At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of November, 2015.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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LG CAPITAL FUNDING, LLC,

Plaintiff,

- against -

Index No. 508410/2014

SANOMEDICS INTERNATIONAL HOLDINGS, INC. AND MANHATTAN TRANSFER REGISTRAR CO.,

Defendants.

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The following e-filed papers read herein:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 11-31 34, 36-38 |
| Opposing Affidavits (Affirmations) | |
| Reply Affidavits (Affirmations) | 39-46 48 |
| Affidavit (Affirmation) | |
| Memoranda of Law | 32 35 47 |

In this action by plaintiff LG Capital Funding, LLC (plaintiff) against defendants Sanomedics International Holdings, Inc. (SIH) and Manhattan Transfer Registrar Co. (MTR) (collectively, defendants) alleging the breach of the terms of a securities purchase agreement and two notes, plaintiff moves, under motion sequence number one, for an order, pursuant

to CPLR 3212 (e), (1) granting it partial summary judgment as against defendants on its claims for breach of contract, conversion, and recovery of attorneys' fees and costs, i.e., the second, third, fourth, sixth, seventh, eighth, and tenth causes of action asserted in its amended complaint and awarding it compensatory damages in the amount of $1,364,204.81, plus interest from April 24, 2015, against defendants, jointly and severally, or, in the alternative, granting it partial summary judgment as to liability only, with damages to be determined at an inquest, (2) severing its second, third, fourth, sixth, seventh, and eighth causes of action from the remaining causes of action, and (3) severing its tenth cause of action for attorneys' fees and costs from the remaining causes of action. Defendants cross-move, under motion sequence number two, for an order: (1) granting them leave to amend their verified answer upon the ground that such amendment will allow them to resolve this action on the merits, (2) dismissing plaintiff's causes of action for conversion (i.e., its fourth and eighth causes of action), as well as its request for punitive damages on this private breach of contact case, for failure to state a cause of action, and (3) denying plaintiff's pre-discovery motion for partial summary judgment.

**BACKGROUND**

(1)

Plaintiff is a limited liability company with its principal place of business in Brooklyn, New York. SIH is a Delaware corporation with its principal place of business in Florida, and MTR is a stock transfer company with offices located in New York. On September 20, 2013,

SIH, as the company, and plaintiff, as the buyer, entered into a Securities Purchase Agreement, pursuant to which plaintiff purchased from SIH an 8% secured convertible promissory note, in the aggregate principal amount of $36,500 (Note 1), which was convertible into shares of SIH's common stock with a par value of $0.001 per share.

Note 1 provided that SIH, as the borrower, promised to pay to the order of plaintiff the sum of $36,500, together with interest on the unpaid principal balance at the rate of 8% per annum from the issue date of September 20, 2013 until the maturity date of June 20, 2014 (a period of nine months). On September 25, 2013, plaintiff paid the $36,500 purchase price for Note 1 in full.

Pursuant to section 1.1 of Note 1, plaintiff had the right to convert all or any part of the outstanding and unpaid principal amount of Note 1, into fully paid and non-assessable shares of common stock of SIH at the "Conversion Price" set forth in Note 1, beginning on a date 180 days after the issue date of Note 1 (i.e., September 20, 2013) up until the maturity date of Note 1 or to the date of payment of a Default Amount upon an Event of Default by borrower SIH.. Section 1.1 of Note 1 provided that the number of shares of common stock to be issued on conversion was to be determined by dividing the "Conversion Amount" by the "Conversion Price," as these terms were defined in Note 1, on the date specified in the notice of conversion (the Notice of Conversion), which was to be delivered to SIH by plaintiff in accordance with section 1.4, provided that the Notice of Conversion was "submitted by facsimile . . . or by other means resulting in, or reasonably expected to result

in, notice to [SIH] before 6:00 P.M., New York . . . time on such conversion date" (the Conversion Date). Section 1.4 (a) of Note 1 specified that it could be converted into the common stock of SIH by plaintiff's submission to SIH of a Notice of Conversion "by facsimile or other reasonable means of communication dispatched on the Conversion Date prior to 6 P.M., New York . . . time," and then physically surrendering Note 1 upon conversion of the entire unpaid principal.

Section 1.1 in Note 1 provides a formula to determine the "Conversion Amount," which at the option of SIH, might include unpaid interest. "Conversion Price" was to be computed under Note 1 based upon the "Market Price" for the common stock at the time of conversion, defined in Note 1 as the average of the lowest three closing bid prices on the applicable trading exchange for the common stock during the 10-day period ending one trading day before the date of the Conversion Notice.

Section 1.4 (e) of Note 1 provided, in pertinent part, as follows:

> "If the Holder shall have given a Notice of Conversion as provided herein, [SIH's] obligation to issue and deliver the certificates for Common Stock shall be absolute and unconditional, irrespective of the absence of any action by the Holder to enforce the same, any waiver or consent with respect to any provision thereof, the recovery of any judgment against any person or any action to enforce the same, any failure or delay in the enforcement of any other obligation of [SIH] to the holder of record, or any setoff, counterclaim, recoupment, limitation or termination, or any breach or alleged breach by the Holder of any obligation to [SIH]..."

An agreement between MTR, as the transfer agent for SIH, and SIH, dated September 20, 2013 (the First MTR Agreement), executed by SIH by David C. Langle (Langle), its chief financial officer, and acknowledged and signed for MTR by John Ahearn (Ahearn), a partner and president of MTR, set forth that SIH, as the Company, and plaintiff, as the investor, had entered into the Securities Purchase Agreement dated as of September 20, 2013, which had provided for the issuance of Note 1 in the principal amount of $36,500. Attached to the First MTR Agreement was a copy of Note 1, and the First MTR Agreement directed MTR to familiarize itself with its issuance and delivery obligations as SIH's transfer agent. The First MTR Agreement noted that "[t]he ability to convert the Note in a timely manner is a material obligation of [SIH] pursuant to the Note," and expressly provided that plaintiff was intended to be a third-party beneficiary of that agreement. It further provided:

> "[MTR] is hereby irrevocably authorized and instructed to issue shares of the Common Stock (without any restrictive legend) to [plaintiff] without any further action or confirmation by [SIH]: (A) upon [MTR's] receipt from [plaintiff] of: (i) a . . . Conversion Notice executed by [plaintiff]; and (ii) an opinion of counsel of [plaintiff], in form, substance and scope customary for opinions of counsel in comparable transactions (and satisfactory to [MTR]), to the effect that the shares of Common Stock of [SIH] issued to [plaintiff] pursuant to the Conversion Notice are not 'restricted securities' as defined in Rule 144 and should be issued to [plaintiff] without any restrictive legend; and (B) the number of shares of common stock to be issued is less than 9.99% of the total issued stock of [SIH]." (emphasis in original)

(2)

On January 22, 2014, plaintiff, as the buyer, and CLSS Holdings, LLC (CLSS), as the seller, entered into a Debt Purchase Agreement pursuant to which plaintiff purchased from CLSS all rights with respect to $42,000 in principal under a convertible promissory note in the amount of $367,000 issued by SIH on March 10, 2011 (the Transferred Rights). SIH executed the Debt Purchase Agreement, accepting and agreeing to the assignment of the Transferred Rights to plaintiff and that plaintiff may convert the Transferred Rights into shares of SIH's stock.

Also on January 22, 2014, SIH issued to plaintiff a Convertible Redeemable Note in the aggregate principal face amount of $42,000 (Note 2) as a "Replacement Note Originally Issued March 10, 2011 in the Amount of $367,000." Note 2 had a maturity date of October 22, 2014 and SIH was obligated to pay interest on the principal amount at the rate of 10% per annum, commencing on January 22, 2014.

Note 2, like Note 1, contained terms with respect to the conversion to common stock of SIH. Pursuant to section 4 (a) of Note 2, plaintiff was "entitled, at its option, at any time, to convert all or any amount of the principal face amount of this Note then outstanding into [SIH's] common stock . . . without restrictive legend of any nature, at a price . . . for each share of Common Stock equal to 50% of the lowest closing bid price of the Common Stock as reported on the National Quotations Bureau OTCQB exchange which [SIH]'s shares are traded or any exchange under which the Common Stock may be traded in the future . . . for

the ten prior trading days including the day upon which a Notice of Conversion is received by [SIH] (provided such Notice of Conversion is delivered by fax or other electronic method of communication to [SIH] after 4 P.M. Eastern Standard or Daylight Savings Time if the [plaintiff] wishe[d] to include[] the same day closing price)" (emphasis in original). Conversion was to be effectuated by SIH delivering the shares of Common Stock to plaintiff within 3 business days of receipt by SIH of the Notice of Conversion, following which, the Note was to be surrendered. Section 8 (k) of Note 2 listed as an act of default, SIH's failure to deliver to plaintiff the common stock pursuant to section 4 without restrictive legend within three business days of its receipt of a Notice of Conversion.

Section 12 of Note 2 required SIH to issue irrevocable transfer agent instructions reserving 315,000 shares of common stock for conversion under the Note. An agreement between MTR and SIH, dated January 22, 2014 (the Second MTR Agreement), "irrevocably" instructed MTR to reserve 315,000 shares of common stock for issuance upon full conversion of Note 2. The Second MTR Agreement provided:

> "Upon receipt of a properly executed Conversion Notice and an opinion of counsel to the Investor [plaintiff], the Transfer Agent [MTR] shall within three (3) Trading days issue and surrender to a common carrier for overnight delivery to the address specified in the Conversion Notice, a certificate registered in the name of [plaintiff] for the number of shares of common stock to which [plaintiff] is entitled as set forth in the Conversion Notice without the need for any action or confirmation by [SIH] with respect to the issuance of Common Stock pursuant to any Conversion Notices received from [plaintiff]." (emphasis in the original)

The Second MTR Agreement recites the approval by SIH's Board of Directors of the "irrevocable instructions".

The Second MTR Agreement specified that the Notice of Conversion was to be executed by plaintiff and the opinion of counsel of plaintiff was to indicate that the issuance of the common shares upon conversion of Note 2 was exempt from registration under the Federal Securities Act of 1933 and that the shares of common stock of SIH issued to plaintiff pursuant to the Notice of Conversion were not restricted securities as defined by Rule 144 under the Securities Act and should be issued to plaintiff without any restrictive legend, or, if not, that the opinion of counsel should direct MTR to affix a restrictive legend.

The Second MTR Agreement expressly stated that plaintiff was "intended to be and is a third party beneficiary hereof." The Second MTR Agreement, was signed on behalf of SIH, by David C. Langle, as its chief financial officer, and signed, acknowledged, and agreed to by MTR, by John Ahearn, as MTR's partner.

(3)

Plaintiff asserts that on May 14, 2014, in connection with Note 1, it sent a Notice of Conversion by e-mail to SIH, pursuant to which SIH was obligated to convert the $36,500 principal amount and $1,946.67 in accrued interest, at a Conversion Price of $0.35755, into 107,526 shares of SIH common stock, the requisite opinion of counsel, dated May 15, 2014, to the effect that the shares of common stock of SIH to be issued to it pursuant to the Notice

of Conversion were not restricted securities as defined by Rule 144 and should be issued without a restrictive legend.

It is undisputed that defendants never issued any SIH shares of common stock to plaintiff in connection with its attempt to exercise its conversion rights under Note 1. Consequently, on September 12, 2014, plaintiff filed this action against defendants, alleging claims of breach of contract, specific performance, conversion, and recovery of attorneys' fees, as provided in Section 4.5 of Note 1, arising from defendants' failure to honor the terms of Note 1 and the Securities Purchase Agreement.

In addition, plaintiff asserts that on October 15, 2014, in connection with Note 2, it submitted to SIH, by e-mail, a Notice of Conversion, pursuant to which SIH was obligated to convert $32,345 in principal and $2,348.34 in accrued interest, at a conversion price of $.0075, into 4,625,778 shares of SIH stock, leaving a principal balance on the Note of $9,655. It further asserts that, also on October 15, 2015, it submitted to MTR the Notice of Conversion with respect to Note 2 and the requisite opinion of counsel. It is undisputed that defendants never issued any SIH shares of common stock to plaintiff with respect to its attempt to exercise its conversion rights under Note 2.

On November 3, 2014, defendants filed their answer to plaintiff's complaint with respect to Note 1, which contained affirmative defenses of failure to state a cause of action, laches, statute of frauds and/or waiver, unenforceability because the contract was an adhesion contract or an illusory contract, usury, impermissibility of punitive damages, unclean hands,

and improperly named parties. On November 17, 2014, plaintiff filed an amended complaint, which added claims arising from defendants' failure to honor the terms of Note 2.

Plaintiff's amended complaint alleges 10 causes of action, which include a first cause of action for specific performance of the Securities Purchase Agreement and Note 1, a second cause of action for breach of contract against SIH with respect to Note 1, a third cause of action for breach of contract against MTR with respect to the First MTR Agreement, a fourth cause of action for conversion against SIH with respect to Note 1, a fifth cause of action for specific performance of Note 2, a sixth cause of action for breach of contract against SIH with respect to its conversion rights under Note 2, a seventh cause of action for breach of contract against MTR under the Second MTR Agreement, an eighth cause of action for conversion against SIH with respect to Note 2, a ninth cause of action for breach of contract against SIH with respect to the balance owed under Note 2, and a tenth cause of action for the recovery of attorneys' fees incurred by it with respect to the costs of collection in connection with Note 1 and Note 2. On December 10, 2014, defendants filed their answer to the amended complaint. Defendants' answer contains no affirmative defenses.

On May 6, 2015, plaintiff filed its instant motion for partial summary judgment with respect to its second, third, fourth, sixth, seventh, eighth, and tenth causes of action. Asserting that they inadvertently failed to interpose affirmative defenses in their answer to plaintiff's amended complaint, on May 27, 2015, defendants filed their cross motion, seeking to amend their answer, annexing a proposed amended answer, which adds the affirmative

defenses that the amended complaint fails to state a claim upon which relief may be granted, that the amended complaint fails to state a claim for conversion, that the amended complaint fails to state a claim for punitive damages, that plaintiff's calculation of interest is usurious or based on a rate that is greater than allowed by law and constitutes criminal usury, and that the liquidated damages sought are unreasonable, grossly disproportionate to the actual damages, and constitute unenforceable penalties used to compel performance. Defendants, in their cross motion, further seek the dismissal of plaintiff's fourth and eighth causes of action for conversion and plaintiff's request for punitive damages, and the denial of plaintiff's motion.

**DISCUSSION**

The court first addresses defendants' cross motion insofar as it seeks dismissal of plaintiff's fourth and eighth causes of action for conversion and its claims for punitive damages. Plaintiff's fourth cause of action for conversion alleges that as a result of its exercise of its conversion rights under Note 1, it became the rightful owner of 107,526 shares of SIH common stock. Plaintiff's eighth cause of action for conversion alleges that as a result of its exercise of its conversion rights under Note 2, it became the rightful owner of 4,625,778 shares of SIH common stock. Plaintiff, in both of these causes of action, alleges that it demanded that SIH issue these shares to it, but SIH refused to do so and had no legitimate justification for this refusal. Plaintiff contends that by refusing to issue these shares, SIH converted them, and that such conversion has not ended to date. It claims that

it lost the use of these shares during the period of conversion, causing it to sustain damages in excess of $80,000 with respect to Note 1 and damages in excess of $650,000 with respect to Note 2. It further claims that SIH acted with the intention of depriving it of its property or legal rights, and its actions were wanton, fraudulent, and shocking to the conscience, and perpetrated in complete disregard of its rights. In addition to compensatory damages, plaintiff seeks punitive damages in the sum of at least $250,000 with respect to each Note 1 and Note 2.

"'In order to establish a cause of action to recover damages for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights'" (*Mackey Reed Elec., Inc. v Morrone & Assoc., P.C.*, 125 AD3d 822, 824 [2d Dept 2015], quoting *Matter of Channel Mar. Sales, Inc. v City of New York*, 75 AD3d 600, 601 [2d Dept 2010]).

Here, it is undisputed that plaintiff never had ownership, possession or control of SIH's common stock prior to its alleged conversion, as required for a conversion claim (*see Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 884 [1st Dept 1982]). Rather, plaintiff merely had the right, under Note 1 and Note 2, to be repaid in money or in stock. "'The mere right to payment cannot be the basis for a cause of action alleging conversion'" (*Zendler Constr. Co., Inc. v First Adj. Group, Inc.*, 59 AD3d 439, 440 [2d Dept 2009],

quoting *Selinger Enters., Inc. v Cassuto*, 50 AD3d 766, 768 [2d Dept 2008]; *see also Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 592 [2d Dept 2007]).

Moreover, "'a claim to recover damages for conversion cannot be predicated on a mere breach of contract'" (*Wolf v National Council of Young Israel*, 264 AD2d 416, 417 [2d Dept 1999], quoting *Priolo Communications v MCI Telecom. Corp.*, 248 AD2d 453, 454 [2d Dept 1998]; *see also Weinstein v Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 642 [2d Dept 2011]; *MBL Life Assur. Corp. v 555 Realty Co.*, 240 AD2d 375, 376 [2d Dept 1997]; *Peters Griffin Woodward, Inc.*, 88 AD2d at 884). Plaintiff is alleging that defendants failed to repay two loans in shares of stock in breach of their contractual obligations. Thus, plaintiff's fourth and eighth causes of action for conversion are duplicative of plaintiff's second and sixth causes of action alleging breach of contract on the same grounds (*see AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568-569 [1st Dept 2009]). Since plaintiff's conversion claims do not allege a separate taking or stem from a wrong which is independent of its alleged breach of contract claims, plaintiff's fourth and eighth causes of action must be dismissed and plaintiff's motion, insofar as it seeks partial summary judgment in its favor on its fourth and eighth causes of action, must be denied (*see* CPLR 3212 [b]).

Inasmuch as these conversion claims must be dismissed and there is no alternative basis to find that defendants' conduct constitutes a tort, plaintiff's claim for punitive damages must likewise be dismissed. "Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights"

(*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]). Only "where [the] breach of contract also involves a fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations,' [are] punitive damages recoverable if the conduct was 'aimed at the public generally'" (*Rocanova*, 83 NY2d at 613, quoting *Walker v Sheldon*, 10 NY2d 401, 405 [1961]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]; *Alexander v. GEICO Ins. Co.*, 35 AD3d 989, 990 [3d Dept 2006]; *Varveris v. Hermitage Ins. Co.*, 24 AD3d 537, 538 [2d Dept 2005]; *Logan v Empire Blue Cross & Blue Shield*, 275 AD2d 187, 194 [2d Dept 2000], *lv dismissed* 96 NY2d 823 [2001]). "Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which [it] was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally" (*Rocanova*, 83 NY2d at 613).

Plaintiff does not allege any egregious tortious conduct or any pattern of conduct directed at the public generally. Rather, this action involves solely a contract dispute between private parties. Thus, plaintiff's claim for punitive damages is insufficient as a matter of law, and no punitive damages may be awarded (*see Rocanova*, 83 NY2d at 613).

Since the court has dismissed plaintiff's conversion claims and its claims for punitive damages, defendants' cross motion, insofar as it seek to amend their answer to assert the affirmative defenses that plaintiff's amended complaint fails to state a claim for conversion and fails to state a claim for punitive damages, is rendered moot.

With respect to plaintiff's motion for partial summary judgment on its breach of contract claims, on a motion for summary judgment, the movant must make a prima facie showing, by tendering evidentiary proof in admissible form, of its entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once the movant has made this prima facie showing, the burden shifts to the opposing party to demonstrate the existence of a genuine material triable issue of fact by producing evidentiary proof in admissible form (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to sustain this burden (*Zuckerman*, 49 NY2d at 562).

Here, plaintiff has submitted the affirmation of its managing member, Joseph Lerman, attesting to the facts as alleged by it in its amended complaint, along with copies of Note 1, Note 2, the Securities Purchase Agreement, the First MTR Agreement, and the Second MTR Agreement. It also has submitted copies of the Notices of Conversion and opinion of counsel letters, which, it asserts, defendants received. It is undisputed that no shares of SIH common stock were issued to plaintiff, nor were the loans otherwise repaid. In addition, pursuant to the express terms of the First MTR Agreement and the Second MTR Agreement, plaintiff was named as a third-party beneficiary. Thus, plaintiff has established, prima facie, its entitlement to judgment as a matter of law, shifting the burden to defendants to raise a genuine issue of fact.

In opposition to plaintiff's motion, defendants assert that it is undisputed that plaintiff failed to sign and deliver the Securities Purchase Agreement, and that, pursuant to section 6 (a) of the Securities Purchase Agreement, this was a condition precedent to transferring the shares of common stock under Note 1. Section 6 of the Securities Purchase Agreement, entitled "Conditions to the Company's Obligation to Sell," insofar as relevant to defendants' argument, provided:

> "The obligation of [SIH] hereunder ***to issue and sell the Note to [plaintiff] at the Closing*** is subject to the satisfaction, at or before the Closing Date of each of the following conditions thereto, provided that these conditions are for [SIH's] sole benefit and may be waived by [SIH] at any time in its sole discretion:
> a. [Plaintiff] shall have executed this Agreement and delivered the same to [SIH].
> b. [Plaintiff] shall have delivered the Purchase Price in accordance with Section 1 (b) above.
> c. The representations and warranties of [plaintiff] shall be true and correct in all material respects as of the date when made and as of the Closing Date as though made at that time . . . and [plaintiff] shall have performed, satisfied and complied in all material respects with . . . conditions required by this Agreement . . . ***at or prior to the Closing Date*** (emphasis added).

It is well established that "[a] condition precedent is an 'act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises'" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995], citing Calamari and Perillo, Contracts § 11-2, at 438 [3d ed]; *see also Ashkenazi v Kent S. Assoc.*, LLC, 51 AD3d 611, 611 [2d Dept 2008]; *Klewin Bldg. Co., Inc. v Heritage Plumbing & Heating, Inc.*, 42 AD3d 559, 560 [2d Dept 2007]; *Preferred*

*Mtge. Brokers v Byfield*, 282 AD2d 589, 590 [2d Dept 2001]). "[I]t is for the court to decide, as a matter of law, whether an express condition precedent to performance exists under the terms of a contract" (*Rooney v Slomowitz*, 11 AD3d 864, 865 [3d Dept 2004]; *see also Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]).

"As a general rule, it must clearly appear from the agreement itself that the parties intended a provision to operate as a condition precedent" (*Kass v Kass*, 235 AD2d 150, 159 [2d Dept 1997], *affd* 91 NY2d 554 [1998]). "If the language is in any way ambiguous, the law does not favor a construction which creates a condition precedent" (*Ashkenazi*, 51 AD3d at 611; *see also Kass*, 235 AD2d at 159; *Manning v Michaels*, 149 AD2d 897, 898 [3d Dept 1989]). "A contractual duty will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition" (*Ashkenazi*, 51 AD3d at 611-612; *see also Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992]; *Roan/Meyers Assoc., L.P. v CT Holdings, Inc.*, 26 AD3d 295, 296 [1st Dept 2006]; *Rooney*, 11 AD3d at 865).

Here, by its express terms, section 6 (a) of the Securities Purchase Agreement required execution and delivery by plaintiff of the Securities Purchase Agreement as a condition only to SIH's sale of Note 1 to plaintiff at the closing. Section 1 (a), entitled "Purchase of Note," provided that "[o]n the Closing Date (as defined below), [SIF] shall issue and sell to [plaintiff] and [plaintiff] agrees to purchase from [SIF the] principal amount of Note," which is set forth therein as $36,500.

Section 1 (c), entitled "Closing Date," provided:

> "Subject to the satisfaction (or written waiver) of the conditions thereto set forth in Section 6 and Section 7 below, the date and time of the issuance and sale of the Note pursuant to this Agreement (the 'Closing Date') shall be 12:00 noon, Eastern Standard Time on September 23, 2013, or such other mutually agreed upon time. The closing of the transactions contemplated by this Agreement (the 'Closing') shall occur on the Closing Date at such location as may be agreed to by the parties."

It is undisputed that the closing took place on September 20, 2013 and SIH received the $36,500 in funds. As set forth above, section 6 of the Securities Purchase Agreement specifically provided that SIH could waive the listed conditions at any time. While defendants point to section 8 (e) of the Securities Purchase Agreement, this section provided that "[n]o provision of this Agreement may be waived or amended other than by an instrument in writing signed by the majority in interest of the Buyer [i.e., plaintiff]," and, thus, did not pertain to a waiver by SIH.

"When interpreting a contract, the construction arrived at should give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized" (*Fernandez v Price*, 63 AD3d 672, 675 [2d Dept 2009]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *McCabe v Witteveen*, 34 AD3d 652, 654 [2d Dept 2006]). "'A court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning'" (*Matter of Bokor v Markel*, 104 AD3d 683, 683 [2d Dept

2013], quoting *Matter of Tillim v Fuks*, 221 AD2d 642, 643 [2d Dept 1995]). The court, under the guise of construction, cannot read an express condition into an agreement (*see Camaiore v Farance*, 50 AD3d 471, 471-472 [1st Dept 2008]). Thus, the court cannot find that the condition set forth in section 6 (a) of the Securities Purchase Agreement, which was a condition to be satisfied at or before the closing date, was a condition that pertained to SIH's subsequent obligation to convert the debt into stock. Rather, the plain language of this provision unambiguously states that it is a condition to the closing, which took place. Therefore, this condition was waived by SIH's closing on the sale of Note 1 and its acceptance of the $36,500.

Defendants additionally argue plaintiff failed to submit a Securities Purchase Agreement for Note 2. However, there was no securities purchase agreement for Note 2, but only a Debt Purchase Agreement, which indicated that Note 2 was a replacement note in favor of plaintiff, replacing a convertible note given by SIH to CLSS. Contrary to defendants' argument, plaintiff was not required to attach an original assignment of Note 2 because it was not assigned from anyone, but, rather, was an original replacement note. While defendants also assert that SIH failed to sign Note 2, only the borrower is required to execute a note, not the lender (*see generally Prince v Schacher*, 125 AD3d 626, 627 [2d Dept 2015]).

Defendants further deny that plaintiff sent the Notices of Conversion in compliance with the two loans, and contend that plaintiff failed to submit proof of the delivery.

Defendants have submitted the affidavit of Keith Houlihan (Houlihan), SIH's chief executive officer. Houlihan asserts that while plaintiff alleges that it sent Notices of Conversion and opinions of counsel in 2014 on May 14 and 15, June 24, July 8, and October 15, he did not receive these notices or opinions of counsel, and he is not aware of anyone at SIH who received these documents in proper form. He states that the opinions of counsel were not in proper form because plaintiff's counsel stated that he relied upon plaintiff's representations to prepare such opinions, and since plaintiff did not sign the Securities Purchase Agreement, no representations were made to be relied upon.

Defendants have also submitted the affidavit of Ahearn, who, as noted above, is a partner of MTR. Ahearn states that while plaintiff alleges that it sent Notices of Conversion and opinions of counsel on May 14, 2014, June 24, 2014, July 8, 2014, and October 15, 2014, neither he nor anyone from MTR received **all** of these Notices of Conversion or opinions of counsel. He complains that Lerman, in his affirmation, did not state the name of the person who sent these documents or provide proof of delivery. He further points to the fact that there was no Notice of Conversion dated July 8, 2014 attached to plaintiff's motion.

In response, plaintiff has submitted the notarized affidavit of Tomer Tal (Tal), an attorney admitted to the California State bar, who attests that he was counsel for plaintiff in connection with Note 1 and Note 2 and in connection with plaintiff's exercise of its conversion rights. Tal states that he issued the required opinions of counsel and specifically attests that, on May 14, 2014, he sent, by e-mail to Ahearn, the president of MTR, with a

copy to Craig Seizer (Seizer) of SIH, several documents, including Note 1, the Notice of Conversion thereunder, and his opinion letter. This e-mail, dated May 14, 2014 at 4:31 P.M., specified these documents as being attached to that e-mail. Tal further attests that on October 15, 2014, he sent by e-mail to Ahearn, with a copy to Langle, the chief financial officer of SIH, several documents, including Note 2, the Notice of Conversion thereunder, and his opinion letter. This e-mail, dated October 14, 2014 at 3:00 P.M., specified these documents as being attached to that e-mail.

Defendants, in response, argue that there is no business records affidavit supporting the two e-mails sent by Tal, and his out-of-state affidavit does not comply with New York law, referencing CPLR 2309. However, Tal's affidavit is duly acknowledged by a notary public licensed in California. Thus, it is admissible (*see Midfirst Bank v Agho*, 121 AD3d 343, 351 [2d Dept 2014]). Furthermore, "the absence of a certificate of conformity is not, in and of itself, a fatal defect (*id.; see also Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc.*, 110 AD3d 680, 682 [2d Dept 2013]; *Bey v Neuman*, 100 AD3d 581, 582 [2d Dept 2012]; *Fredette v Town of Southampton*, 95 AD3d 940, 942 [2d Dept 2012], *lv denied* 19 NY3d 811 [2012]). Even if a certificate of conformity is inadequate or missing, such a defect may be disregarded where no substantial right of the defendants is prejudiced ( *id.; see also Matos v Salem Truck Leasing*, 105 AD3d 916, 917 [2d Dept 2013]; *Rivers v Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012]).

In reply, defendants do not submit any affidavits from Seizer or Langle denying receipt of these e-mails, and no further affidavit is submitted by Ahearn denying the receipt of these e-mails. Notably, Ahearn's affidavit is carefully crafted so as to deny that he received all (i.e., every one) of the alleged four Notices of Conversion, but does not deny that he received the two Notices of Conversion upon which plaintiff bases its claims. In this regard, the court notes that the June 24, 2014 Notice of Conversion was sent after plaintiff had already served the May 15, 2014 Notice of Conversion, and, as such, would have been ineffective as plaintiff had already exercised its conversion rights. Similarly, any attempt to convert $10,000 of the principal amount of Note 1 plus interest on July 8, 2014 (for which no Notice of Conversion has been submitted) would have similarly been a nullity.

Defendants further argue that the opinions of counsel are deficient because they relied upon the representations of plaintiff. This argument is specious as the opinion letters recite that plaintiff represented that the shares were to be issued upon conversion of indebtedness owed to plaintiff for debt that arose for good and valid consideration as reflected in the Notes. Defendants do not explain how the opinion letters, which were for the purpose of supporting the removal of the restricted securities legend, were not in the form, substance, and scope customary for opinions of counsel in comparable transactions or how it did not comply with section 1.5 of Note 1 or of any requirement in Note 2. No expert opinion has been offered that would support defendants' claims of such deficiency. Thus, as to plaintiff's breach of contract claims, the court does not find that defendants have raised any genuine

issues of fact with respect to the receipt of the Notice of Conversion and the opinions of counsel or the adequacy of the opinions of counsel.

Defendants additionally contend that there is an issue of fact as to plaintiff's intent to charge a criminally usurious interest rate. Penal Law § 190.40 provides that "[a] person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he [or she] knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period." It further provides that "[c]riminal usury in the second degree is a class E felony."

Criminally usurious contracts are unenforceable (*see* General Obligations Law § 5-521 [3], § 5-511; Penal Law § 190.40; *Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 [1992]; *Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 741 n 2 [1992]). "A usurious contract is void and relieves the plaintiff of the obligation to repay principal and interest thereon" (*Abir v Malky, Inc.*, 59 AD3d 646, 649 [2d Dept 2009]; *see also* General Obligations Law § 5-511; *Seidel*, 79 NY2d at 740; *Venables v Sagona*, 85 AD3d 904, 905 [2d Dept 2011]; *Stanley Weisz, P.C. Retirement Plan v NCHD Assoc.*, 237 AD2d 276, 277 [2d Dept 1997]; *Fareri v Rain's Intl.*, 187 AD2d 481, 482 [2d Dept 1992]). However, "[t]here is a strong presumption against the finding of usurious intent" (*Lehman v Roseanne Invs. Corp.*, 106 AD2d 617, 618 [2d Dept 1984]; see also *Zhavoronkin v Koutmine*, 52 AD3d 597, 598 [2d Dept 2008]; *Richardson v Brisard & Brisard, Inc.*, 36 Misc 3d 1211[A], 2012 NY

Slip Op 51250[U], *4 [Sup Ct, Kings County 2012]). "[A] loan is not usurious merely because there is a possibility that the lender will receive more than the legal rate of interest" (*Lehman*, 106 AD2d at 618 [2d Dept 1984]).

"Where a usurious rate is not found on the face of the note, the defendant has the burden of proving that [the] plaintiff intended for the transaction to be usurious at the inception" (*Realty Holdings of America, LLC v Stein*, 2013 NY Slip Op. 32945[U], *2 [Sup Ct, NY County 2013]). Note 1 and Note 2 are not criminally usurious on their faces. Note 1 provided for 8% interest per annum, and Note 2 provided for 10% interest per annum. The mere fact that plaintiff's return would increase upon its conversion to shares of stock does not demonstrate a usurious intent (*see AJW Partners, LLC v Cyberlux Corp.*, 21 Misc 3d 1109[A], 2008 NY Slip Op 52020[U], *5 [Sup Ct, NY County 2008]). Moreover, defendants' proposed affirmative defense of usury, which it seeks to add by amendment, does not allege usurious intent.

It is further noted that "[u]sury laws apply only to loans or forbearances, not investments" (*Seidel*, 79 NY2d at 744). Although the initial transactions were loans, which were clearly not usurious, as plaintiff notes, the Securities Purchase Agreement provided that, upon conversion, SIH was selling securities under Note 1 to it as an "investor." The conversion to stock would convert plaintiff from a lender to an investor with the right to share in the profits and losses of SIH. Notably, the First MTR Agreement with respect to Note 1 and the Second MTR Agreement with respect to Note 2 refer to plaintiff as an

"investor". While a loan may not be disguised as an investment as a cover for usury (*see e.g. Bouffard v Befese, LLC*, 111 AD3d 866, 869 [2d Dept 2013]),the Notes refer to SIH as the borrower, and only upon conversion at plaintiff's election would SIH's debt to plaintiff become an investment, upon which plaintiff took the risk that the stock could be completely worthless. Where the transaction provides for the purchase of shares of stock and the price of stock fluctuates so that it is unclear if the interest rate would exceed the legal rate of interest, no usury exists (*see Phlo Corp. v Stevens*, 2001 WL 1313387 [SD NY 2001], *affd* 62 Fed Appx 377 [2d Cir 2003]).

To the extent that defendants base their proposed defense of usury on the liquidated damages clause, "'the defense of usury does not apply where . . . the terms of . . . [a] note impose a rate of interest in excess of the statutory maximum only after default or maturity'" (*Kraus v Mendelsohn*, 97 AD3d 641, 641 [2d Dept 2013], quoting *Miller Planning Corp. v Wells*, 253 AD2d 859, 860 [2d Dept 1998]).

Thus, since defendants cannot demonstrate a usurious intent at the time of inception, they have failed to raise a triable issue of fact as to criminal usury. Where a proposed affirmative defense is palpably insufficient or patently lacking in merit, leave to amend the answer to assert it must be denied (*see Krigsman v Cyngiel*, 130 AD3d 786, 787 [2d Dept 2015]). Thus, since defendants' proposed affirmative defense of usury is devoid of merit, defendants' cross motion, insofar as it seeks to amend their answer to add this defense must be denied.

Inasmuch as SIH has failed to raise a genuine issue of fact as to its failure to abide by the terms of Note 1 and Note 2, summary judgment on the issue of liability with respect to plaintiff's second and sixth causes of action for breach of contract as against SIH must be granted. In addition, since the express terms of the First MTR Agreement and the Second MTR Agreement provided that plaintiff was a third-party beneficiary of those Agreements and no genuine issue of fact has been raised as to MTR's breach of those Agreements by its failure to issue the SIH shares to plaintiff, plaintiff is entitled to summary judgment on the issue of liability with respect to its third and seventh causes of action for breach of contract as against MTR.

With respect to the issue of damages, plaintiff seeks compensatory damages, as well as liquidated damages pursuant to liquidated damage clauses in Note 1 and Note 2.[1] Plaintiff asserts that if defendants had honored its Notice of Conversion, it would have received 107,526 shares of SIH common stock by May 19, 2014 for Note 1 (the third day after the May 15, 2014 Notice of Conversion). It states that on that day, the weighted average price of SIH common stock (based on volume and trading price) was $0.853909 per share, supporting this claim for compensatory damages with submission of Bloomberg stock quotations. This price is reduced to reflect a subsequent stock split by SIH in February 2015, when SIH issued one share of common stock in exchange for 125 shares. Plaintiff contends that, after recognizing this stock split, the weighted average price of the SIH shares on May

[1]As discussed above, plaintiff's claim for punitive damages must be dismissed.

19, 2014 was $0.68 (85.3909/125 = $0.68 per share). It claims that this equates to damages of $73,117.68 (107,526 x $0.68 per share).

As to Note 2, plaintiff asserts that if defendants had honored its Notice of Conversion, it would have received 4,625,778 shares of SIH common stock by October 17, 2014. It states that on that date, the weighted average price for SIH stock was $0.112 per share, as evidenced by the Bloomberg stock quotations and the subsequent SIH stock split in the ratio of 125 to 1 shares (14.0053/125 = $0.112). It claims that this equates to damages of $518,087.13 (4,625,778 shares x $0.112 per share).

Defendants, in opposition, point out that the Bloomberg price quotations relied upon by plaintiff in its calculations are not in admissible form. Furthermore, it is unclear how plaintiff arrived at these calculations of its damages or that plaintiff is entitled to the amounts requested. Thus, there must be an inquest as to the amount of actual damages sustained by plaintiff to which it is entitled (*see Rockmore Inv. Master Fund Ltd. v. Power 3 Medical Products, Inc.*, 30 Misc 3d 1206[A], 2010 NY Slip Op 52309[U], *5 [Sup Ct, NY County 2010]).

Plaintiff also seeks additional damages based upon liquidated damages clauses contained in section 1.4 (g) of Note 1 and section 8 (l) of Note 2. Section 1.4 (g) of Note 1 provided that the parties had agreed that "if delivery of the Common Stock issuable upon conversion of this Note [were] more than three (3) business days after the Deadline . . . [SIH was required to] pay to [plaintiff] $2,000 per day in cash, for each day beyond the Deadline

that [SIH] fail[ed] to deliver such Common Stock." Such cash amount was required to be paid to plaintiff by the fifth day of the month following the month in which it accrued, and added to the principal amount of Note 1, in which event, interest was to accrue thereon in accordance with the terms of Note 1, and such additional principal amount was to be convertible into common stock. This section further provided that SIH "agree[d] that the right to convert [wa]s a valuable right to [plaintiff]," and that "[t]he damages resulting from a failure, attempt to frustrate, [or] interference with such conversion right are difficult if not impossible to qualify [sic]," and that "[a]ccordingly the parties acknowledge that the liquidated provision contained in this Section 1.4 (g) are justified."

In addition, section 4.7 of Note 1, captioned "Certain Amounts", provided:

> "Whenever pursuant to this Note the [SIH] is required to pay an amount in excess of the outstanding principal amount (or the portion thereof required to be paid at that time) plus accrued and unpaid interest plus Default Interest on such interest, [SIH] and the Holder agree that the actual damages to the Holder from the receipt of cash payment on this Note may be difficult to determine and the amount to be so paid by [SIH] represents stipulated damages and not a penalty and is intended to compensate the Holder in part for loss of the opportunity to convert this Note and to earn a return from the sale of shares of Common Stock acquired upon version of this Note at a price in excess of the price paid for such shares pursuant to this Note. [SIH] and the Holder hereby agree that such amount of stipulated damages is not plainly disproportionate to the possible loss to the Holder from the receipt of a cash payment without the opportunity to convert this Note into shares of Common Stock."

Section 8 (l) of Note 2 provided that in the event of a breach of section 8 (k) (which required that SIH deliver to plaintiff the common stock pursuant to section 4 without

restrictive legend within three business days of its receipt of a Notice of Conversion), "the penalty shall be $250 per day [that] the shares are not issued beginning on the 4th day after the conversion notice was delivered to [SIH]," and that "[t]his penalty shall increase to $500 per day beginning on the 10th day."

Defendants contend that there is an issue of fact as to the reasonableness and enforceability of these liquidated damages clauses in Note 1 and Note 2. They assert that these clauses, by their plain language, were used to compel performance by having a penalty for non-performance.

"As a general matter parties are free to agree to a liquidated damages clause 'provided that the clause is neither unconscionable nor contrary to public policy'" (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 536 [2014], quoting *Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 424 [1977]). "Liquidated damages that constitute a penalty, however, violate public policy, and are unenforceable" (*172 Van Duzer Realty Corp.*, 24 NY3d at 536; *see also Truck Rent-A-Ctr.*, 41 NY2d at 424; *City of Rye v Public Serv. Mut. Ins. Co.*, 34 NY2d 470, 472-473 [1974]). "A provision which requires damages 'grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable'" (*172 Van Duzer Realty Corp.*, 24 NY3d at 536, quoting *Truck Rent-A-Ctr.*, 41 NY2d at 424).

"Whether a contractual provision represents an enforceable liquidated damages provision or an unenforceable penalty is a question of law" (*United Tit. Agency, LLC v*

*Surfside-3 Mar., Inc.*, 65 AD3d 1134, 1135 [2d Dept 2009]; *see also Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120 [2006], *rearg denied* 7 NY3d 784 [2006]; *Truck Rent-A-Ctr.*, 41 NY2d at 424). "The burden is on the party seeking to avoid liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]). "The party challenging a liquidated damages clause must establish either that actual damages were readily ascertainable at the time the contract was entered into or that the liquidated damages were conspicuously disproportionate to foreseeable or probable losses" (*United Tit. Agency, LLC*, 65 AD3d at 1135; *see also Bates Adv. USA, Inc.*, 7 NY3d at 120).

"'If the [liquidated damages] clause is rejected as being a penalty, the recovery is limited to actual damages proven'" (*JMD Holding Corp.*, 4 NY3d at 380, quoting *Brecher v Laikin*, 430 F Supp 103, 106 [SD NY 1977]). "[W]here a liquidated damages provision is an unenforceable penalty, 'the rest of the agreement stands, and the injured party is remitted to the conventional damage remedy for breach of that agreement, just as if the provision had not been included'" (*JMD Holding Corp.*, 4 NY3d at 380, quoting 3 Farnsworth, Contracts § 12.18, at 304 [3d ed]).

While it is recited in section 4.7 of Note 1 that plaintiff and SIH "agree[d] that [the] amount of stipulated damages [wa]s not plainly disproportionate to the possible loss to [plaintiff] from the receipt of a cash payment without the opportunity to convert this Note into shares of Common Stock," plaintiff has "by no means conclusively demonstrate[d] the

absence of gross disproportionality" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 396-397 [1999]; *see also Genesee Val. Trust Co. v Waterford Group, LLC*, 130 AD3d 1555, 1558 [4th Dept 2015]). Plaintiff demands, in addition to compensatory damages of $73,117.68 for failure to timely convert the $36,500 loan under Note 1, liquidated or "stipulated" damages in excess of $682,000, for a total of $755,117.68. Plaintiff also seeks to recover for defendants' failure to convert $32,345, plus interest, on Note 2, $518,087.13 in compensatory damages, in addition to the liquidated sum of $91,000, for a total of $609,087.13. This claim would represent a double recovery for breach of the same contractual obligations in violation of public policy, in addition to such sums being grossly disproportionate to the actual potential loss. Although the parties may have been unable to compute the amount of actual anticipated damages which would result from the inability to convert the loan to stock, the liquidated damages of $682,000 under Note 1 and $91,000 under Note 2, are so far in excess of the principal loan amounts of $36,000 and $42,000 of Note 1 and Note 2, respectively, and are so conspicuously and grossly disproportionate to the probable loss, that there can be no question that these liquidated damage clauses were clearly designed to penalize SIH (*see Del Nero v Colvin*, 111 AD3d 1250, 1252 [4th Dept 2013], *lv denied* 114 AD3d 1226 [2014]; *Ford v Cardiovascular Specialists, P.C.*, 103 AD3d 1222, 1223 [4th Dept 2013]; *Borek, Stockel & Co. v Slevira*, 203 AD2d 314, 314 [2d Dept 1994]). It's noted that these damages are expressly characterized as a "penalty" in Note 2, section 8(l). These liquidated damages

clauses are therefore unenforceable as a matter of law, and plaintiff is limited to recovery of the actual damages sustained, which shall be determined by the trier of fact.

Plaintiff also seeks partial summary judgment as to liability upon its tenth cause of action for the recovery of attorneys' fees and costs incurred in connection with recovery on Note 1 and Note 2. Section 4.5 of Note 1 provided that if there were a default in the payment of Note 1, SIH would pay plaintiff the costs of collection, including reasonable attorneys' fees. Section 8 (a) of the Securities Purchase Agreement similarly provided that the prevailing party in any action concerning the transactions contemplated by that agreement "shall be entitled to recover from the other party its reasonable attorneys' fees and costs." In section 7 of Note 2, SIH agreed "to pay all costs and expenses, including reasonable attorneys' fees and expenses, which may be incurred by [plaintiff] in collecting any amount due under this Note." Section 8 (l) of Note 2 provided that if plaintiff commenced an action to enforce any provision of Note 2, SIH would be entitled to reimbursement of its attorneys' fees.

Pursuant to these provisions, plaintiff is entitled to recover its reasonable attorneys' fees and costs incurred in prosecuting this action. The amount of such reasonable attorneys' fees and costs must be determined at a hearing (*see CIT Group/Equip. Fin., Inc. v Riddle*, 31 AD3d 477, 478 [2d Dept 2006]; *MBNA Am. Bank v Paradise*, 285 AD2d 586, 586 [2d Dept 2001]). Thus, the amount of these attorneys' fees and costs will be simultaneously determined at the hearing to determine plaintiff's damages.

## CONCLUSION

Accordingly, plaintiff's motion for partial summary judgment in its favor is granted on the issue of liability with respect to its second, third, sixth, seventh, and tenth causes of action, and is otherwise denied. Defendants' cross motion is granted to the extent that it seeks dismissal of plaintiff's fourth and eighth causes of action for conversion and plaintiff's request for punitive damages. Defendants' cross motion, insofar as it seeks leave to amend their answer to add the affirmative defenses that plaintiff's amended complaint fails to state a claim of conversion and fails to state a claim for punitive damages, and that the liquidated damages sought constitute unenforceable penalties, is rendered moot by the dismissal of plaintiff's conversion claims, plaintiff's claims for punitive damages, and plaintiff's claims for liquidated damages and is denied. Defendants' cross motion, insofar as it seeks leave to amend their answer to assert the affirmative defenses of criminal usury and failure to state a claim upon which relief may be granted, is denied. A trial on damages shall be held to compute the amount of compensatory damages and attorneys' fees and costs due to plaintiff. The parties shall conduct discovery regarding such damages prior to trial.

This constitutes the decision, order, and judgment of the court.

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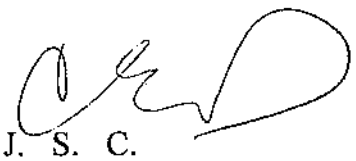

J. S. C.

HON. CAROLYN E. DEMAREST