

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

RTN Investors, LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 08C-04-007 JRJ
	:	
RETN, LLC, and JOVICA PETROVIC	:	
a/k/a JOSHUA PETROVIC,	:	
	:	
Defendants.	:	

Date Submitted: December 29, 2010
Date Decided: February 10, 2011

Findings of Fact and Conclusions of Law Following Bench Trial

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JURDEN, J.

Introduction

This is the Court's opinion following a bench trial¹ on breach of contract and unjust enrichment claims under a Loan Agreement (the "Loan") asserted by Plaintiff, RTN Investors, LLC ("RTN"), and counter breach of contract claims by Defendants, RETN, LLC ("RETN") and Jovica a/k/a Joshua Petrovic ("Petrovic").

Undisputed Facts

Background

Plaintiff RTN is a Delaware limited liability company organized and managed by John Nacheff ("Nacheff"). Nacheff solicited Robert Popoff ("Popoff") to assist in managing RTN,² and Joseph Hausauer ("Hausauer") to assist in conducting due diligence for RTN, underwriting the Loan for investors, and raising private equity.³ Defendant RETN is a Delaware limited liability company formed in 2006 by Petrovic, a German citizen and developer in the United States. Petrovic sought to fund RETN and its project, "Myestate," which would be the first 24/7 real estate advertising channel in Europe.⁴ Under Petrovic's business plan, RETN would sell broadcasting time to advertisers who owned real estate in the U.S. and wished to market it in Europe. A primary facet of Petrovic's plan was to acquire a building in Munich, Germany (the "Facility") to be used as the headquarters and call center for RETN.⁵

¹ The bench trial was held on October 29, 2009, November 16, 2009, April 30, 2010, June 3, 2010, and June 4, 2010.

² Popoff Trial Tr., at 7:2-16, April 30, 2010.

³ Hausauer Trial Tr., at 56:17-20, June 4, 2010; Nacheff Trial Tr., at 21:6-16, October 29, 2009.

⁴ Nacheff Trial Tr., at 12:18-13:6, October 29, 2009; Petrovic Trial Tr., at 108:3-5, April 30, 2010.

⁵ Nacheff Trial Tr., at 89:2-5, October 29, 2009; Petrovic Trial Tr., at 113:18-23, April 30, 2010; Petrovic Trial Tr., at 28:3-30:1, June 3, 2010.

Solicitation of RTN to Fund RETN

Joseph Krzys (“Krzys”)⁶ was instrumental in introducing Petrovic to Nachev.⁷ In April 2007, Petrovic solicited RTN and proposed a plan in which RTN would make a short-term investment of \$5 million in RETN. In turn, RETN would gain funds from the sale of advertising time, paid for by advertisers on the real estate broadcast channel, to repay RTN for its investment.⁸ Petrovic also intended to raise funds from German investors to repay the short-term debt to RTN. Petrovic would accomplish this goal by forming a Closed End Fund (the “Fund”) under German law.⁹ In addition, Petrovic represented to RTN that he had received an unconditional commitment, dated April 18, 2007, from Dr. Hanswerner Jehl (“Jehl”), an investment attorney in Germany retained by Petrovic, to raise €25 million to support RETN’s business.¹⁰ Petrovic and RTN subsequently entered into a Purchase Agreement on April 24, 2007, for the purchase of the Facility for €2 million.¹¹ RETN assigned a mortgage on the Facility to RTN in the event that RETN was unable to provide evidence that the Loan was repaid. If RETN failed to repay the Loan, RTN would take title to the Facility.¹²

⁶ Joseph Krzys is a self-employed real-estate developer who met Petrovic in 2005 at a FedEx Kinko’s store in Florida. Krzys Trial Tr., at 6:5-7:1, November 16, 2009. At the request of Petrovic, Krzys became involved in several of Petrovic’s projects, including Myestate. Krzys Trial Tr., at 7:6-14:13, November 16, 2009.

⁷ In late 2006 or early 2007, Petrovic asked Krzys to help him raise money to create RTN. Krzys Trial Tr., at 14:8-9, November 16, 2009. Krzys knew that Nachev had “raised money for some other people” and suggested that he and Petrovic meet with Nachev at a bank in which Nachev worked as a mortgage broker to discuss the Myestate project. Krzys Trial Tr., at 14:9-15:4, November 16, 2009; Nachev Trial Tr., at 38:15-21, October 29, 2009; Petrovic Trial Tr., at 110:5-8, April 30, 2010.

⁸ Petrovic Trial Tr., at 108:1-5; 117:17-19, April 30, 2010.

⁹ Nachev Trial Tr., 17:19-18:5, October 29, 2009.

¹⁰ Plaintiff’s Ex. 6.

¹¹ Plaintiff’s Exs. 8-9.

¹² Plaintiff’s Ex. 9 (Purchase Agreement); and 11 (Assignment of Land Charge).

The Loan

RTN and RETN secured the \$5 million loan on June 27, 2007.¹³ It was a fully integrated contract as it superseded all prior understandings and agreements between the parties.¹⁴ The purpose of the Loan was to fund RETN's operations and to acquire the Facility.¹⁵ In an effort to further induce RTN to enter into the Loan, six ancillary documents were executed by RETN and Petrovic on June 27, 2007. First, RETN executed a Promissory Note for \$5 million.¹⁶ Second, Petrovic executed an Agreement of Guaranty and Suretyship, personally guarantying all obligations of RETN under the Loan.¹⁷ Third, Petrovic executed a Partial Assignment of Settlement Agreement Rights and Proceeds in which a Florida limited liability company managed by Petrovic, Treeline Development, LLC, assigned to RTN all of its rights arising from a Mediation Settlement Agreement in the amount of \$5.6 million, entered into with Treeline Preserve Developers, LLC and others to the extent that RETN owed funds.¹⁸ Fourth, Treeline Development, LLC executed a Non-Recourse Agreement of Guaranty and Suretyship for the benefit of RTN.¹⁹ Fifth, RETN executed a Security Agreement in favor of RTN.²⁰ Sixth, Petrovic executed a Unit Pledge Agreement, also in favor of RTN.²¹

Disbursement of Funds under the Loan

All funds were required to be disbursed under the Loan by January 15, 2008, and RETN was obligated to repay the outstanding balance of the loan by January 15, 2008, as

¹³ Plaintiff's Ex. 17, hereinafter "Loan".

¹⁴ Loan, Art. 8.09, at 13.

¹⁵ Loan, Recitals, at 1.

¹⁶ Plaintiff's Ex. 18.

¹⁷ Plaintiff's Ex. 19.

¹⁸ Plaintiff's Ex. 20.

¹⁹ Plaintiff's Ex. 21.

²⁰ Plaintiff's Ex. 22.

²¹ Plaintiff's Ex. 23.

well as an Exit Fee in the amount of \$1 million.²² The Exit Fee accrued on January 15, 2008, with the fee increasing by ten percent of the unpaid principal balance of the Note outstanding on January 15, 2008.²³ If RETN failed to make full payment of its obligations under the Loan on the Loan Expiry Date, it was required to pay the Exit Fee in full, the entire outstanding principal balance of the Note, all accrued but unpaid interest, and any other sums payable under the Loan, by the Loan Expiry Date on May 31, 2008, unless otherwise extended.²⁴ May 31, 2008 was also the deadline for the firm underwriting commitment to raise €25 million entered into by Jehl.²⁵

Events of Default under the Loan

RTN and RETN agreed that certain events would constitute Events of Default under the Loan, in which RTN was permitted to forgo any further loan disbursements and declare all amounts under the Loan due immediately.²⁶ The following events would constitute such default: (1) the failure to repay the Loan; (2) the failure of the Fund to finalize investment documentation by September 15, 2007, to begin raising funds to repay the Loan; (3) RETN's material default in the performance of any Negative or Affirmative Covenant, such as incurring new encumbrances against the Facility or executing any security documents in connection with RTN's collateral; and (4) the insolvency of RETN or inability of RETN to pay its debts.²⁷ In addition, RETN was obligated to give notice to RTN of any material adverse change in circumstances which

²² Loan, Art. 2.08, at 6.

²³ Loan, Art. 2.01(c), at 5; Art. 2.08, at 6.

²⁴ Loan, Art. 2.08, at 6; Petrovic Trial Tr., at 147:14-18, April 30, 2010; 56:18-20, June 3, 2010.

²⁵ Plaintiff's Ex. 6.

²⁶ Loan, Art. 7.02, at 11.

²⁷ Loan, Art. 7.01 (a)-(i), at 10-11.

caused a material adverse affect, with the failure to do so constituting an Event of Default.²⁸

Parties' Contentions

The Creation of RTN GmbH²⁹

In April 2007, Nachef and Hausauer traveled to Germany to meet with Petrovic and Jehl. Plaintiff contends that in the course of discussions between RETN and RTN, Petrovic and Nachef discussed the concept of an “80/20 split.”³⁰ This split provided that eighty percent of the first funds out of the Fund would be paid to RTN until the loan was paid in full.³¹ This 80/20 split was again discussed by Petrovic, Popoff, and Nachef when Popoff and Nachef traveled to Germany in September 2007.³²

Petrovic hired Jehl and Dr. Peter Fey (“Fey”) to assist in the creation of RTN GmbH. Defendants assert that RTN GmbH was created in accordance with the Loan as an affiliate of RETN to raise funds to repay the Loan to RTN.³³ Further, RTN GmbH was formed because neither RTN nor RETN, both Delaware entities, could serve as the investment vehicle for the Fund under German law.³⁴ Defendants claim that plaintiff was aware that the creation of RTN GmbH was necessary to raise capital for the Fund and

²⁸ Loan, Art. 5.01(b), at 9.

²⁹ Plaintiff and defendants refer to this entity as “RTN GmbH” and “RETN GmbH” interchangeably throughout their Post-Trial Briefs. It appears as though plaintiff and defendants are referring to the same entity, so that RTN GmbH and RETN GmbH are one and the same. The correct name of this entity is “RTN GmbH.” *Compare* Plaintiff’s Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 72, at 30 (stating that “RETN GmbH” entered into an unenforceable contract with RETN to sell the Facility when in fact “RTN GmbH” is the correct entity as referenced in Plaintiff’s Ex. 36), *with* Defendants’ Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 71, at 7 (stating that Petrovic created “RETN GmbH” when in fact Petrovic testified at trial that “RTN GmbH” was the entity created (Petrovic Trial Tr., at 137:14-17, April 30, 2010)).

³⁰ Nachef Trial Tr., at 30:11-31:10, October 29, 2009; Hausauer Trial Tr., at 68:7-21, June 4, 2010.

³¹ *Id.*

³² Popoff Trial Tr., at 100:17-103:21, April 30, 2010.

³³ Petrovic Trial Tr., at 137:14-19, April 30, 2010.

³⁴ Fey Trial Tr., at 117:13-19, November 16, 2009; Jehl Depo. Tr., at 13:19-14:5, June 4, 2010.

was informed of this fact at the April 2007 meeting in Germany.³⁵ Defendants further assert that nowhere in the Loan is RETN required to structure the Fund, or to provide an 80/20 split of its proceeds, through RTN.³⁶ According to defendants, plaintiff had the opportunity during the April 2007 and September 2007 meetings to ask Jehl any questions regarding RTN GmbH and its structure,³⁷ and Fey mailed Nacheff a letter on July 17, 2007, informing him of the existence of RTN GmbH.³⁸

Plaintiff counters that structuring the Fund through RTN GmbH and not RTN was a breach of the Loan.³⁹ Plaintiff contends that the parties' intent, as demonstrated in the Loan, was that the Loan would be repaid by funds from German investors.⁴⁰ Although Petrovic testified that the Loan did not state that the funds must be paid to RTN from the Fund, a provision in the Loan specifically states that RETN intended to raise funds to repay the Loan through a German investment fund.⁴¹

The Closed End Fund Prospectus

Under the terms of the Loan, the Closed End Fund Prospectus ("Prospectus") was to be finalized by September 15, 2007.⁴² RTN did not waive any of its rights with regard to the completion deadline of September 15, 2007⁴³ and maintains that "finalize" under the terms of the Loan meant that the Prospectus had to be approved by *Bundesanstalt für Finanzdienstleistungsaufsicht* ("BaFin") no later than September 15, 2007.⁴⁴ In mid-September 2007, due to RTN's concern that the Prospectus had not yet been finalized,

³⁵ Popoff Trial Tr., at 37:22-38:2, April 30, 2010.

³⁶ Krzys Trial Tr., at 68:2-4, November 16, 2009.

³⁷ Nacheff Trial Tr., at 186:5-19, October 29, 2009.

³⁸ Plaintiff's Ex. 25.

³⁹ Krzys Trial Tr., at 34:13-35:1, November 16, 2009; Hausauer Trial Tr., at 82:20-83:19, June 4, 2010.

⁴⁰ Fey Trial Tr., at 104:16-105:9, November 16, 2009.

⁴¹ Loan, Recitals, at 1.

⁴² Loan, Art. 7.01(g), at 11.

⁴³ Nacheff Trial Tr., at 68:20-69:1, October 29, 2009; Popoff Trial Tr., at 14:18-15:14, April 30, 2010.

⁴⁴ Nacheff Trial Tr., at 18:10-19:10, October 29, 2009.

Nachef and Popoff met with Petrovic and Jehl in Germany.⁴⁵ Petrovic assured Nachef and Popoff that the Prospectus would be finalized shortly.⁴⁶ Plaintiff notes that a dinner was held on September 11, 2007, celebrating the completion of the Prospectus brochure.⁴⁷ At a meeting the following day, however, Jehl and Petrovic explained to Nachef and Popoff that the brochure needed to be amended due to a change in German tax law treatment of capital gains.⁴⁸ Plaintiff claims that most of the conversation during this meeting was in German and RTN's representatives were not informed of such change and how or if this would affect the timing of the Prospectus.

Although RETN and Petrovic claim that the Prospectus was not completed by the deadline because of a change in German tax law, the September 23, 2007 draft of the Prospectus included language regarding the tax law change, and other parts of the Prospectus not relating to tax laws were noticeably incomplete and missing.⁴⁹ RTN's investors received a copy of this draft Prospectus on September 24, 2007, and raised serious concerns because it was far from complete.⁵⁰ The draft made no mention of RTN or the fact that it was owed \$5 million.⁵¹ Ultimately, RTN claims that Petrovic failed to raise any capital from the Fund and failed to send the Prospectus to potential German investors in a timely manner. While the Prospectus was eventually completed, and RTN funded all of RETN's operations, RTN asserts that RETN failed to perform its obligations under the Loan with regard to the Fund. The Prospectus was not received by

⁴⁵ Nachef Trial Tr., at 63:18-64:2, October 29, 2009.

⁴⁶ Nachef Trial Tr., at 137:22-138:9, October 29, 2009; Popoff Trial Tr., at 12:6-8, April 30, 2010.

⁴⁷ Jehl Depo. Tr., at 11:15-17, July 2, 2010.

⁴⁸ Jehl Depo. Tr., at 23:8-24:4, June 4, 2010.

⁴⁹ Plaintiff's Ex. 28.

⁵⁰ *Id.* See also Hausauer Trial Tr., at 82:20-83:12, June 4, 2010 (testifying that the Prospectus did not state that RETN was obligated to repay RTN under the terms of the Loan).

⁵¹ Plaintiff's Ex. 28. See also Hausauer Trial Tr., at 83:13-19, June 4, 2010 (noting that the Prospectus "made no mention of [RTN]").

BaFin until December 12, 2007, and was not finalized and approved by BaFin until January 8, 2008.⁵² Because this was past the completion deadline of September 15, 2007, RTN contends that RETN and Petrovic's failure to meet the deadline constituted an Event of Default.

Defendants maintain that the term "finalize" with regard to the completion of the Prospectus is not defined in the Loan and is therefore ambiguous. Further, according to defendants, RETN was required to maintain a permit or approval issued by any "Governmental Authority" in connection with its satellite television business.⁵³ Therefore, the parties were fully capable of requiring specific governmental approval if they intended to do so. In addition, Defendants claim that a draft of the Prospectus was shown to RTN in August 2007, although admittedly different from the final version filed with BaFin due to the change in German tax laws.⁵⁴ Moreover, defendants claim that Jehl told Nacheff and Popoff of the need to change the Prospectus so that it would conform to the new German tax laws at a meeting on September 12, 2007 in Germany.⁵⁵ Jehl claims he spoke with Nacheff and Popoff in English, and that when there was trouble communicating, Petrovic provided further English translation.⁵⁶ After the meeting, Jehl thought Nacheff and Popoff fully understood the reason for the change in the Prospectus.⁵⁷

Defendants assert that the Prospectus was not filed with BaFin until December 2007 because Jehl had advised RETN that this would allow it to take advantage of the

⁵² Plaintiff's Ex. 40. *See also* Nacheff Trial Tr., at 69:16-19, October 29, 2009 (stating that in January of 2008, the Prospectus was approved by BaFin).

⁵³ Loan, Art. 7.01(h), at 11. The term "Governmental Authority" is defined in Art. 1.01, at 2.

⁵⁴ Jehl Depo. Tr., at 21:13-23, June 4, 2010.

⁵⁵ Jehl Depo. Tr., at 23:5-19, June 4, 2010.

⁵⁶ Jehl Depo. Tr., at 23:20-24:2, June 4, 2010.

⁵⁷ Jehl Depo. Tr., at 24:2-4, June 4, 2010.

significant change in German tax law.⁵⁸ Defendants further contend that RTN never objected to RETN's decision to file the Prospectus with BaFin after the September 15, 2007 deadline. Rather, it was not until three months after the September 15th deadline had passed and after Petrovic announced RTN's breach of financing obligations that RTN first claimed that the delay in filing the Prospectus was an Event of Default.⁵⁹

RTN's Obligations to Disburse Funds under the Loan

RTN claims that it was entitled to make payments under the Loan in one or more disbursements to RETN because RTN needed time to raise money to fund the Loan.⁶⁰ Plaintiff also claims that there was no requirement that it make payments pursuant to a set schedule incorporated into the Loan.⁶¹ Plaintiff contends that it made thirteen disbursements to RETN from April 19, 2007 to October 12, 2007, totaling \$3,274,515.75, representing payment for RETN's cost of operations and the Facility.⁶² From the original \$5 million Loan, \$2.8 million was to be allocated to the cost of purchasing the Facility, with the remaining \$2.2 million allocated to funding the operations of RETN.⁶³

Under the Loan, RTN and RETN were permitted to enter into agreements amending or waiving provisions of the Loan so long as these agreements were in writing.⁶⁴ On August 17, 2007, Petrovic signed and sent a letter to RTN modifying the

⁵⁸ Jehl Depo. Tr., at 27:10-28:2, June 4, 2010.

⁵⁹ Defendants' Exs. 59, 60.

⁶⁰ Krzys Trial Tr., at 28:8-12, November 16, 2009; Nacheff Trial Tr., at 27:18-28:8, October 29, 2009.

⁶¹ Nacheff Trial Tr., at 122:14-17, October 29, 2009; Petrovic Trial Tr., at 18:20-23, June 4, 2010.

⁶² See Plaintiff's Ex. 62, for payments made on April 19, 2007 in the amount of \$100,000 and April 25, 2007 in the amount of \$150,000 by Southern Financial Trust, LLC to RETN and its vendor, Astra; Plaintiff's Ex. 63, for a payment made on May 30, 2007 in the amount of \$150,000 by 1st Integrity Investments, LLC to RETN; and Plaintiff's Ex. 32, for payments made from June 29, 2007 to October 12, 2007 from RTN to RETN and its vendor, Astra, totaling \$2,874,515.75.

⁶³ Nacheff Trial Tr., at 48:20-49:1, October 29, 2009; Petrovic Trial Tr., at 25:9-13, June 4, 2010.

⁶⁴ Loan, Art. 8.03, at 12.

Loan by reducing the amount from \$5 million to \$4 million.⁶⁵ In his letter, Petrovic stated the modification was required because RETN was generating cash from its advertising sales and the entire \$5 million was no longer needed.⁶⁶ It is important to note that at trial, however, Petrovic claimed he reduced the amount of the Loan as a “favor” to RTN.⁶⁷ RTN relied upon this written amendment to the Loan and transferred \$800,000 to the German Notar as Petrovic requested.⁶⁸ With the reduction of the loan from \$5 million to \$4 million, allocation of funding for operations was reduced accordingly to \$1.2 million.⁶⁹ Therefore, under the parties’ agreement, RTN asserts that it overfunded RETN’s operations in the amount of \$1 million.

Defendants argue that because RTN was created for the express purpose of raising investment funds for RETN, and although some flexibility was allowed, RTN was never permitted to raise capital at its leisure.⁷⁰ Rather, a schedule of cash flows was prepared before execution of the Loan to provide both parties with a basis for predicting RETN’s funding needs.⁷¹ Defendants assert that RTN failed to provide the needed funding to RETN in a timely fashion and, as a result, RETN lost the opportunity to purchase the Facility.⁷² Defendants also contend that the Loan is ambiguous because it does not clearly delineate when RTN was required to make payments to RETN. According to

⁶⁵ Plaintiff’s Ex. 26.

⁶⁶ *Id.*

⁶⁷ Petrovic Trial Tr., at 26:9-12, June 4, 2010.

⁶⁸ Nachev Trial Tr., at 60:20-22, October 29, 2009.

⁶⁹ Nachev Trial Tr., at 61:13-20, October 29, 2009.

⁷⁰ Petrovic Trial Tr., at 122:14-123:2, April 30, 2010.

⁷¹ Petrovic Trial Tr., at 120:14-122:13, April 30, 2010.

⁷² Petrovic Trial Tr., at 123:3-124:6, April 30, 2010.

Nachef, the Loan gave RTN flexibility in funding RETN⁷³ and only required RTN to provide its “best efforts” to provide funding in a timely fashion.⁷⁴

Defendants claim that plaintiff failed to meet its funding obligation under the Loan, raising only \$2.8 million of the agreed \$5 million before prematurely ceasing its funding efforts.⁷⁵ Defendants acknowledge that plaintiff made eight disbursements to RETN for operations funding and made two deposits into an Escrow Account for the purchase of the Facility.⁷⁶ Defendants assert, however, that two disbursements made to RETN on April 19, 2007 and April 25, 2007 from Southern Financial Trust, LLC (“Southern Financial”) were not made pursuant to the Loan because Southern Financial was not a party to the Loan and made the disbursements before the execution of the Loan.⁷⁷ In addition, defendants refute plaintiff’s claim that it paid APS Astra Platform Services (“Astra”) pursuant to the Loan because Astra was not a party to the Loan.⁷⁸ Finally, funds held in the Escrow Account were released back to RTN on two separate occasions.⁷⁹

Purchase of the Facility

The original date for purchase of the Facility was June 30, 2007.⁸⁰ However, the Seller of the Facility provided repeated extensions for its purchase.⁸¹ The funding date was extended until July 31, 2007, August 18, 2007, September 7, 2007, September 28,

⁷³ Nachef Trial Tr., at 119:11-13, October 29, 2009.

⁷⁴ Nachef Trial Tr., at 126:6, October 29, 2009.

⁷⁵ Defendants’ Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 71, at 2.

⁷⁶ See Defendants’ Ex. 54.

⁷⁷ Defendants’ Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 71, at 13.

⁷⁸ *Id.*

⁷⁹ See Defendants’ Ex. 54.

⁸⁰ Plaintiff’s Ex. 9, at 4.

⁸¹ Petrovic Trial Tr., at 82:18-22, June 3, 2010.

2007, and December 15, 2007.⁸² RTN alleges that the contract to sell was finally terminated on February 15, 2008.⁸³ RTN claims that although the contract was terminated in February 2008, the Seller was willing to sell the Facility to Petrovic until May 2008.⁸⁴ RTN also claims that if threats of losing the Facility arose, it was told by its primary investors that they would provide any necessary funding to close on the Facility.⁸⁵ According to plaintiff, Petrovic had knowledge of this information because he did not express concern regarding the purchase of the Facility and proceeded to enter into a contract on February 26, 2008, with realtors to market the Facility on his behalf as the alleged “owner of the property.”⁸⁶

Defendants contend that RTN’s inability to raise sufficient funds spoiled RETN’s ability to purchase the Facility at a favorable price. According to Petrovic, due to RTN’s lack of sufficient funding to purchase the Facility, Petrovic had to secure several extensions.⁸⁷ During these periods of extension for purchase of the Facility, Petrovic claims he stressed to Nacheff that these extensions were not indefinite and that the required funding was needed to avoid the risk of losing the Facility.⁸⁸ Further, according to Petrovic, Nacheff repeatedly assured Petrovic that RTN would raise the additional \$1 million needed to purchase the Facility in time to meet the extended closing dates. But Nacheff testified that he told Petrovic certain changes needed to be made to the Loan before RTN could raise the additional funds.⁸⁹ According to defendants, plaintiff’s claim that additional investors were willing to cover RTN’s deficiency in funding was

⁸² Petrovic Trial Tr., at 83:5-85:8, June 3, 2010.

⁸³ Petrovic Trial Tr., at 85:9-86:3, June 3, 2010.

⁸⁴ Plaintiff’s Exs. 46, 47.

⁸⁵ Nacheff Trial Tr., at 58:23-59:13, October 29, 2009.

⁸⁶ Petrovic Trial Tr., at 86:4-14, June 3, 2010; Plaintiff’s Ex. 44.

⁸⁷ Petrovic Trial Tr., at 126:22-128:13, April 30, 2010.

⁸⁸ Petrovic Trial Tr., at 128:17-129:3, April 30, 2010.

⁸⁹ Nacheff Trial Tr., at 114:6-117:2, October 29, 2009.

incorrect. Defendants claim one investor was only interested in making a direct investment in the Facility in exchange for a first lien position on the Facility, which was impossible because RTN possessed the right to a first lien position on the Facility.⁹⁰ Defendants further claim that a second investor was only willing to make an investment if the Loan was drastically amended.⁹¹ Defendants allege that RETN's contract to purchase the Facility was terminated on April 2, 2008, as a proximate result of lack of funding from RTN.⁹² RETN was obligated to pay back rent and interest as a result of the termination of the Purchase Agreement.⁹³

Plaintiff claims that Petrovic caused RETN and RTN GmbH to enter into a contract to sell the Facility,⁹⁴ which was in further breach of the Loan. Although the contract was unenforceable because it was not notarized, this attempt to sell the Facility was a direct violation of the terms of the Loan which stated that RETN was not permitted to incur any encumbrances against any of its properties or sell any of its assets.⁹⁵ Plaintiff argues that RETN and Petrovic had no right to sell the Facility because it was encumbered by a first mortgage in RTN's favor.⁹⁶ The Facility was only a contingent asset of RETN because it was subject to a first lien and surrender of title to RTN if RETN failed to repay the debt owed to RTN.⁹⁷ Therefore, the proceeds of any sale of the

⁹⁰ Hausauer Trial Tr., at 112:10-113:17, June 4, 2010.

⁹¹ However, this second investor, James Richards, testified at trial that he did not invest additional funds because he was advised by Nacheff that RETN had not complied with the Loan terms on the initial investment. Richards Trial Tr. at 10:2-6, April 21, 2010.

⁹² Defendants' Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 71, at 17 (citing Defendants' Ex. 75).

⁹³ Defendants' Ex. 81.

⁹⁴ Plaintiff's Ex. 36.

⁹⁵ Loan, Art. 6.01, at 9; Art. 6.03, at 10.

⁹⁶ See Loan, Art. 6.01, at 9 (stating that RETN shall not incur any Encumbrance against any of its properties, including the Facility); and Plaintiff's Ex. 11 (Assignment of Land Charge) (noting that the mortgage for the Facility is assigned to RTN). See also Petrovic Trial Tr., at 115:9-23, April 30, 2010 (testifying that the Assignment of Land Charge acted as a lien on the Facility).

⁹⁷ See Plaintiff's Ex. 11 (Assignment of Land Charge).

Facility belonged to RTN, not RETN, until the Loan was paid in full. Additionally, on October 10, 2007, Petrovic caused a Supplement to the Purchase Agreement (“Supplement”) to be drafted without RTN’s knowledge.⁹⁸ This Supplement permitted RTN GmbH to become 60% owner of the Facility, but Petrovic sought to have RETN pay for RTN GmbH’s 60% interest in the amount of €1.2 million so that RTN GmbH was under no obligation to repay the Loan taken by RETN.⁹⁹ The Supplement reduced RETN’s mortgage on the Facility from €2 million to €800,000.¹⁰⁰ Ultimately, the Supplement left RTN without the protection for which it had originally bargained.¹⁰¹

Defendants respond that the initial plan was for RETN to purchase and own the Facility.¹⁰² An opportunity arose for RETN to earn a €2.2 million profit by selling the Facility and leasing a portion of the building back to RETN for its operations.¹⁰³ As a result, Petrovic entered into a contract to sell the Facility for €4.3 million, which was binding on the parties provided RETN could purchase the Facility by January 15, 2008.¹⁰⁴ Petrovic claims, however, that neither of these opportunities were realized due to RTN’s alleged failure to provide the necessary financing and, as a result, RETN lost this potential profit.¹⁰⁵

RETN’s Financial Information and Obligations to Creditors

Plaintiff contends that RETN and Petrovic failed to provide financial information to RTN in accordance with the terms of the Loan. RTN’s representatives asked to see RETN’s financials on numerous occasions, beginning in August 2007, but were

⁹⁸ Plaintiff’s Ex. 30.

⁹⁹ Nacheff Trial Tr., at 76:21-77:6, October 29, 2009; Plaintiff’s Exs. 27, 30.

¹⁰⁰ Plaintiff’s Ex. 30.

¹⁰¹ Plaintiff’s Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 72, at 32.

¹⁰² Petrovic Trial Tr., at 123:17-124:6, April 30, 2010.

¹⁰³ Defendants’ Ex. 36.

¹⁰⁴ *Id.*

¹⁰⁵ Petrovic Trial Tr., at 6:15-8:3, June 3, 2010.

repeatedly denied access.¹⁰⁶ At trial, Petrovic admitted that he kept no financials for RETN, and therefore could not provide such to RTN.¹⁰⁷ The only records possessed by Petrovic were RETN's bank statements, but Petrovic was not able to identify how RETN's funds were spent even after reference to those records.¹⁰⁸ Petrovic's credibility was further eroded by his admission that at times he withdrew money that RTN had invested in RETN from RETN's bank account to pay for his own personal travel expenses and cash for himself. Specifically, he used \$500.00 to pay a bill at a hotel in Las Vegas,¹⁰⁹ he transferred \$50,000.00 to an entity he later could not identify,¹¹⁰ and he took \$5,000.00 cash for his own personal use.¹¹¹

Plaintiff argues that in addition to siphoning funds for his own personal use, Petrovic utilized RETN as a "shell" to improperly fund several entities he controlled. In 2007, he made two transfers from RETN to two entities with which he was affiliated.¹¹² Further, RETN's bank statements indicated that amounts were withdrawn on various occasions, but Petrovic could not identify the purpose of the transfer or to whom the funds were transferred.¹¹³ Although Petrovic repeatedly assured RTN that advertising funds were flowing into RETN, these funds were actually being deposited with RTN

¹⁰⁶ Hausauer Trial Tr., at 75:15-22; 76:4-11; 80:8-17, June 4, 2010; Nacheff Trial Tr., at 62:17-23; 63:1-12; 67:11-19, October 29, 2009; Popoff Trial Tr., at 77:22-78:11, April 30, 2010.

¹⁰⁷ Petrovic Trial Tr., at 77:13-22, June 3, 2010.

¹⁰⁸ Petrovic Trial Tr., at 8:22-12:6, June 4, 2010.

¹⁰⁹ Petrovic Trial Tr., at 12:7-18, June 4, 2010.

¹¹⁰ Petrovic Trial Tr., at 12:19-21, June 4, 2010.

¹¹¹ Petrovic Trial Tr., at 16:14-19, June 4, 2010.

¹¹² See Plaintiff's Ex. 39, for transfers made by RETN on June 28, 2007 to RTN GmbH in the amount of \$136,870 and on July 25, 2007 to ACI Beteiligungs GmbH in the amount of \$278,400.

¹¹³ Petrovic Trial Tr., at 9:17-14:6, June 4, 2010.

GmbH.¹¹⁴ Petrovic moved money between RETN and RTN GmbH to create “phantom” debt obligations for RTN GmbH at the expense of RETN.¹¹⁵

In addition, Petrovic executed lease agreements between RETN and other entities in his control, which utilized space in the Facility for which RTN was paying rent.¹¹⁶ Petrovic caused RETN to incur debt for RTN GmbH’s benefit through a Contract for the Digital Satellite Broadcasting of the TV Channel RTN Myestate.¹¹⁷ While RETN was involved in a contractual relationship with the satellite provider Astra, RTN GmbH (not RETN) was the beneficiary of Astra’s services.¹¹⁸ Finally, RETN made loans of over \$1 million to RTN GmbH with Petrovic signing on both sides of the transaction.¹¹⁹

In further breach of the Loan, Plaintiff contends that RETN failed to pay its creditors, specifically Astra, on time in accordance with the terms of the Loan. Astra’s services were a key element in RETN’s business because in order for RETN to broadcast and advertise real estate sales information to potential buyers, it needed to be able to broadcast in Europe via satellite transmission through the use of Astra’s services.¹²⁰ RETN owed money to Astra for the services it received from October 2007 to March 2008.¹²¹ Although RETN was transferring money out of its account, it failed to pay Astra.¹²²

¹¹⁴ Petrovic Trial Tr., at 33:22-34:3, June 4, 2010.

¹¹⁵ Plaintiff’s Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 72, at 28. For example, when RTN GmbH was to become a 60% owner of the Facility, leaving RETN with a 40% interest, Defendants intended to pay for RTN GmbH’s ownership interest with RETN’s money, which was actually funded by RTN. *Id.*

¹¹⁶ Plaintiff’s Ex. 59.

¹¹⁷ Plaintiff’s Ex. 57.

¹¹⁸ Plaintiff’s Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 72, at 29 (citing Plaintiff’s Ex. 57).

¹¹⁹ Plaintiff’s Ex. 2.

¹²⁰ Hausauer Trial Tr., at 80:18-81:15, June 4, 2010.

¹²¹ Plaintiff’s Ex. 45.

¹²² Plaintiff’s Ex. 39.

Defendants claim that plaintiff was always able to access whatever information it needed, including financial information or documents, specifically during meetings in Germany. The person charged with RTN's due diligence, Hausauer, claimed at trial that he never asked Petrovic for such financial information. While Hausauer may not have asked Petrovic for RETN's financials, he repeatedly requested such information from Fey.¹²³ And RTN representatives requested RETN's financial information on numerous other occasions, such as the September 2007 trip to Munich¹²⁴ and in a letter dated December 12, 2007 to Petrovic.¹²⁵

Defendants claim that the reason they were unable to pay creditors such as Astra was due to RTN's inability to provide sufficient funding.¹²⁶ Indeed, defendants blame plaintiff's lack of funding for their ultimate demise and insolvency.

Opportunities for RETN to Cure Loan Defaults

RTN asserts that it offered RETN numerous opportunities to cure defaults in its performance under the Loan. On December 12, 2007, Nacheff sent Petrovic a letter setting forth the various breaches and offering to provide additional funding if the Loan was amended and restated to address such defaults.¹²⁷ By December 14, 2007, RTN had secured additional funds and was willing and able to continue the deal if RETN and Petrovic were willing to cure the defaults.¹²⁸ On December 20, 2007, Petrovic, Krzys, and Nacheff had a telephone conference in which Petrovic refused to connect RTN to

¹²³ Hausauer Trial Tr., at 75:15-22, June 4, 2010.

¹²⁴ Nacheff Trial Tr., at 62:17-23; 67:11-19, October 29, 2009; Popoff Trial Tr., at 77:22-78:11, April 30, 2010; Hausauer Trial Tr., at 76:4-11, June 4, 2010.

¹²⁵ Plaintiff's Ex. 33.

¹²⁶ Defendants' Ex. 77.

¹²⁷ Plaintiff's Ex. 33.

¹²⁸ Nacheff Trial Tr., at 113:17-21, October 29, 2009.

RTN GmbH at the request of RTN.¹²⁹ Petrovic also refused to modify the Prospectus to reflect that money was owed to RTN.¹³⁰ Finally, Petrovic stated, in direct contradiction to the terms of the Loan, that he would not use funds from the Closed End Fund to repay the RTN loan.¹³¹

Damages

On the issue of damages, plaintiff admits that €800,000 (approximately \$1 million U.S. dollars), was returned to RTN by order of the German courts on January 15, 2009. Originally, this sum was deposited by RTN with the German Notar¹³² at RETN's request on July 12, 2007, and was to be held by the German Notar for the purchase of the Facility.¹³³ RETN brought an action in Germany to recoup the \$1 million but lost this action, and the money was ordered to be returned to RTN.¹³⁴

Plaintiff further avers, however, that defendants failed to repay the sums advanced on the Loan Expiry Date and that, pursuant to the Loan and Promissory Note, plaintiff is owed the net amount it funded to RETN, which is \$3,124,515.75, plus the \$1 million Exit Fee, and approximately \$412,451.58, representing 10% of the outstanding balance due as of the Loan Expiry Date. After deducting the \$1 million returned to RTN by the German courts, the plaintiff's damages total \$3,536,967.33. In addition, RTN claims it is owed \$1,250.00, representing half of the amount incurred for translation costs related to the

¹²⁹ Krzys Trial Tr., at 39:16-40:3, November 16, 2009.

¹³⁰ Krzys Trial Tr., at 40:3-6, November 16, 2009.

¹³¹ Krzys Trial Tr., at 72:5-12, November 16, 2009. *See* Loan, Recitals, at 1 (“[T]he Borrower intends to raise funds to repay the Loan through a German investment fund (the ‘Fund’), which is an affiliate of the Borrower.”).

¹³² The “Notar,” Dr. Martin Schuck, is a quasi-judicial officer in Germany who serves as escrow agent for, among other things, real estate transactions. Plaintiff's Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 72, at 15.

¹³³ Nacheff Trial Tr., at 60:20-22, October 29, 2009.

¹³⁴ Petrovic Trial Tr., at 51:5-52:10, June 4, 2010.

September 23rd draft Prospectus utilized at trial. This does not include prejudgment interest or reasonable attorneys' fees, which plaintiff also claims.

Defendants counter that they have suffered harm as a result of RTN's breach under the Loan and are therefore entitled to damages in the amount of \$4,422,043.00.¹³⁵ This amount represents RETN's unsatisfied balance with Astra, expenses incurred by RETN on RTN's behalf, such as legal fees, travel and other expenses, and RETN's lost profit from its inability to buy and lease-back the Facility, excluding interest.¹³⁶

Court's Finding of Facts

The Court finds that the following facts were established by a preponderance of the evidence at trial.

The Creation of RTN GmbH

The Loan specifically states that "the Borrower intends to raise funds to repay the Loan through a German investment fund (the "Fund"), which is an affiliate of the Borrower."¹³⁷ Accepting Defendants' contention as true that neither RTN nor RETN could serve as the investment vehicle for the Closed End Fund under German law because both are Delaware entities, the creation of RTN GmbH was necessary and permissible. Further, Nachev was notified by Fey in a letter dated July 17, 2007, of the existence and purpose of RTN GmbH.¹³⁸ RTN GmbH served as an "affiliate" of the Borrower in accordance with the terms of the Loan to raise the funds needed to repay RTN.¹³⁹

¹³⁵ Defendants' Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 71, at 19.

¹³⁶ *Id.* at 18-19.

¹³⁷ Loan, Recitals, at 1.

¹³⁸ Plaintiff's Ex. 25.

¹³⁹ Petrovic Trial Tr., at 137:14-19, April 30, 2010. *See* Loan, Recitals, at 1 (stating how funds would be raised to repay RTN).

The Closed End Fund Prospectus

The terms of the Loan specifically state that an Event of Default occurs if “[t]he Fund shall fail to finalize all necessary investment documentation to begin raising funds to repay the Loan by September 15, 2007.”¹⁴⁰ While the term “finalize” is not expressly defined in the Loan, this Court accepts as reasonable plaintiff’s interpretation of the term “finalize,” as requiring the Prospectus to be submitted to BaFin for approval by the deadline of September 15, 2007. Because the Prospectus was not received by BaFin until December 12, 2007, an Event of Default occurred due to the failure to meet the September 15, 2007 deadline.

RTN’s Obligations to Disburse Funds under the Loan

The Loan states that “[t]he Lender may make the Loan to Borrower in one or more disbursements during the term of the Loan.”¹⁴¹ The term of the Loan was not to extend past January 15, 2008.¹⁴² There was no express payment schedule incorporated into the Loan which RTN was required to follow. Plaintiff claims that it provided over \$3.2 million to RETN between April 19, 2007 and October 12, 2007. However, two of these payments were made to RETN from Southern Financial and one from 1st Integrity Investments, LLC.¹⁴³ These payments were tendered before the execution of the Loan and neither Southern Financial nor 1st Integrity Investments, LLC were parties to the Loan. Therefore, less these three payments, the plaintiff’s funding totaled approximately \$2.87 million. RTN’s payment to Astra is included in this total because although Astra

¹⁴⁰ Loan, Art. 7.01(g), at 11.

¹⁴¹ Loan, Art. 2.01(a), at 5.

¹⁴² Loan, Art. 2.01(c), at 5.

¹⁴³ See Plaintiff’s Ex. 62, for payments made by Southern Financial to RETN and its vendor, Astra on April 19, 2007 and April 25, 2007 totaling \$250,000; and Plaintiff’s Ex. 63, for a payment made by 1st Integrity Investments, LLC to RETN on May 30, 2007 in the amount of \$150,000.

was not a party to the Loan, the payment was made after the execution of the Loan and at the request of RETN for the benefit of RETN.¹⁴⁴

Purchase of the Facility

The defendants fail to meet their burden of proof on their claim that RTN's inability to raise sufficient funds spoiled RETN's ability to purchase the Facility at a favorable price. RTN met with the Sellers of the Facility in April 2007 and discussed a possible extension beyond the original closing date of June 30, 2007 to purchase the Facility.¹⁴⁵ The Sellers of the Facility did in fact provide repeated extensions for the purchase of the Facility throughout the second half of 2007.¹⁴⁶ The purchase price of the Facility of \$2.8 million was a fixed amount. The original loan amount was \$5 million, leaving \$2.2 million for the cost of operations.¹⁴⁷

The parties were permitted to enter into agreements amending or modifying the Loan.¹⁴⁸ Petrovic took advantage of this provision on August 17, 2007, when he sent a letter to RTN, reducing the loan amount from \$5 million to \$4 million, thereby reducing the funding for operations from \$2.2 million to \$1.2 million (because the Facility purchase price of \$2.8 million was a fixed amount).¹⁴⁹ The letter stated that RETN was generating cash from its advertising sales and the entire \$5 million was no longer needed.¹⁵⁰ Although Petrovic testified that he reduced the loan amount as a "favor" to

¹⁴⁴ Plaintiff's Proposed Post-Trial Findings of Fact and Conclusions of Law, D.I. 72, at 12. *See* Hausauer Trial Tr., at 81:1-5, June 4, 2010 (indicating that certain investor money went directly to Astra because it was the "single lynch pin of the value" of RETN).

¹⁴⁵ Hausauer Trial Tr., at 71:4-12, June 4, 2010.

¹⁴⁶ Petrovic Trial Tr., at 82:18-86:3, June 3, 2010.

¹⁴⁷ Nacheff Trial Tr., at 48:20-49, October 29, 2009; Petrovic Trial Tr., at 25:9-13, June 4, 2010.

¹⁴⁸ Loan, Art. 8.03, at 12.

¹⁴⁹ Nacheff Trial Tr., at 61:13-20, October 29, 2009.

¹⁵⁰ Plaintiff's Ex. 26. *See also* Nacheff Trial Tr., at 60:3-10, October 29, 2009 (stating that the August 17, 2007 letter from Petrovic to RTN indicated RETN had begun to generate capital from the sale of advertising time and as a result, the Loan amount was reduced from \$5 million to \$4 million).

RTN,¹⁵¹ the Court finds the reason provided in the August 17, 2007 letter written and signed by Petrovic for the reduction of the Loan¹⁵² more credible. RTN relied on Petrovic's letter as a written amendment to the Loan and transferred \$800,000 to the German Notar upon Petrovic's request.¹⁵³

Petrovic made no mention in his August 17, 2007 letter of problems with funding for the Facility or the urgent need to provide the remaining funds to avoid default.¹⁵⁴ If the Purchase Agreement for the Facility was in danger of termination, Petrovic should and would have notified RTN of this impending termination and would certainly not have reduced the loan amount by \$1 million.¹⁵⁵ If RTN was made aware of possible default, it would have requested the remaining funds from one of its investors, James Richards ("Richards"), who testified that he committed to funding the additional \$1.8 million under the Loan if necessary and that he had the personal liquidity to do so within forty-eight hours of such request.¹⁵⁶ It was not until December of 2007 that Richards decided not to make an additional investment in RETN, after Nacheff warned against it due to RETN's failure to comply with the terms of the Loan on the initial investment.¹⁵⁷

Although the Purchase Agreement for the Facility was terminated on February 15, 2008, the Seller did provide the opportunity for a new purchase agreement in a letter to Petrovic dated April 2, 2008.¹⁵⁸ The Seller agreed to conclude a new purchase agreement for the Facility if RTN GmbH would transfer a one-time flat compensation amount of

¹⁵¹ Petrovic Trial Tr., 26:9-12, June 4, 2010.

¹⁵² See Plaintiff's Ex. 26.

¹⁵³ Nacheff Trial Tr., at 60:20-22, October 29, 2009.

¹⁵⁴ See Plaintiff's Ex. 26.

¹⁵⁵ See *Id.*

¹⁵⁶ Richards Depo. Tr., at 8:15-9:7, April 21, 2010.

¹⁵⁷ Richards Depo. Tr., at 10:2-15, April 21, 2010.

¹⁵⁸ Plaintiff's Ex. 46.

€160,000 by April 15, 2008, conclude a notarized purchase agreement by April 30, 2008, and pay a purchase price of €2 million by June 30, 2008.¹⁵⁹

Under the Loan, RETN was to use RTN's funds for purchase of the Facility.¹⁶⁰ Only RETN had the right to purchase the Facility.¹⁶¹ Petrovic, however, drafted a Supplement to the Purchase Agreement on October 10, 2007 without RTN's knowledge. This Supplement permitted RTN GmbH to become 60% owner of the Facility. Yet, Petrovic sought to have RETN pay for RTN GmbH's 60% interest in the amount of €1.2 million so that RTN GmbH was under no obligation to repay the Loan taken by RETN. The Supplement reduced RETN's mortgage on the Facility from €2 million to €800,000 and left RTN without the protection for which it had originally bargained.¹⁶²

RETN's Financial Information and Obligation to Creditors

The Loan requires RETN to furnish to RTN "such other information, in such form as [RTN] may reasonably request from time to time."¹⁶³ Under these terms, RTN requested RETN's financials on several occasions, beginning in September 2007.¹⁶⁴ During the September 2007 trip to Munich, RTN representatives asked for RETN's financials in person but were refused. In a letter to Petrovic dated December 12, 2007, RTN again requested RETN's financials but received no information.¹⁶⁵ In fact, Petrovic admitted that he did not keep financials for RETN other than bank records created by Petrovic himself.¹⁶⁶ When asked how RTN's funds were being used by RETN, Petrovic

¹⁵⁹ Plaintiff's Ex. 46.

¹⁶⁰ Loan, Recitals, at 1.

¹⁶¹ Loan, Art. 5.04, at 9.

¹⁶² Plaintiff's Ex. 30, at 4.

¹⁶³ Loan, Art. 5.01(d), at 9.

¹⁶⁴ Hausauer Trial Tr., at 75:15-76:16, June 4, 2010.

¹⁶⁵ Plaintiff's Ex. 2.

¹⁶⁶ Petrovic Trial Tr., at 77:13-22, June 3, 2010.

could not specifically identify for what the funds were utilized.¹⁶⁷ As a result, RTN had no way of knowing how its funds were being spent to further the business of RETN. Petrovic was a sophisticated businessman and should have kept detailed financial records of RETN's funds and expenses in anticipation of providing such information to RTN as an investor in RETN and as required by the Loan. He admittedly failed to keep such information, rendering him unable to provide it upon RTN's request in breach of the terms of the Loan.

Petrovic admitted that on several occasions he utilized money from RETN's bank account for his own personal use. He withdrew \$500.00 to pay a bill at the Bellagio in Las Vegas;¹⁶⁸ he transferred \$50,000.00 out of RETN's account to an entity he was unable to identify at trial;¹⁶⁹ he withdrew \$5,000.00 for his own personal use;¹⁷⁰ and he took several other ATM withdrawals out of RETN's account.¹⁷¹ Under the Loan, funds provided to RETN by RTN were to be used only for the purchase of the Facility and for the cost of operations.¹⁷² Petrovic's use of RETN's money for his own personal use constituted a breach of the terms of the Loan.

In further breach of the Loan, Petrovic made two transfers in 2007 to two entities with which he was affiliated. At trial, he was unable to identify the purpose of the transfers or to whom the funds were transferred.¹⁷³ Petrovic executed lease agreements between RETN and other entities in his control, ACI Vertiebs GmbH, RTN GmbH, and Myestate Expansion Beteiligungs GmbH & Co. KG. These entities utilized space in the

¹⁶⁷ Petrovic Trial Tr., at 8:22-12:6, June 4, 2010.

¹⁶⁸ Petrovic Trial Tr., at 12:7-18, June 4, 2010.

¹⁶⁹ Petrovic Trial Tr., at 12:19-21, June 4, 2010.

¹⁷⁰ Petrovic Trial Tr., at 16:14-19, June 4, 2010.

¹⁷¹ Petrovic Trial Tr., at 102:4-104:14, June 3, 2010.

¹⁷² Loan, Recitals, at 1.

¹⁷³ Petrovic Trial Tr., at 7:7-9:16, June 4, 2010.

Facility while RTN was paying the rent. At trial, Petrovic admitted that none of these entities had made payments to RETN for the use of the Facility¹⁷⁴ and RETN's bank statements confirmed this admission.¹⁷⁵

Petrovic caused RETN to incur debt solely for the benefit of RTN GmbH via the Contract for the Digital Satellite Broadcasting of the TV Channel RTN Myestate. While RETN was the entity that had a contractual relationship with satellite provider Astra and was obligated to pay for Astra's services, RETN was not the beneficiary of those services. Instead, defendants caused RETN to contract with RTN GmbH so that RTN GmbH owned the rights to RTN Myestate but, in reality, RETN was solely responsible for paying a €200,000 deposit and making monthly payments to Astra.¹⁷⁶ RTN GmbH was supposed to pay RETN €1.2 million per year in monthly payments starting in May 2007 for the right to utilize Astra's services, but RETN's bank statements reveal no such payments were made between June and December 2007. Finally, also in breach of the Loan, Petrovic caused RETN to make loans of over \$1 million to RTN GmbH with Petrovic signing as both Borrower and Lender.¹⁷⁷ RTN GmbH failed to repay any of these funds from June through December 2007.¹⁷⁸

Under the terms of the Loan, if RETN failed to pay its creditors, then an Event of Default occurred.¹⁷⁹ RETN failed to pay its most important debt to Astra, for services it received from October 2007 to March 2008.¹⁸⁰ Astra's services were necessary to RETN's operations because in order for RETN to broadcast real estate sales information

¹⁷⁴ Petrovic Trial Tr., at 116:17-19, June 3, 2010.

¹⁷⁵ Plaintiff's Ex. 39.

¹⁷⁶ Plaintiff's Ex. 27.

¹⁷⁷ Plaintiff's Ex. 2.

¹⁷⁸ Plaintiff's Ex. 39.

¹⁷⁹ Loan, Art. 7.01(i), at 11.

¹⁸⁰ Plaintiff's Ex. 45.

to potential buyers, it needed to be able to broadcast to Europe and the United Kingdom through use of Astra's services as a satellite provider.¹⁸¹ By not paying Astra with the funds received from RTN for operations, RETN was undermining the success of its business and rendering itself insolvent in breach of the Loan.¹⁸² RTN provided the necessary funding for operations to RETN, but this money was not used to pay for the critical services provided to RETN by Astra.¹⁸³

Opportunities for RETN to Cure Loan Defaults

RTN offered RETN numerous opportunities to cure its defaults under the Loan.¹⁸⁴ On December 12, 2007, Nacheff sent Petrovic a letter stating RETN's breaches and offering to provide additional funding if the Loan was amended and restated to address the defaults.¹⁸⁵ On December 14, 2007, RTN secured additional funds to continue the deal if RETN and Petrovic proved willing to cure the defaults.¹⁸⁶ Finally, on December 20, 2007, RTN representatives attempted to speak with RTN GmbH during a phone conversation with Petrovic but were denied.¹⁸⁷ Petrovic refused to modify the Prospectus upon RTN's request.¹⁸⁸ As a result of Petrovic's lack of cooperation in amending and curing RETN's defaults under the Loan, RETN breached the terms of the Loan.

¹⁸¹ Hausauer Trial Tr., at 80:18-81:15, June 4, 2010.

¹⁸² See Loan, Recitals, at 1 (stating that the purpose of the Loan amount of \$5 million is to "secure U.K. satellite broadcasting signal and existing satellite access"). See also Loan, Art. 7.01(i), at 11.

¹⁸³ See Plaintiff's Ex. 45.

¹⁸⁴ Nacheff Trial Tr., at 78:13-79:17, October 29, 2009.

¹⁸⁵ Plaintiff's Ex. 2.

¹⁸⁶ Nacheff Trial Tr., at 113:17-21, October 29, 2009. See also Plaintiff's Ex. 35 (stating that RTN was able to secure additional funds in the amount of €1.3 million for the purchase of the Facility provided that certain changes could be made to the Loan).

¹⁸⁷ Krzys Trial Tr., at 39:16-40:3, November 16, 2009.

¹⁸⁸ Krzys Trial Tr., at 40:3-6, November 16, 2009.

Witness Credibility

The numerous contradictions and inconsistencies in Petrovic's trial testimony damaged his credibility. For example, Petrovic originally testified that he and his lawyer did not know that Section 2.01, which permitted the lender to make payments in one or more disbursements, was in the Loan,¹⁸⁹ but then admitted that his lawyer had drafted the language and he had received a copy of it before he signed the Loan.¹⁹⁰ Petrovic initially testified that he was to receive all \$5 million under the Loan on June 27, 2007,¹⁹¹ and that RTN told him they had all \$5 million as of that date,¹⁹² but he later admitted that the parties never intended that he would receive all of the money.¹⁹³ Finally, Petrovic admitted that he commingled RETN's business funds with his own personal funds and that he transferred money to unidentified sources.¹⁹⁴

Jehl's credibility was undermined by his refusal to speak with plaintiff before trial. Jehl agreed to testify via telephone from Germany but he cut the questioning by Plaintiff short on several occasions¹⁹⁵ and refused to testify regarding the September 2007 English version of the draft Prospectus.¹⁹⁶

After carefully considering all the testimony, exhibits, and each witness's means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is, whether it is consistent or inconsistent; whether it has been contradicted; the witnesses' biases, prejudices, or interests; the witnesses' manner or demeanor on the witness stand; and all circumstances that, according to the evidence,

¹⁸⁹ Petrovic Trial Tr., at 143:3-144, April 30, 2010.

¹⁹⁰ Petrovic Trial Tr., at 60:5-65:8, June 3, 2010.

¹⁹¹ Petrovic Trial Tr., at 144:17-145:19, April 30, 2010; 58:10-14, June 3, 2010.

¹⁹² Petrovic Trial Tr., at 122:22-123:2, April 30, 2010.

¹⁹³ Petrovic Trial Tr., at 23:19-24:23, June 4, 2010.

¹⁹⁴ Petrovic Trial Tr., at 6:14-12:6, 12:16-18, 16:3-23, June 4, 2010.

¹⁹⁵ Jehl Depo. Tr., at 43:10-12; 45:1-5; 47:8-9, June 4, 2010; and 23:6; 41:16-17; 61:2-5, July 2, 2010.

¹⁹⁶ Jehl Depo. Tr., at 26:7-28:16, July 2, 2010.

could affect the credibility of the testimony, the Court finds the plaintiff's witnesses and version of events more credible.¹⁹⁷

Discussion

The Terms of the Loan

Under Delaware law, it is the Court's duty to "construe agreements as they are made by the parties and to give to language that is clear, simple and unambiguous the force and effect which the language clearly demands."¹⁹⁸ The Court cannot make for the parties a better agreement than that which they bargained for and cannot afford protection to a party which the contract does not provide.¹⁹⁹ "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction."²⁰⁰ Further, it is "the absence of ambiguity... [which leaves] no room for construction."²⁰¹

After reviewing the Loan, the Court finds the terms of the Loan to be clear and unambiguous and, therefore, the Court will not entertain extrinsic evidence. Article 2.01(a) of the Loan states that RTN was permitted to make the Loan to RETN in "one or more disbursements during the term of the Loan."²⁰² RTN and RETN and their representatives were sophisticated parties entering into the Loan who had the opportunity to incorporate a payment schedule if they so chose. Instead, the parties did not specify the amounts of such disbursements or the dates on which such disbursements were due, thereby according RTN significant flexibility in making payments to RETN.

¹⁹⁷ DEL. P.J.I. CIV. § 23.9 (2000).

¹⁹⁸ *Palese v. Delaware State Lottery Office*, 2006 WL 1875915, at *4 (Del. Ch. 2006).

¹⁹⁹ *Id.*

²⁰⁰ *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A2d 1192, 1196 (Del. 1992).

²⁰¹ *SLMSoft.Com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *11 (Del. Super. Ct. 2003) (citing *Nepa v. Marta*, 415 A.2d 470, 473 (Del. 1980)).

²⁰² Loan, Art. 2.01(a), at 4-5.

Defendants' contention that RTN was obligated to complete funding by the end of August 2007 is rejected because it is inconsistent with other provisions of the Loan. Specifically, Article 7.02, which allowed RTN to forego payments to RETN and declare the unpaid principal of the Loan, interest accrued and all other amounts owed by RETN, if an Event of Default should occur. Such an Event of Default did occur when defendants "failed to finalize all necessary investment documentation to begin raising the funds to repay the Loan by September 15, 2007."²⁰³ The Loan cannot be interpreted as requiring all funding to be complete by August 2007 because RTN's obligation to fund was expressly contingent upon RETN's performance under the Loan, including finalizing the Prospectus by September 15, 2007.

Extrinsic Evidence Barred by the Parol Evidence Rule

Delaware courts consistently uphold integration or merger clauses within agreements.²⁰⁴ Under the parol evidence rule, evidence of prior or contemporaneous agreements that contradict the terms of an integrated and complete writing is inadmissible.²⁰⁵ Once the parties to an agreement determine the language that reflects their mutual understanding, evidence that suggests a different meaning should not be received.²⁰⁶

²⁰³ Loan, Art. 7.01(e), at 5.

²⁰⁴ See *Velocity Express, Inc. v. Office Depot, Inc.*, 2009 WL 2415482, at *7 (Del. Super. 2009) (holding that the agreement at issue was completely integrated and that a subsequent oral agreement was therefore unenforceable); *T.P. Inc. of Delaware v. J&D's Pets, Inc.*, 1999 WL 135243, at *5 (Del. Ch. 1999) ("The final contract signed by the parties, by its terms, purports to be a fully integrated agreement."); *Tracinda Corp. v. DaimlerChrysler AG*, 364 F. Supp. 2d 362, 401 (D. Del. 2005) ("[T]he written documents governing this transaction contradict the oral representations allegedly made . . . and contain integration clauses precluding the parties from incorporating any oral representations into the parties' agreements.").

²⁰⁵ *In re SLM Int'l, Inc.*, 248 B.R. 240, 247 (Bankr. D. Del. 2000) (citing Restatement (Second) of Contracts § 215 (1981)); *Brandywine Shoppe, Inc. v. State Farm Fire & Cas. Co.*, 307 A.2d 806, 808-809 (Del. Super. 1973); *Arthur Jordan Piano Co. v. Lewis*, 154 A. 467, 469 (Del. Super. 1930).

²⁰⁶ *Mesa Partners v. Phillips Petroleum Co.*, 488 A.2d 107, 113 (Del. Ch. 1984).

Defendants' assertion that Article 2.01(a) of the Loan is ambiguous and that extrinsic evidence should be admitted is rejected. The Loan is a completely integrated writing, in which Article 8.09 specifically states that "[t]his Agreement supersedes all prior understandings and agreements, whether written or oral, among the parties relating to the transactions provided for herein."²⁰⁷ This provision is in no way vague or ambiguous. The extrinsic evidence defendants seek to admit, such as Nacheff's handwritten notes and cash flow projections, are a product of negotiations that took place prior to signing the Loan. Because these notes and cash flow projections were created before the Loan was signed by the parties, they are superseded by the terms of the actual Loan.

In addition, the extrinsic evidence defendants seek to admit does not demonstrate an agreement, or meeting of the minds, between plaintiff and defendants. "[U]nless extrinsic evidence can speak to the intent of *all* parties to a contract, it provides an incomplete guide with which to interpret contractual language."²⁰⁸ The extrinsic evidence consists of notes handwritten by Nacheff or drafts of documents prepared for RTN's investors. As such, these notes and documents were prepared only for use by RTN and its investors, not RETN. There was no agreement or understanding between the parties regarding these notes and drafts. It is clear that the notes and drafts were only preliminary and were not intended to be integrated into the final terms of the Loan.

²⁰⁷ Loan, Art. 8.09, at 13.

²⁰⁸ *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998).

As previously noted,²⁰⁹ this Court does not find the language of Article 2.01(a) of the Loan to be ambiguous and, therefore, it does not reach the issue of whether or not any ambiguities should be construed against the drafter of the agreement.

Extensions for the Purchase of the Facility

“[I]t is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.”²¹⁰ In determining whether a failure is material, one factor to consider is “the extent to which the injured party will be deprived of the benefit which he reasonably expected.”²¹¹ Further, “[e]ven if the failure is material, it may still be possible to cure it by subsequent performance without a material failure.”²¹² No party may claim excuse of performance if the other party substantially performed.²¹³

Defendants’ argument that they are excused from performance under the Loan because RTN breached the Loan first (by not meeting the funding deadline of June 30, 2007 to purchase the Facility) is unpersuasive. The seller of the Facility agreed to numerous extensions of the closing deadline. Therefore, RTN did not fail to perform under the Loan when the initial closing deadline of June 30, 2007 was not met because several extensions of the deadline were made. Defendants were not deprived of any reasonably expected benefit because the seller of the Facility did not enforce the initial closing date of June 30, 2007. Rather, the seller agreed to several extensions at

²⁰⁹ See *supra* Discussion, at p.29.

²¹⁰ Restatement (Second) of Contracts § 237 (1981).

²¹¹ *SLMSoft.Com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *13 (Del. Super. Ct. 2003) (citing Restatement (Second) of Contracts § 241).

²¹² Restatement (Second) of Contracts § 237 (1981), comment b.

²¹³ Restatement (Second) of Contracts § 237 (1981), comment d.

Petrovic's request. In fact, the seller did not terminate the Purchase Agreement until February 15, 2008, at which time defendants had committed several uncured breaches of the Loan.

Defendants' conduct prior to this litigation is at odds with their assertion that RTN breached the terms of the Loan by failing to provide \$2.6 million on June 30, 2007. Defendants did not declare RTN to be in default and did not express concern about the funding of the Facility and the potential for termination of the Purchase Agreement. To the contrary, Petrovic sent a letter to RTN on August 17, 2007, amending and restating the Loan to reduce the amount from \$5 million to \$4 million. Petrovic made no mention in the August 17th letter of RTN breaching the terms of the Loan with regard to the purchase of the Facility. Further, if defendants believed RTN to be in default, they did not provide RTN with an opportunity to cure such default and mitigate losses.

Defendants' argument that their obligation to repay the Loan is excused due to RTN's prior breach is also unavailing. The Loan amount was reduced by Petrovic from \$5 million to \$4 million in his August 17, 2007 letter to RTN. With this amendment to the Loan in effect, RTN substantially performed its obligations under the Loan in funding approximately \$2.87 million by the end of October 2007.²¹⁴ Because RTN substantially performed its funding obligations under the terms of the Loan, defendants cannot claim that they are excused from repaying RTN.

²¹⁴ This amount of approximately \$2.87 million does not include payments made to RETN by Southern Financial on April 19, 2007 and April 25, 2007, totaling \$250,000, and by 1st Integrity Investments, LLC on May 30, 2007, totaling \$150,000. These payments were made prior to the date of the Loan, (June 27, 2007), and these entities were not parties to the Loan.

Defendants' Breach under the Terms of the Loan

Article 7.01(a) through (i) sets forth such events which are considered “Events of Default” under the Loan. Article 7.02 states that if an Event of Default occurs, the lender (RTN) is under no further obligation to make payments under the Loan and the borrower (RETN) becomes immediately responsible for repaying the funds already disbursed under the Loan. Defendants failed to perform several of their obligations under the Loan, thereby constituting Events of Default and triggering their obligation to repay funds previously disbursed by RTN.

1. Defendants' Failure to Produce Financial Statements

Article 5.01(d) of the Loan states that RETN is obligated to provide information to RTN upon reasonable request.²¹⁵ After repeated requests from RTN and its agents, Petrovic and RETN failed to provide financial information regarding RETN and its operations in Germany. Petrovic promised to deliver financials to RTN but did not do so. In fact, Petrovic admitted at trial that he kept no financial records for RETN.²¹⁶ Without knowledge of where its money was being spent, RTN was not reasonably expected to continue to fund this venture. Millions of dollars were at stake and without adequate assurances of RETN's financial situation, RTN could not reasonably be expected to provide additional funding.

²¹⁵ Loan, Art. 5.01, at 9.

²¹⁶ Petrovic Trial Tr., at 77:13-22, June 3, 2010. As a result of defendants' failure to produce financial records pursuant to discovery requests, they were not permitted to use those same documents to prove their case at trial. See *Digiacobbe v. Sestak*, 1998 WL 684149 (Del. Ch. 1998) (stating that when documents “are not produced as required by the Rules of Court,” the party who fails to produce those documents “must bear the consequences of not being allowed to use them at trial”); *Philipbar v. Gourley*, 1999 WL 1457019 (Del. Fam. Ct. 1999) (noting that because Husband failed to produce documents pursuant to a court order, he “was not allowed to make further production”).

2. Defendants' Failure to Finalize Investment Documentation by the Deadline

Article 7.01(g) states that an Event of Default occurs if “[t]he Fund shall fail to finalize all necessary investment documentation to begin raising the funds to repay the Loan by September 15, 2007.”²¹⁷ This provision refers to the Prospectus for potential German investors, which was being prepared by Petrovic and other RETN representatives. The Prospectus was not submitted to BaFin by the September 15, 2007 deadline. Rather, BaFin did not receive the Prospectus until December 11, 2007 and it was not later finalized and approved until January 8, 2008.

Under Delaware law, “[a] party asserting an oral modification must prove the intended change with ‘specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document.’”²¹⁸ Defendants’ contention that RTN waived the September 15, 2007 deadline and agreed to delay the Prospectus to enable Jehl to incorporate German tax law changes is without merit. Article 8.03 explicitly prohibits any modifications of the Loan terms except if in writing and bars any “implied waivers” by RTN through a course of conduct or otherwise.²¹⁹ RTN never agreed to an extension orally or in writing. Further, RTN did not engage in a course of conduct or otherwise that would lead defendants to believe that the Prospectus deadline was implicitly waived.

²¹⁷ Loan, Art. 7.01(g), at 11.

²¹⁸ *Continental Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1230 (Del. Ch. 2000) (quoting *Reeder v. Sanford School, Inc.*, 397 A.2d 139, 141 (Del. 1979)).

²¹⁹ Loan, Art. 8.03, at 12.

3. Defendants' Assignment of Interest in the Facility to RTN GmbH

Article 5.04 of the Loan states that “[t]he Borrower will use the proceeds of the Loan for the purposes set forth in Section 3.15 hereof.”²²⁰ Article 3.15 states that “[t]he proceeds of the Loan shall be used for funding the Borrower’s purchase of the Facility....”²²¹ On October 10, 2007, defendants entered into an agreement (the Supplement) with the seller of the Facility, without RTN’s knowledge or consent. The Supplement amends the Purchase Agreement and introduces RTN GmbH as a co-purchaser with RETN, in which RETN possesses a 40% (or €800,000) interest in the base purchase price of the Facility and RTN GmbH possesses a 60% (or €1.2 million) interest. The Supplement is a violation of the terms of the Loan because only RTN had the right to purchase and hold an equity interest in the Facility. As such, RETN and RTN GmbH were not eligible to enter into the Supplement with the seller of the Facility. Further, under the Assignment of Land Charge, RTN GmbH has no obligation to release its majority interest in the Facility to RTN upon defendants’ failure to repay RTN.

Defendants also sought to effect a reduction in the amount of RTN’s mortgage from \$6 million to €800,000, which represents RETN’s share of the purchase price of the Facility. This act was a violation of the terms of the Loan, specifically, Articles 6.01²²² and 3.14,²²³ and constituted a “Material Adverse Effect” under Article 1.01.²²⁴ Defendants claim that such a mortgage reduction could not go into effect without RTN’s approval, but there is no reason to believe that defendants intended to obtain RTN’s

²²⁰ Loan, Art. 5.04, at 9.

²²¹ Loan, Art. 3.15, at 7.

²²² Article 6.01 states that “[t]he Borrower shall not, at any time create, incur, assume or suffer to exist any material Encumbrance on or against any of its properties, including but not limited to the Facility...” except as stated in subsections (a) through (e). Loan, Art. 6.01, at 9.

²²³ Article 3.14 states that “the Borrower has good title to its properties and assets, free and clear of all mortgages, pledges, liens and other Encumbrances....” Loan, Art. 3.14, at 7.

²²⁴ Loan, Art. 1.01, at 3.

approval because the entire transaction was concealed from RTN from the beginning. Further, the assignment of a 60% interest to RTN GmbH under the terms of the Supplement does not require RTN's approval.

4. Defendants' Structuring of the Fund

Recitals can be used to explain the intended meaning of the operative or granting part of an agreement.²²⁵ The Recitals to the Loan state that "the Borrower intends to raise funds to repay the Loan through a German investment fund, which is an affiliate of the Borrower."²²⁶ In reviewing the Prospectus, RTN discovered that defendants committed two further breaches of the Loan, (in addition to the failure to meet the September 15, 2007 submission deadline), with regard to repaying RTN through the Fund. First, the entity identified as the vehicle for raising capital, Myestate Expansion Beteiligungs GmbH & Co., KG, was not an affiliate of RETN and had no contractual obligation to distribute to RETN funds raised for repayment of the Loan. At trial, Petrovic admitted that RTN investors had no recourse against the Myestate Expansion Fund if monies were not paid back under the Loan to RTN.²²⁷

Second, the Prospectus failed to disclose to potential German investors the defendants' obligation to repay RTN. Such non-disclosure constitutes a Material Adverse Effect under the Loan²²⁸ because it involves RETN's financial condition, specifically, its obligation and ability to repay the Loan to RTN. In addition, the Prospectus failed to mention that the parties had agreed to split the proceeds raised from the Fund on an 80/20 basis, pursuant to which eighty cents of every dollar would go to

²²⁵ *New Castle Co. v. Crescenzo*, 1985 WL 21130 at *3 (Del. Ch. 1985).

²²⁶ Loan, Recitals, at 1.

²²⁷ Petrovic Trial Tr., at 53:10-14, June 3, 2010.

²²⁸ Loan, Art. 1.01, at 3.

RTN until the Loan was repaid in full, and RETN would retain twenty cents of every dollar raised for further expansion. RETN knew or should have known that RTN was relying upon this 80/20 split as an inducement to fund the Loan. The absence of this financial information from the Prospectus constituted a Material Adverse Effect under the terms of the Loan²²⁹ which triggered an obligation to notify RTN of such change.

Further undermining defendants' claim is Petrovic's testimony at trial that money from the Fund could not be transferred directly to RTN.²³⁰ Fey testified at trial that it would be "a criminal act" to transfer closed end funds to RTN if this obligation was not disclosed in the Prospectus.²³¹ It is clear from the testimony of both Petrovic and Fey that RTN could not be repaid from the Fund. Rather, Petrovic's true intentions were revealed when he testified that he planned to repay RTN by purchasing the Facility back from RTN.²³² Petrovic's plan to flip the Facility using money raised from the Fund constituted a breach of the Loan because he did not own the Facility and therefore could not sell it himself. Rather, the title to the Facility was to be held by the German Notar until the Loan was repaid because the building served as collateral to ensure that RTN was reimbursed for its previous funding. As a result, the Facility could not be used as the source of repayment because, in the event of a shortfall, there would be no collateral.

5. Defendants' Depletion of the Loan Proceeds and Subsequent Insolvency

Article 7.01(i) of the Loan states that an Event of Default occurs if the Borrower (RETN) becomes insolvent and generally unable to pay its debts.²³³ RETN's liabilities exceeded its assets, thereby rendering it insolvent by definition. RETN's insolvency is

²²⁹ Loan, Art. 1.01, at 3.

²³⁰ Petrovic Trial Tr., at 43:19-44:2, June 4, 2010.

²³¹ Fey Trial Tr., at 105:10-106:1, November 16, 2009.

²³² Petrovic Trial Tr., at 59:5-14, June 3, 2010.

²³³ Loan, Art. 7.01(i), at 11.

apparent from its failure to pay its primary vendor, Astra, at least as early as October 2007. As a result of RETN's insolvency, an Event of Default was triggered under the Loan, thereby obligating RETN to immediately repay RTN.

6. Defendants' Failure to Repay the Loan

Under Article 7.01(a) of the Loan, an Event of Default occurs if the Borrower (RETN) fails to repay the principal or interest on the Note by the due date. Defendants have failed to repay any portion of the Loan to RTN.²³⁴ Defendants have defaulted by virtue of non-payment to RTN, thereby triggering monetary damages consisting of principal, applicable fees, interest and attorneys' fees.²³⁵

Defendants' Counterclaim

Defendants' counterclaim against RTN for breach of contract and subsequent damages consists of two components. First is the alleged lost opportunity to sell the Facility at a higher price and garner a profit. Second is the alleged expenses incurred as a result of RETN defaulting on several agreements because of RTN's failure to adequately fund RETN's operational expenses.

The first component of defendants' counterclaim, alleging lost opportunity damages, lacks merit. Defendants argue that their performance under the Loan is excused because of RTN's failure to perform. However, for a non-breaching party to successfully claim that its performance is excused as a result of the breaching party's failure to perform, there must be an "uncured material failure" of performance.²³⁶ RTN's

²³⁴ RETN's failure to repay any portion of the Loan to RTN does not take into account the €800,000 (approximately \$1 million U.S. dollars), which was returned to RTN by order of the German courts on January 15, 2009.

²³⁵ See Loan, Art. 2.07, at 6; Plaintiff's Ex. 19 (Agreement of Guaranty and Suretyship), Art. 1, at 1.

²³⁶ Restatement § 237 (1981), comment b. See Restatement § 241 (1981) (describing the circumstances significant in determining whether a failure is material).

alleged non-performance of its funding duties with respect to the Facility cannot be deemed material because the Facility was expendable to the defendants. It is clear to this Court that the Facility was not material to the long-term success of Petrovic's business plan because although defendants have asserted a counterclaim for lost opportunity damages, they were, in fact, ready to sell the Facility for a quick profit. Further, Petrovic testified that purchasing the Facility was not critical to the long-term success of his business plan,²³⁷ which was contrary to the initial representations made to RTN in which the building would serve as the headquarters for Petrovic's project. Because the Facility was not material to defendants' business plan and did not have any long-term value to the project, defendants cannot argue convincingly under Delaware law that RTN's alleged failure to fund the Facility's purchase excuses their non-performance under the Loan and justifies an award of breach damages.

In addition, Defendants' outstanding debt to RTN is not taken into account and defendants have failed to acknowledge the terms of the Loan which explicitly bar RETN from selling or disposing of its assets.²³⁸ Further, defendants had no entitlement to the proceeds of any sale and, therefore, no claim for damages, because RTN had a first lien position on the Facility and outstanding Loan. Defendants' counterclaim for damages cannot be based upon a sale which clearly breaches the terms of the Loan between RTN and RETN. In addition, the agreement of sale between RETN and RTN GmbH as joint sellers and Sulejman Berisha as buyer was unenforceable because it lacked the required German Notar's seal. Finally, RETN alone has no standing to assert a counterclaim for

²³⁷ Petrovic Trial Tr., at 33:3-6, June 3, 2010.

²³⁸ Loan, Art. 6.03, at 10.

damages because its co-seller, RTN GmbH, is not a party to the counterclaim or this action.²³⁹

The second component of defendants' counterclaim, alleging fees and expenses incurred by defendants, also lacks merit. Under Delaware law, consequential damages for breach of contract must be reasonably foreseeable.²⁴⁰ In the present case, defendants' counterclaim for damages cannot be sustained because such damages were not reasonably foreseeable by RTN. Defendants' intent to sell the Facility to a prospective purchaser for profit was not expressed to RTN. Further, RTN was not aware of the expenses, penalties, or other alleged damages defendants' incurred as a result of their own failure to adhere to the covenants expressly set forth in the Loan.²⁴¹ In addition, RTN was unaware that Petrovic owed legal fees to his attorneys. Finally, it was not foreseeable that RTN GmbH, a non-party to the Loan, would incur expenses or litigation.

Further undermining defendants' counterclaim for damages is the fact that RTN fully funded the \$2.2 million allocated to operations under the original \$5 million Loan. Taking into account Petrovic's August 17, 2007 letter to RTN, which reduced the Loan amount from \$5 million to \$4 million, RTN actually over-funded defendants' operations by \$1 million. Defendants' claim for damages as a result of travel expenses incurred by Petrovic similarly has no merit. Petrovic used RTN's money to pay for his travel expenses and as a result, he is not entitled to recoup those expenses because they were funded by RTN, not Petrovic.

²³⁹ See Defendants' Answer to Complaint and Counterclaim, D.I. 8.

²⁴⁰ *Atwell v. RHIS, Inc.*, 2006 WL 2686531, at *1 (Del. Super. Ct. 2006), *aff'd*, 974 A.2d 148 (Del. 2009).

²⁴¹ For example, RTN was not aware that defendants had made a deposit with Astra at the time of contracting. Nachev Trial Tr., at 82:9-12, October 29, 2009.

Unjust Enrichment

Because this Court deems the Loan an enforceable and unambiguous contract, there is no need to reach plaintiff's alternative legal argument of unjust enrichment.

Conclusion

For all of the foregoing reasons, this Court enters judgment against defendants, RETN and Petrovic,²⁴² jointly and severally, with damages totaling \$4,161,967.32,²⁴³ consisting of \$2,874,515.75 disbursed by RTN to defendants,²⁴⁴ and an Exit Fee of \$1,287,451.57.²⁴⁵ The Court also awards reasonable attorneys' fees and costs. Plaintiff's counsel shall submit an affidavit setting forth such fees and costs within 15 days. Plaintiff's counsel shall also submit a proposed form of order including the amount of interest owed upon the unpaid principal balance of the Note within 15 days.

IT IS SO ORDERED.

Jan R. Jurden, Judge

²⁴² Petrovic is personally liable because of his designation as Guarantor in the Agreement of Guaranty & Suretyship dated June 21, 2007.

²⁴³ This total does not include the cost of attorneys' fees or interest.

²⁴⁴ This amount consists of disbursements by RTN under the Loan from June 29, 2007 to October 12, 2007, and excludes those payments made on April 19, 2007 and April 25, 2007 by Southern Financial and on May 30, 2007 by 1st Integrity Investments, LLC because these payments were made before the Loan was entered into on June 27, 2007 and neither Southern Financial nor 1st Integrity Investments, LLC were parties to the Loan.

²⁴⁵ Under Article 2.08 of the Loan, "[i]f the Borrower fails to pay the entire unpaid principal balance of the Note, all accrued but unpaid interest thereon and the Exit Fee to the Lender on the Loan Expiry Date, the Exit Fee shall increase by 10.0% of the unpaid principal balance of the Note outstanding on the Loan Expiry Date." Because defendants failed to pay the entire unpaid principal balance of the Note, interest on that balance, and the Exit Fee to plaintiff on the Loan Expiry Date, the Exit fee of \$1,000,000 increased by 10% of the unpaid principal balance of the Note (10% of \$2,874,515.75 is \$287,451.57). Therefore, the total Exit Fee is \$1,287,451.57 (representing the original \$1,000,000 Exit Fee plus \$287,451.57).