 Restatement (Second) of Contracts § 250 cmt. d (1981).

83 *E.g.*, *Morgan v. Wells*, 80 A.2d 504, 506 (Del. Ch. 1951); Restatement (Second) of Contracts § 255 (1981). *See also Carteret Bancorp, Inc. v. Home Group, Inc.*, 1988 WL 3010, at *5 (Del. Ch. Jan. 13, 1988) ("[T]he law generally has acknowledged for more than one hundred years that an unequivocal statement by a promisor that he will not perform his promise gives the injured party an immediate

CMH refused to perform its duties under the Consulting Agreement beginning in September 2006, and has made no attempt to resume paying Plaintiff's salary since then. That CMH mistakenly may have believed the salary payments constituted only the personal obligations of Wes Medek is irrelevant. Medek, Inc., which later was renamed CMH, entered into the Consulting Agreement with Plaintiff and failed to live up to its end of the bargain. Accordingly, I find that CMH repudiated the Consulting Agreement.

Because CMH is in total breach of the Consulting Agreement, Plaintiff may recover all damages stemming from the breach, which include the unpaid wages stretching back to September 2006, as well as the present value of all future payments due Plaintiff through August 2014. The Guaranty reinforces this conclusion by authorizing Plaintiff to accelerate the time for payment of indebtedness under the Consulting Agreement.[84] In other words, Plaintiff is entitled to the entire outstanding value of the Consulting Agreement.

Santora calculated the damages for Plaintiff's unpaid salary by multiplying the contractual weekly salary of $1,282.06 by the number of weeks since CMH stopped paying salary to her. Santora then added the accrued prejudgment interest based on the legal rate prescribed in 6 *Del. C.* § 2301(a).[85] I find that Santora's method of computing

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claim to damages for total breach, in addition to discharging his remaining duties of performance.").

[84] Guaranty ¶ 6.1.

[85] Section 2301(a) provides that "[w]here there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate . . . ."

the past damages for salary under the Consulting Agreement is reasonable and will award such damages through approximately the date of the judgment to be entered based on this opinion.

As to Plaintiff's future damages, Santora multiplied $1,282.06 by the number of weeks between May 1, 2008 and August 3, 2014, and then applied a discount rate of 7%. Santora testified that a 7% discount rate should be applied to calculate the present value of Plaintiff's future damages from the Consulting Agreement.[86] I agree. I, therefore, award damages to Plaintiff based on the future salary obligations under the Consulting Agreement in an amount to be determined by applying Santora's methodology, but using

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Santora used the Federal Reserve discount rate as of April 23, 2008, which was 2.5%. Santora's calculations of past damages run through April 30, 2008, presumably because he submitted his report to Plaintiff on May 5, 2008.

[86] In his report, Santora provided three damages figures based on three different discount factors: 7% per section VII of the SSO; 3.11%, the five-year Treasury Note rate as of April 29, 2008; and 3.82%, the ten-year Treasury Note rate as of April 29, 2008. T. Tr. at 260-61; D.I. 93 Ex. A, Santora Report, at 1, Attach. A. Santora opined that a 7% discount rate yielded the fairest future damages figure because the SSO contemplated a buyout of the Consulting Agreement at that rate: "The agreement calls for seven percent. And if the agreement was put in place, it would certainly – that is the highest amount. That is the highest discount rate, which generally yields the lowest value. From a fairness standpoint, seven percent seems to be appropriate." T. Tr. at 262. Although Plaintiff plausibly argues that a damages award should be based on one of the Treasury Note rates, I find more convincing Santora's testimony that 7% is a fair rate of discount based on the relevant circumstances.

the number of weeks between approximately the date of the forthcoming judgment and August 3, 2014 as the multiplier.[87]

Accordingly, I find that CMH and PCCW are jointly and severally liable to Plaintiff for the damages flowing from the breach of the Consulting Agreement. I also find, in accordance with Delaware law, that Plaintiff is excused from the performance of any duties under the Consulting Agreement, including her obligation to refrain from competition with CMH, as a result of CMH's total breach and repudiation.

2. Damages related to the health and dental insurance

a. Health insurance

Damages are warranted to remedy losses Plaintiff incurred because of the breach of the SSO by Wes Medek in terms of his obligations to provide for health and dental insurance and the breach of the Guaranty by PCCW. Those losses can be measured by the present value of the total future costs to Plaintiff for such coverage, as well as the past losses plus interest at the statutory rate.

Santora calculated the costs of future health insurance using an amount of $387.50 per month, which he determined is the average cost of procuring health insurance for a

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87 Santora's calculations, which used April 30, 2008 as the delimiting date, yielded a damages amount of $119,904.66 for losses suffered by Plaintiff in connection with past due salary and $337,298.95 for losses attributed to future salary payments. *See* Santora Report Attach. A. The parties shall submit the updated figures in the proposed form of judgment to be submitted after the issuance of this opinion.

single female.[88] Defendants presented no contrary evidence. Thus, I accept Santora's average cost number. Santora calculated the present value of the future damages for health insurance by multiplying that average cost by the number of months between May 1, 2008 and August 3, 2014.[89] He then applied a 7% discount rate to arrive at the present value.[90] To calculate back damages, Santora multiplied the average cost of health insurance of $387.50 per month by the number of months between September 1, 2006 and April 30, 2008, and then added accrued interest at the legal rate prescribed in 6 *Del. C.* § 2301(a).[91] I accept the methodology Santora used to compute Plaintiff's past and future health insurance damages, and direct the parties to apply that methodology to compute such damages using the approximate date of the judgment or the end of the last

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88 Santora also calculated a damages figure based on the average cost of health insurance for a single female with a dependent, which is higher than that for a single female. The SSO, however, clearly states that after the passage of one year from August 4, 1999, neither Wes Medek nor PCCW was obligated to pay for Ryan Stevens's insurance costs without reimbursement from Plaintiff. SSO ¶ X.1. In addition, Santora admitted that the average cost of health insurance for a single female with a dependent was irrelevant in this case. T. Tr. at 263. Thus, I will award damages based on the average health insurance cost for a single female.

89 *See* Santora Report Attach. B. Presumably, Santora used April 30, 2008 as the demarcation date between Plaintiff's future damages and back damages because it marks the end of the last full month before he submitted his report to Plaintiff on May 5, 2008.

90 Plaintiff concedes that the applicable discount rate for the health and dental insurance components of her damages is 7%. POB at 23. Santora's calculations for the present value of future damages for health insurance losses suffered by Plaintiff are delineated in Attachment B of his report.

91 *See* Santora Report Attach. B.

full month before the judgment as the point of demarcation between past and future damages.[92]

b. Dental insurance

Plaintiff asks for damages based on a loss of $860 per year in connection with unpaid dental expenses. Plaintiff argues that $860 should be the measure of her annual loss because it is the maximum amount Wes Medek agreed to reimburse Plaintiff for her dental expenses in the October 12, 2005 Family Court Stipulation and Order. Plaintiff essentially uses a number, which represents a cap on Wes Medek's reimbursement exposure, as a proxy for the cost of dental insurance. Plaintiff did not present any other figure on which to calculate damages in connection with the loss of dental insurance. Likewise, Defendant failed to propose an alternative figure or dispute the reasonableness of $860 per year. Santora used this figure in his damages calculations because the Plaintiff provided it to him; nevertheless, Santora also opined that it was "more than fair."[93] Additionally, PCCW's liability for the cost of dental insurance under the Guaranty stems from Wes Medek's breach of the SSO, which obligates him to provide dental insurance, not reimbursement for dental expenditures. For these reasons, I find that the $860 per year number that Wes Medek agreed to in the Family Court Stipulation

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92 Santora calculated the health insurance damages to be $34,710.90 using April 30, 2008 as the delimiting date. Santora Report Attach. B. The parties shall submit the updated figure in the proposed form of judgment to be submitted after the issuance of this opinion.

93 T. Tr. at 279.

and Order is an appropriate figure on which to formulate damages for the loss of Plaintiff's dental insurance.

Santora calculated back damages for dental insurance by multiplying $860 by the number of years between September 1, 2006 and April 30, 2008, and then added interest at the legal rate prescribed in 6 *Del. C.* § 2301(a).[94] He arrived at a present value of future damages by multiplying $860 by the number of years between May 1, 2008 and August 3, 2014, and then applying a 7% discount rate.[95] Because I hold that Santora's methodology yields an appropriate and reasonable damages amount for the lack of dental insurance, I order the parties to apply that methodology to calculate this component of Plaintiff's damages, using the date of the anticipated judgment or thereabouts as the delimiting date between future and present damages.

Defendants suggest that, if PCCW is liable for health and dental coverage, the damages should be measured by the loss to Plaintiff, *i.e.*, her out-of-pocket and actual expenses in replacing the insurance coverage. This argument lacks merit. Plaintiff proved at trial that she is entitled to the present value of the health and dental insurance by operation of the SSO's buy-out provision. Per paragraph X.1 of the SSO, Wes Medek agreed to cause PCCW to pay the present value of the future insurance costs at a discount

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94 *See* Santora Report Attach. C.

95 *See id.* Santora produced a damages figure of $6,984.32 for the loss of dental insurance, using April 30, 2008 as the delimiting date. Santora Report Attach. C. The parties shall submit the updated figure in the proposed form of order submitted after the issuance of this opinion.

rate of 7%. Because I am awarding compensatory damages meant to measure the loss to Plaintiff, I am awarding the present value of the future costs to Plaintiff, as well as past damages for the insurance that was not provided from September 1, 2006 until approximately the date of the judgment, plus prejudgment interest at the statutory rate. This award is against Defendant PCCW only.

F. Attorneys' Fees and Costs

Plaintiff contends the Guaranty and the SSO entitle her to recover her attorneys' fees and costs in pressing her claims. Paragraph 16 of the Guaranty provides:

> Guarantor agrees to pay on demand all reasonable cost [sic] and expenses of every kind incurred by [Plaintiff]: (a) in enforcing this Guaranty; (b) in realizing upon or protecting any collateral for this Guaranty and (c) for any other purpose related to this Guaranty. "Costs and expenses" as used in the preceding sentence shall include, without limitation, the actual attorneys' fees incurred by [Plaintiff] in retaining counsel for advice, suit, appeal, any insolvency or other proceedings under the Federal Bankruptcy Code or otherwise, or for any purpose specified in the preceding sentence.

Section XIV.9 of the SSO provides in relevant part: "In the event of a breach hereof, the party committing the breach shall be obligated to pay as contract damages the reasonable and necessary costs, including such reasonable legal fees incurred by the non-breaching party to enforce or protect his or her rights hereunder."

Plaintiff succeeded on her claims to enforce the Guaranty as to PCCW's liability for both the Consulting Agreement salary and the health and dental insurance. She did not succeed on her claim for relief for the alleged lapse in life insurance. Defendant argues that Plaintiff may recover only those fees and costs incurred on successful claims.

Plaintiff did not specifically address this argument in its post-trial reply brief.[96] In addition, Defendants' argument comports with the language of both the SSO and the Guaranty. The relevant provision of the SSO, for example, states that reasonable legal fees shall be paid as contract damages "[i]n the event of a breach hereof" by "the party committing the breach." This provision implicitly requires that the nonbreaching party succeed in proving the occurrence of a breach to recover its attorneys' fees. Furthermore, Plaintiff has not shown claims under the UFTA fall within the ambit of section 16 of the Guaranty, *i.e.*, Plaintiff has not shown the costs related to those claims were incurred in enforcing the Guaranty, realizing upon or protecting collateral for the Guaranty, or pursuing another purpose related to the Guaranty. Thus, Plaintiff is entitled to recover only those reasonable attorneys' fees and costs associated with the portion of her claims pertaining to PCCW's liability under the Guaranty for the Consulting Agreement salary and health and dental insurance costs. Further, Plaintiff may recover those fees and costs only from PCCW, not Harbison or CMH.[97]

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96 In fact, Plaintiff offered only a one-line response to Defendants' theory regarding attorneys' fees and costs in her reply brief: "The plaintiff believes this argument is addressed adequately in her opening brief." PRB at 6. Therefore, the argument effectively has been waived. *See, e.g.*, *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("issues not briefed are deemed waived"); *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.").

97 As discussed *infra* Part II.G, Wes Medek must indemnify PCCW as a co-guarantor for the attorneys' fees and costs associated with enforcing the Guaranty and as a principal obligor under the SSO. CMH is liable under the Consulting Agreement, but that document does not contain a provision on attorneys' fees and costs.

G. Defendants' Crossclaim

Defendants Harbison, PCCW, and CMH request relief in the form of a judgment against Wes Medek for any damages for which they are liable to Plaintiff.[98] Defendants seek indemnification against Wes Medek for all liability they might have to Plaintiff because the underlying debts spring from Wes Medek's personal obligations under the SSO. Wes Medek has refused to appear before this Court and has failed to present any defense to Defendants' crossclaim. Thus, I hold that Wes Medek must indemnify Defendants for all damages awarded for CMH's breach of the Consulting Agreement. Wes Medek shifted his financial indebtedness to Plaintiff stemming from their divorce to CMH. Moreover, he expressly agreed to guarantee CMH's debts to Plaintiff in the Guaranty. Similarly, as to the award to Plaintiff based on the loss of her health and dental insurance, Wes Medek is liable to Defendants because he undertook to cause PCCW to provide those benefits under the express terms of the SSO. As discussed *supra* Part II.C, I also find that the parties intended that the Guaranty would commit Wes Medek, as well as PCCW, to secure his own debts, including the obligation to cause PCCW to pay the present value of Plaintiff's total future costs of insurance. Additionally, the PFMSA between Harbison and Wes Medek provides that his obligations to pay a weekly salary and provide health and dental insurance to Plaintiff are his personal obligations under the SSO and that he will assume and fulfill those

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98 *See* Defs.' Answer and Crossclaim ¶¶ 56-58; PSO at 9.

responsibilities after September 1, 2006.[99] Because Wes Medek failed to assume and fulfill any of those obligations, I find in favor of Defendants on their crossclaim for indemnification from Wes Medek for the total amount of their liability to Plaintiff.

III. CONCLUSION

For the reasons stated in this opinion, I hold that CMH and PCCW are jointly and severally liable to Plaintiff for damages for CMH's breach of the Consulting Agreement in an amount to be determined by the parties in accordance with this opinion. I also hold that PCCW is liable to Plaintiff for her health and dental insurance benefits based on its guaranty of Wes Medek's obligations under the SSO and his breach of those obligations. The parties shall determine the precise amount of those damages, as well, in accordance with this opinion. In addition, Defendant PCCW is liable for Plaintiff's attorneys' fees and costs incurred in enforcing the Guaranty and SSO. Finally, I hold that Wes Medek must indemnify Defendants for any and all liability to Plaintiff as a result of these proceedings.[100]

Plaintiff shall submit within ten days a proposed form of judgment, on notice, implementing the rulings in this opinion.

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[99] PFMSA at 4.

[100] Plaintiff shall submit within ten days of the date of this opinion an application detailing the basis for and amount of the reasonable attorneys' fees and costs she expended in successfully enforcing the Guaranty and SSO against PCCW. To the extent Defendant PCCW objects to the amount of attorneys' fees and costs requested, it shall file an opposition within ten days of the filing of Plaintiff's application.