IN THE COURT OF COMMON PLEAS
HURON COUNTY, OHIO
GENERAL DIVISION

JAMES STAVA,	)	Case No. CVH 2019-0574
	)	
Plaintiff,	)	Judge James W. Conway
	)	
v.	)	
	)	**REPLY IN SUPPORT OF PLAINTIFF**
GUARDIAN MANFUACTURING CO. LLC,	)	**JAMES STAVA'S SUPPLEMENTAL**
	)	**MOTION FOR SUMMARY JUDGMENT**
Defendant.	)	

In his opening brief, Plaintiff James Stava explained that Defendant had breached the terms of the at-issue promissory notes, that Defendant was not entitled to *yet another* extension of the deadline for repayment of the notes, and that Mr. Stava was entitled to a money judgment consisting of principal note balances plus contractual interest accrued to date, additional pre- and post-judgment interest, and litigation costs including attorneys' fees. In its opposition, Defendant Guardian Manufacturing Company LLC ("Guardian" or "Defendant") does not contest, and thereby concedes, (1) that, if Guardian's latest attempted extension is not valid, it has breached the terms of the promissory notes, the entirety of which are now due, and that (2) if such is the case, damages are equal to principal plus interest, attorneys' fees, and costs of suit. The core dispute, then, as anticipated by Mr. Stava's opening brief, is whether Guardian was entitled to extend the notes until July 28, 2020. As discussed below and in Mr. Stava's opening brief, it was not. That should be the end of the matter.

Consistent with past behavior, however, Defendant also seeks to throw additional sand in the gears in a further attempt to delay payment of its past-due debt by raising several other arguments that are factually inaccurate and/or legally inconsequential. In short, the supplemental

motion for summary judgment turns on the extension issue. And because the extension is not valid, summary judgment should be granted in Mr. Stava's favor.

ARGUMENT

Perhaps the most noteworthy aspect of Defendant's brief in opposition to Mr. Stava's motion for summary judgment is what it does *not* say. Defendant's brief does not argue that the Notes and Amendments[1] at issue are invalid and does not deny that it has not paid a penny in either principal or interest on the Notes. This speaks volumes and weighs heavily in favor of a grant of summary judgment to Mr. Stava. Instead of contesting the core merits of Mr. Stava's position, Defendant seeks to further distract and delay, instead raising new tangential issues in an attempt to postpone the inevitable. Along these same lines, Defendant primarily argues that—despite the plain, absolute language of the First and Second Amendments—it is entitled to an *additional* extension of the Notes. But these arguments lack merit, and thus summary judgment should be granted in Mr. Stava's favor.

A. Casey's Purported Attempt to "Extend" the Term of the Notes Past January 28, 2020 Remains Invalid.

1. The Notes as Amended Plainly Do Not Allow for Unilateral Extension by Defendant.

As explained in Mr. Stava's opening brief, the extension issue here is straightforward. The original Notes provided the following regarding the timing of repayment: "Principal, fees, and interest shall be payable in one-time payment on or before [31 November, 2017 (First Note); 15 February, 2018 (Second Note)]. This loan is extendable at Guardian's option, six months for an

[1] Unless otherwise indicated, capitalized terms in this brief have the meaning given to them in Mr. Stava's opening brief.

additional 1 (one) point fee, payable at that time." Ex. A,[2] April 2017 Note, at 1; Ex. B, July 2017 Note, at 1. This timing mechanism was replaced by the following in the First Amendment: "The outstanding balance of both said Notes shall now be due and payable *no later than* January 28, 2019." Ex. C, January 2018 Amendment, at 1 (emphasis added). And the Second Amendment likewise contained substantively identical language: "The outstanding balance of both Notes is now due and payable *no later than* January 28, 2020." Ex. D, January 2019 Amendment, at 1 (emphasis added). Thus, the Amendments scrapped the original timing mechanism for a new one.

Defendant responds that "[t]here is nothing magical about the language" used in the Amendments regarding the new deadline system. Opp. Br. at 7. Indeed, the provisions of the agreement are not "magical," but they *do* have a specific meaning and *are* enforceable. It is a well-established rule that "in interpreting . . . a contract, [courts] presume that the use of different words indicates an intention that the words possess different meanings." *Wood v. Simmers*, 10th Dist. Franklin No. 19AP-275, 2019-Ohio-4440, ¶ 19; *see Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74, 416 P.3d 389, ¶ 31. A timing provision stating that payment is to be made "on or before" a given date but that a due-date-extension is available is very different from a timing provision stating matter-of-factly that payment is due "no later than" a date certain.

Defendant's argument that the quoted language from the original notes can be parsed and subdivided so that the replacement "no later than" provision from the Amendments applies only to the date-specific first portion of the original Notes' timing provision but not to the due-date-extension language of the original Notes' timing provision also fails to even acknowledge, let alone satisfactorily address, Mr. Stava's argument in his opening brief that this forced

[2] All "Ex." references are to the lettered exhibits to the Affidavit of James J. Stava filed concurrently with Mr. Stava's opening brief (Exhibits A throught H) and the lettered exhibits to the Affidavit of James J. Stava filed concurrently with this reply brief (Exhibits I through P).

interpretation "would render the phrase 'no later than' mere surplusage."[3] Opening Br. at 9; *see, e.g.*, *State ex rel. Reams v. Stuart*, 127 Ohio St. 314, 316, 188 N.E. 393 (1933) (a reading of a contract that renders words "surplusage" is "contrary to the canon which requires that effect be given, if possible, to all the words of a document"); *Vitagraph, Inc. v. Am. Theatre Co.*, 77 Utah 71, 79, 291 P. 303 (1930) ("[i]n construing a contract . . . no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof"). In other words, if Defendant's stilted reading splitting the timing provision of the original Notes in two were allowed to stand, the post-Second Amendment timing provision would effectively (and wrongly) read, "The outstanding balance of both Notes is now due and payable no later than January 28, 2020. This note is extendable, at Guardian's option, six months . . . ." Such a provision would, of course, be nonsensical. A debt cannot *both* be due **no later than** a date certain *and also* be extendable beyond that date.

2. Even if the Extension Language Had Remained Intact, Still Defendant Failed to Heed It.

Additionally, even if, counterfactually, the due-date-extension language from the original Notes were valid, still Mr. Stava is entitled to summary judgment because, as pointed out in Mr. Stava's opening brief, Guardian failed to invoke the extension. Opening Br. at 11. Once again, the (superseded) due-date-extension language says that the loan "is extendable, at Guardian's option, six months for an additional 1 (one) point fee, payable at that time." Ex. A, April 2017 Note, at 1; Ex. B, July 2017 Note, at 1. But the purported fee paid to Mr. Stava was inadequate,

[3] This argument is also rendered invalid by Defendant's own admissions. Defendant admits that date-specific language from the original Notes and the due-date-extension language were both part of a single "topic"—"the Notes' due dates." Opp. Br. at 7. And Defendant elsewhere admits that "the Notes were amended with regard to . . . due dates." *Id.* at 6. Thus, Defendant inadvertently admits that the Amendments applied to both the date-specific *and* the due-date-extension language in the original Notes.

late, and not paid by Guardian. Thus, it was triply invalid. *See* Opening Br. at 11. In its response, Defendant argues that the fee was not inadequate because the "1 (one) percent fee" reference supposedly did not mean one percent of the actual loan balance at the time of the purported extension in January 2020 but instead meant one percent of the original principal borrowed years earlier. Opp. Br. at 9. The only support Defendant offers for this argument is no support at all—a flippant assertion that the one-point-fee language "referred to a fee on the principal, as is discussed earlier in the Notes." *Id.* But payment of a one-point fee at the time of origination, when the total loan balance was $100,000.00, is worlds apart from paying a one-point fee years later when the loan balance has grown substantially.

Defendant also argues that the one-point fee was not late because the Notes provide that it was "payable" on the applicable due date (January 28, 2020, by Defendant's theory) and "payable," Defendant says, is defined by *Merriam-Webster* as "that may, can or must be paid." Opp. Br. at 9. Therefore, according to Defendant, it was enough that the payment was mailed on January 28, 2020, and—again, according to Defendant—the fact that it was actually received days later is no matter. *See id.* But while "that may, can or must be paid" might be one colloquial definition of "payable," in the law, it is well established that "payable" has the exact same meaning as "due." *E.g.*, *Kohlbrand v. Ranieri*, 159 Ohio App.3d 140, 2005-Ohio-295, 823 N.E.2d 76, ¶ 16 (1st Dist.) (in legal documents, "*due* and *payable* mean the same thing"); *Carr v. Acacia Country Club Co.*, 2012-Ohio-1940, 970 N.E.2d 1075, ¶ 39 (8th Dist.), fn. 19 (same). And, of course, a debt due by a specific date must be *paid by* that date. Merely initiating the payment process is not enough. In the promissory note context, as in life, "the check is in the mail" is an insufficient response to meet such a fixed obligation.

Finally on this point, Casey *admits* in his affidavit that he, not Guardian, paid the (inadequate, late) extension fee, asserting that Guardian could not issue checks at the time due to an alleged "malware attack."[4] Casey Aff. ¶ 11. But the (no longer valid) due-date-extension language stated that the loan was extendable "at *Guardian's* option . . . for an additional 1 (one) point fee." Ex. A, April 2017 Note, at 1 (emphasis added); Ex. B, July 2017 Note, at 1 (emphasis added). Casey did *not* hold that option in his personal capacity.[5]

3. The Extension Language from the Notes and the Entire First Amendment Should Be Construed Against Defendant, as Casey Authored Both.

As discussed in Mr. Stava's opening brief and in parts A.1 and A.2 above, the due-date-extension language from the original Notes was supplanted by the "no later than" provision included in the Amendments; additionally, even if that were not the case, Defendant failed to trigger the defunct extension provision. If the Court concludes Mr. Stava is correct on either of these points, then the Court need go no further, and summary judgment should be entered in his favor on this issue. Indeed, Defendant shows its concern that the Court will in fact heed the plain language of the Amendments and end the case there when it argues that, "to the extent this Court finds the Notes and Amendments do not clearly support Guardian's interpretation [regarding the

[4] How a "malware attack" could prevent issuance of a paper check drawn on a company bank account is left entirely unexplained.

[5] Defendant also argues that any "technical breach" it committed was not consequential enough to "excuse further performance by the non-breaching party," by which Defendant apparently means excuse Mr. Stava from honoring the purported extension. Opp. Br. at 10. Defendant's and Casey's conduct with respect to the alleged extension, however, was no "technical breach" but rather a series of breaches evidencing a disregard for the sole mechanism by which an extension could (purportedly) be obtained. The payment was inadequate, late, and not even made by Defendant—the sole entity empowered (under Defendant's erroneous theory) to seek the extension. Indeed, the sole Utah case cited by Defendant on this "technical breach" issue, *id.*, confirms that refusal to make "timely" payment, by itself, is sufficient to excuse the non-breaching party from performance. *Saunders v. Sharp*, 840 P.2d 796, 806 (Utah App.1992) (discussing *McCarren v. Merrill*, 15 Utah 2d 179, 181, 389 P.2d 732 (1964)).

extension issue], the documents are at least ambiguous in that regard. The Notes and at least the First Amendment were prepared by Stava and should therefore be construed in Guardian's favor." Opp. Br. at 11.

This argument is meritless. First and foremost, the documents are not ambiguous but, rather, unequivocally support Mr. Stava's position (and even if they didn't, the fact that Defendant didn't comply with the defunct due-date-extension language puts an end to the case anyway). Second, Defendant's factual assertions—based solely on Casey's self-serving affidavit and without corroborating documentary support—are wrong. The original Notes were based on an earlier note, executed by Casey in 2011. Aff. ¶ 17. The template of that note was in fact provided by Mr. Stava to Casey. *Id.* ¶ 16. But it was *edited by Casey*. *Id.*; Ex. I ("redlined" version of note edited by Casey). And that edited version was the one that was ultimately executed. Ex. I at 6-7, 2011 Promissory Note. Moreover, that finalized, Casey-edited 2011 note served as the template for the 2017 Notes at issue in this case, except that *Casey added the due-date-extension language*. Aff. ¶ 17.

Further, Defendant's assertion that "the First Amendment"—that is, the very Amendment that supplanted the due-date-extension language and enacted the "no later than" requirement in its place—was "prepared by Stava and should therefore be construed in Guardian's favor," Opp. Br. at 11, is also false. Aff. ¶ 18; Ex. L, Casey Email and Draft First Amendment, at 1-2. With regard to the First Amendment, Casey rejected the draft prepared by Mr. Stava in its entirety and substituted a completely new draft of his own making. *Id.* That *Casey-drafted* version of the First Amendment was the one actually executed. Aff. ¶ 18; Ex. C, January 2018 Amendment, at 1. Given these realities, if the Court were to find the at-issue language of the Notes and Amendments

ambiguous, then it must, per the Casey-endorsed rule, *see* Opp. Br. at 10-11, construe the language in *Mr. Stava's* favor.[6]

4. Defendant's Breach-of-Good-Faith Argument Is Meritless.

In a last-ditch attempt to salvage its claim that summary judgment in Mr. Stava's favor should be denied, Defendant asserts that Mr. Stava is not entitled to repayment of the repeatedly extended, now-overdue Notes because Mr. Stava supposedly "procured [Defendant's] breach in violation of his implied covenant of good faith and fair dealing." Opp. Br. at 11. How Mr. Stava allegedly "procured" Defendant's breach is largely left a mystery.[7] Defendant's brief alleges in passing that Mr. Stava pressed the company to make distributions to investors. Opp. Br at 3, 12. Defendant attempts to insinuate that merely calling for distributions somehow caused Guardian to default on the Notes, *id.*, but stops short of actually alleging as much. And at any rate, whether or

[6] The assertions regarding authorship of the Notes and First Amendment are not the only falsehoods found in Defendant's brief and Casey's affidavit. *See also infra* at 16 (refuting false assertion that Mr. Stava did not inform Casey of the missed origination payment with respect to the July 2017 Note until January 2020). Still other falsehoods, because they do not bear directly on the outcome of this motion, do not merit the same level of discussion. For example, Defendant's brief asserts that Mr. Stava contacted Casey and "inquired as to whether Guardian could make use of additional financing." Opp. Br. at 2. Casey likewise swears that "[i]n 2017, Stava contacted me and inquired as to whether Defendant could make use of additional financing, which would be repaid with interest. I indicated the company would be interested in obtaining the financing." Casey Aff. ¶ 6. The statements give the illusion that Mr. Stava was eager to make the loans to Defendant and that Defendant, via Casey, was a reluctant—or at least, less-than-eager—borrower. But the email trail tells a story very different from Casey's self-serving, uncorroborated affidavit. *E.g.*, Ex. J, March 30, 2017 Email from Casey, at 1 (Casey: "You [Mr. Stava] noted normally folks *approaching you for a loan* do not set terms." (emphasis added)); Ex. P, April 5, 2017 Email from Casey, at 1 [redacted to avoid disclosure of business information] (Casey "approaching some members to cover . . . costs" because loan had yet to go through).

[7] Further, Defendant does not even attempt to explain *why* Mr. Stava would want to procure Defendant's breach, as breach would not provide (and, indeed, has not provided) *any* benefit to Mr. Stava.

not Mr. Stava or other investors did ever urge the company to make distributions, the issue is ultimately irrelevant, given that the distributions were never actually made.

Defendant also alleges that Mr. Stava breached the implied covenant of good faith and fair dealing in two ways: by joining in a suit brought by Defendant's minority owners to address severe misconduct perpetrated by Casey and, incredibly, by bringing *this* suit. Opp. Br. at 12. But as Defendant admits, the owners' suit was dismissed *without* prejudice, to allow the parties to pursue mediation (something Casey has steadfastly refused to do post-dismissal). The case was not decided on the merits, and that litigation, or a variation thereof, will likely be revived soon.[8] Moreover, in raising this breach-of-good faith argument, Defendant fails even to assert (indeed, there is no basis for asserting), let alone proffer evidence sufficient to create a "genuine issue of material fact," Civ.R. 56(C), that either the owners' suit or this suit was brought in bad faith.[9]

[8] Here and throughout its brief, Defendant misleadingly and variously asserts and insinuates that Mr. Stava has "abandoned" his claims that Defendant breached the Notes long prior to the January 2020 default thus accelerating the Notes—claims that were the initial basis for this suit. *E.g.*, Opp. Br. at 12 fn. 8. Such assertions are doubly misleading, as they ignore the procedural posture of this case and the clear statements made in Mr. Stava's opening brief, on the one hand, while also falsely insinuating that this suit was brought in bad faith, on the other. But as the Court well knows, the very purpose of the Court's granting Mr. Stava leave to file this supplemental motion for summary judgment was to allow the parties to focus their attention on the lapse of the January 2020 repayment deadline—given the relatively straightforward nature of that issue—in an effort to conserve the comparatively far greater resources of the Court and parties that would necessarily be expended in additional briefing regarding whether triggering events accelerating the notes had indeed occurred. As Mr. Stava stated in his opening brief, "the January 28, 2020 lapse of the final, fixed deadline for payment of the notes—an event that did not occur until after the First Amended Complaint and first round of summary judgment briefs were filed—drastically simplified the case." Opening Br. at 5. And as also made clear in Mr. Stava's opening brief, he "by no means waives his arguments regarding acceleration. Rather, he relies on his previously filed briefs on that issue for the time being and requests—and hereby moves, that, if this Court were for some reason to deny this present supplemental motion, his new counsel be permitted to file renewed briefing on the acceleration issue." *Id.* at 5 fn. 4.

[9] Defendant complains that "massive discovery" was sought in the investors' suit, Opp. Br. at 12, and Casey likewise laments that "the lawsuits created substantial unnecessary work" for him, Casey Aff. ¶ 10. The supposed "massive discovery" and "substantial unnecessary work"

Further, Defendant cites *no* authority for the proposition that bringing suit against a contracting party for legitimate grievances somehow excuses that party from its contractual obligations. Indeed, such a rule would lead to perverse results, as contracting parties would be incentivized to separately injure their counterparts and force suit in order to avoid performance under their contracts.

Similarly, as Defendant acknowledges,"[u]nder the covenant of good faith and fair dealing, each party impliedly promises that he will not *intentionally or purposely* do anything which will destroy or injure the other party's right to receive the fruits of the contract." *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998) (internal quotation marks omitted; emphasis added); *see* Opp. Br. at 11 (quoting the same). But Defendant's brief contains no allegation of intentional or purposeful wrongful conduct (or, indeed, any wrongful conduct) by Mr. Stava. Further, even under Defendant's theory, Mr. Stava has not done "anything which [would] destroy or injure the other party's right to receive the fruits of the contract." *Id.* The "fruit" or benefit to which Defendant was entitled under the Notes was receipt of $200,000 in funds from Mr. Stava with the right to forego repayment for a specified period of time provided certain conditions were met. *See* Ex. A, April 2017 Note, at 1; Ex. B, July 2017 Note, at 1. Defendant long ago received the $200,000 and has *certainly* received the time benefit of that money. Accordingly, Defendant has received all benefits to which it was entitled.

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apparently refer to the production of Guardian bank records in that case—records which Casey spent significant amounts of time illegally and gratuitously redacting. The fault for that "massive discovery" and "substantial . . . work" thus lies entirely with Casey, as he violated the Guardian operating agreement by withholding the documents in the first place and, then, by redacting them. Ex. M, Guardian Operating Agreement, § 5.1 ("Each Member shall have access to [company] books, records, and other materials at all reasonable times.").

Finally, in both cases cited in this section of Defendant's brief, the court at issue *rejected* the claim of breach of the covenant of good faith and fair dealing. In *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998), just quoted, Defendant neglects to mention that the Utah Supreme Court went on to state that it will not "construe the covenant [of good faith and fair dealing] to establish new, independent rights not agreed upon by the parties." *Id.* (internal quotation marks omitted). In other words, the court said that the covenant may only be used to enforce "express obligation[s]" under "the contract language" or to enforce "other obligation[s]" evidenced by the parties' "course of dealings." *Id.* The party claiming breach of the covenant in *Brown* failed to show an "express" or "course of dealings" obligation and thus summary judgment was granted to its opponent.[10] *Id.* at 956. The same result should obtain here. Defendant points to *nothing* in either the language of the Notes and Amendments or in the parties' course of dealings here that "establish[ed] a new, independent right" not to be sued for wrongdoing vis-à-vis the company's minority owners or vis-à-vis the Notes. Indeed, the Notes expressly contemplate the possibility of suit, providing that Defendant agreed "to pay [Mr. Stava] all costs, expenses and reasonable attorney's fees incurred in the collection of the sums due" under the Notes, "whether *through legal proceedings* or otherwise." Ex. A, April 2017 Note, at 1 (emphasis added); Ex. B, July 2017 Note, at 1 (emphasis added).

For all of these reasons and those stated in Mr. Stava's opening brief, Defendant's attempt to extend the Notes past their January 28, 2020 final due date remains invalid, and summary judgment should be granted in Mr. Stava's favor.

[10] A similar result was had in *Zion's Properties v. Holt*, 538 P.2d 1319, 1323 (Utah 1975), where the Utah Supreme Court affirmed the lower court's rejection of the breach-of-good-faith claim.

B. Mr. Stava Is the Proper Party to Bring Suit and, at Any Rate, Defendant Lacks Standing to Enforce the IRA Trust Agreement.

As with its arguments regarding the due-date-extension language, Defendant's argument that Mr. Stava "has not established that he is a person entitled to enforce the Notes" is meritless. Opp. Br. at 13. Defendant's sole argument on this point is that Mr. Stava is not "entitled to enforce the Notes" because Mr. Stava's IRA agreement provides that, in any litigation he initiates regarding his IRA assets, he "agree[s] to . . . "titl[e] the plaintiff as 'Equity Trust Company, Custodian FBO (Your Name) IRA." *Id.* at 13-14 (quoting Ex. H, Trust Agreement, § 10.8(a)).[11] But this ministerial agreement between Mr. Stava and Equity Trust Company is a mere housekeeping matter to which Defendant is a stranger. An agreement between Mr. Stava and Equity Trust regarding nomenclature has no bearing on whether Mr. Stava has the right to initiate this suit, and even if, counterfactually, it did, still Defendant, as a non-party and non-third-party-beneficiary to the trust agreement, would not have standing to assert Equity Trust Company's rights thereunder. In short, the provision is of no consequence to Defendant's specious argument that Mr. Stava is not "a person entitled to enforce the notes." Opp. Br. at 13.

In actuality, Defendant's quotation of the above language from the trust agreement is no more than an attempted distraction, as Defendant hopes that the Court will not notice the clear, directly-on-point language—occurring just two sentences earlier in the trust agreement—dealing

[11] Defendant also quotes from R.C. 1303.31 (U.C.C. § 3-301)—mistakenly cited by Defendant as R.C. 1303.3 (U.C.C. § 3-103)—in this section of its argument. Opp. Br. at 13. But that provision merely gives the definition for the term "person entitled to enforce" as used in certain other portions of the Uniform Commercial Code. It does *not* provide a rule of substantive law. And, at any rate, even if it did, Mr. Stava qualifies as a "person entitle to enforce" under multiple prongs of the quoted definition. At the *very least*, he is a "nonholder in possession of the instrument who has the rights of a holder." R.C. 1303.31(A)(2). And that is to say nothing of R.C. 1303.31(B): "A person may be a 'person entitled to enforce' the instrument even though[, unlike the present case,] the person is not the owner of the instrument or is in wrongful possession of the instrument."

squarely with the actual issue Defendant purports to raise, *i.e.*, who, as between Mr. Stava and Equity Trust Company, has the right to bring suit regarding Mr. Stava's IRA assets: "You agree that you [Mr. Stava] are solely responsible for the prosecution or defense, including the retention of legal counsel, of all legal actions . . . involving your IRA, which arise or become necessary for the protection of the investments in your IRA." Ex. H, Trust Agreement, § 10.8(a). Thus, the trust agreement unequivocally provides that Mr. Stava not only was permitted to bring—but was solely responsible for bringing—this action.[12]

C. Mr. Stava Is Entitled to Damages Consisting of Principal, Interest, and Costs of Litigation.

Defendant largely concedes that the Note and Amendments require that Mr. Stava be paid principle, interest, and costs of litigation. Opp. Br. at 14-17. But Defendant raises several relatively minor issues regarding the calculation of interest and application of certain payments. While wrong on some of these, Defendant is at least arguably correct as to two of these points and, in an effort to facilitate summary judgment and resolution of this case, Mr. Stava concedes these two points while disputing others, as outlined below.

First, Defendant argues that the interest accruing on the Notes is simple, not compound. To facilitate expeditious resolution of this matter, Mr. Stava concedes this point and now requests judgment in his favor based on simple—not compound—interest. *Id.* at 14-15. The interest calculations found in Mr. Stava's affidavit attached to this reply brief are adjusted accordingly. Aff. ¶¶ 10-12. Second, Defendant argues that if (as is the case), the two $1,000.00 payments made by Casey in January 2020 did not effect a due-date extension, then that $1,000.00-per-Note amount

[12] Further, Equity Trust Company is by no means in the dark regarding this litigation. Mr. Stava has kept Equity Trust abreast of the case and has even provided Equity Trust with copies of certain court filings. Aff. ¶ 19.

should be deducted from the total outstanding balance on the Notes. Opp. Br. at 16-17. It is questionable whether this is the case, given that the payments were received from Casey, not Guardian.[13] But in a further effort to expedite summary judgment, Mr. Stava cedes this issue as well. Accordingly, the amount-owed calculations in Mr. Stava's affidavit attached to this reply brief are adjusted in light of this consideration as well. Aff. ¶¶ 10(e), 11(e).

But the remainder of Defendant's arguments regarding reductions to the amount owed to Mr. Stava are entirely meritless. Defendant appears to argue, for example, that a flat 7% interest rate should apply to both Notes from execution to present because "in the First Amendment, the parties agreed the interest rate would be seven (7) percent per annum," and that figure "was not limited to future interest accrual." Opp. Br. at 15. That argument, such as it is, is baseless: There is no case law, statutory law, or provision in the Notes or Amendments that would support such a fantastical interpretation, and indeed Defendant cites to none. To the contrary, the First Amendment, dated January 29, 2018, memorializes a forward-looking agreement that the "interest rate on the amount *outstanding shall be*[—future tense—]7%." Ex. C, January 2018 Amendment, at 1 (emphasis added). Defendant's only attempt at an argument on this issue is to assert that "the rules of contract interpretation discussed in Section II.B.2" of its brief support its ungrounded interpretation. Opp. Br. at 15. Section II.B.2 is the portion of Defendant's brief dedicated to the argument that contractual ambiguities should be interpreted against the drafter. *Id.* at 10-11. There is no ambiguity here, but even if there were, as already show, *supra* at 7-8, Casey drafted the First Amendment, not Mr. Stava, and thus this language should be interpreted against *Defendant*.

[13] Mr. Stava sought to have the two $1,000.00 payments returned but was informed by Equity Trust Company that this was not feasible because the payments were made via cashier's check.

Just as misguided, Defendant next claims that the 18% penalty interest rate provided for in the April 2017 Note should not apply to the period between Defendant's original default on that Note (November 30, 2017) and the date of the First Amendment (January 28, 2018), which set a new, fixed due date—and new, forward-looking interest rate—for both Notes. The four sentences of Defendant's brief dedicated to this argument are difficult to decipher, but it appears Defendant's view is that, because the First Amendment set a new, later deadline, Defendant was no longer in default. *See* Opp. Br. at 15. That is true *prospectively*, but the First Amendment did not somehow reach back in time to cure the default that had already occurred. Accordingly, interest accrued at an 18% rate from the time of the default at the end of November 2018 until the date the First Amendment was enacted. *See* Aff. ¶ 10(b).

Next, Defendant *admits* that "[i]t appears Guardian may not have paid the origination fee" with regard to the July 2017 Note. Opp. Br. at 15; Casey Aff. ¶ 9 (admitting inability "to locate any record of a $1,000.00 payment to Stava in connection with the July 6, 2017, Note"). That is indeed the case, as previously averred by Mr. Stava: The origination fee was never paid. *See* Opening Br. at 12 (citing original Stava affidavit ¶ 17(a)). Accordingly, pursuant to the plain language of the July 2017 Note, penalty interest of 18% began accruing on the date that initial payment was missed. *See* Ex. B, July 2017 Note, at 1. But incredibly, Defendant asserts that "the doctrine of equitable estoppel" bars Mr. Stava from collecting the 18% interest because, Defendant alleges, Mr. "Stava never raised the issue" of failure to pay the $1,000.00. Opp. Br. at 15. Defendant immediately goes on to assert—contradictorily—that "the first time Stava mentioned the apparent oversight [*i.e.*, Guardian's failure to pay the $1,000.00 origination fee] was in an email dated January 25, 2020." *Id.* at 15-16.

Defendant's position is wrong for a number of reasons. First, the July 2017 Note explicitly provides that "[f]ailure of the Holder to exercise any right or option shall not constitute a waiver, nor shall it be a bar to the exercise of any right or option at any future time." Ex. B, July 2017 Note, at 2. Thus, any supposed "failure" on Mr. Stava's part does not deprive him of his right to 18% interest from the date of the origination-fee default. Second, Defendant itself says that equitable estoppel requires, among other things, "a . . . failure to act [that is] inconsistent with a claim later asserted." Opp. Br. at 16 (alterations in original; internal quotation marks omitted). But Defendant has not even alleged, much less proved, that Mr. Stava had any duty to "act" by notifying Defendant of its breach. And even if he did have such a duty (he did not), failure to complain about the origination-fee default from the outset is not "inconsistent with" Mr. Stava's present claim for relief. Third and finally, even if all this were not the case, still Mr. Stava should prevail on this issue, as Defendant's assertion that Mr. Stava "never" told Defendant or Casey about the missed payment or that Mr. Stava did not inform them prior to "an email dated January 25, 2020" is, as with many of Defendant's other factual claims, false. As the attached email unequivocally shows, Casey was informed about the failure to pay the origination fee *at least* two years prior to the January 25, 2020 date he claims. Ex. K, January 9, 2018 Email to Casey, at 1 (informing Casey that "[n]o payment for the point [*i.e.*, the one-basis-point origination fee] was received for the second loan [*i.e.* the July 2017 Note]").[14]

Last of all with respect to damages, Defendant contests Mr. Stava's claim for attorneys' fees not on the merits (the Notes, after all, explicitly provide that Defendant "agrees to pay . . .all

[14] Given Guardian's failure to pay the origination fee, the principal amount of the July 2017 Note increased from $100,000.00 to $101,000.00. The calculations in Mr. Stava's original affidavit failed to take this fact into account, but that oversight is remedied in the affidavit attached to this brief. Aff. ¶ 11(b)-(f).

costs, expenses and reasonable attorneys' fees incurred in the collection of sums due hereunder," Ex. A, April 2017 Note, at 1; Ex. B, July 2017 Note, at 1) but instead because "Stava has produced no fee invoices or other information describing the work done in this matter to demonstrate the reasonableness of the fees sought." Opp. Br. at 17. Without delving into the issue of whether such invoices are indeed required, and in an effort to reduce additional litigation costs and facilitate summary judgment, Mr. Stava attaches invoices, requested by Defendant, showing the breakdown of his costs. Ex. N, Zeiher Invoices; Ex. O, Robinson Invoices; *see also* Aff. ¶¶ 13-14. These invoices neutralize Defendant's argument regarding judgment for attorneys' fees and thus those fees—thus far totaling $17,447.25—should be included in the judgment entered in Mr. Stava's favor.

In light of all this, and for the additional reasons stated in Mr. Stava's opening brief and in his affidavits accompany that brief and this reply, Mr. Stava is, as of today, entitled to a judgment of $278,277.94, plus pre- and post-judgment interest at an annual rate of 18%. Aff. ¶ 15.

D. Mr. Stava's Unjust Enrichment Claim Is Pled in the Alternative.

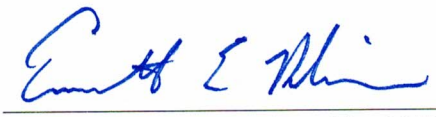
Finally, Defendant argues that Mr. Stava's motion for summary judgment on his unjust enrichment claim should be denied because "where an express contract covers the subject matter of the litigation, recovery for unjust enrichment is not available." Opp. Br. at 13. Mr. Stava agrees, of course, that he is not entitled to recover his damages *twice*, via both his breach-of-promissory-note and unjust-enrichment claims. But the Rules of Civil Procedure allow a plaintiff to plead claims in the alternative, and specifically contemplate that "[a] party may state legal *and equitable* claims . . . regardless of consistency." Utah Civ.R. 8(e) (emphasis added); *see also* Ohio Civ.R. 8(e). If this Court were, for some reason, to conclude that the Notes and Amendments were invalid—a position which both parties disavow, *e.g.*, Opp. Br. at 13 ("a contract unequivocally

covers the subject matter" of this case)—then summary judgment in Mr. Stava's favor on his unjust enrichment claim will be appropriate. If, however, the Court grants summary judgment on Mr. Stava's primary claim that the promissory note was breached, then Mr. Stava agrees he is not *also* entitled to doubly recover under his unjust-enrichment claim.

CONCLUSION

For all of these reasons and those stated in his opening brief, Mr. Stava respectfully moves this Court for an expeditious order granting summary judgment in his favor and awarding damages totaling $278,277.94, plus any additional attorneys' fees accrued in this action, plus pre- and post-judgment interest at a rate of 18%.

Respectfully submitted,



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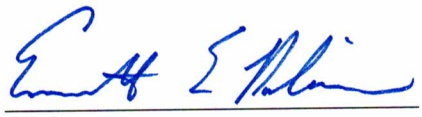
NOTICE OF NON-ORAL HEARING

A non-oral hearing date is set for this motion on May 21, 2020 at 1 P.M. *See* Apr. 13, 2020 Order at 1.



Emmett E. Robinson

Attorney for Plaintiff James Stava

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, this Reply in Support of Plaintiff James Stava's Supplemental Motion for Summary Judgment, along with the affidavit and exhibits in support of the same, was sent to counsel for Guardian Manufacturing Company LLC via e-mail at the following address:

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