IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 612 MDA 2006

BUSY BEE, INC., a Florida Corporation,
BABY BEE, INC., a Florida Corporation,
MLL CORP., a Florida Corporation,
and JASAMI CORP., a Florida Corporation,
trading as CENTURY SHOES, LTD.,
a Florida General Partnership, and
CARLTON SHOES LTD., a Florida General
Partnership, trading as BLS ASSOCIATES,
a Pennsylvania General Partnership,

v.

WACHOVIA BANK, N.A., successor
to CoreStates Bank, N.A.

APPEAL OF WACHOVIA BANK, N.A.

REPLY BRIEF FOR APPELLANT

Appeal from the February 28, 2006 Order and Judgment
of the Court of Common Pleas for Lackawanna County, No. 97-CIV-5078

SCHNADER HARRISON SEGAL & LEWIS LLP
By: Elizabeth K. Ainslie (I.D. No. 35870)
Bruce P. Merenstein (I.D. No. 82609)
Alison C. Finnegan (I.D. No. 88519)
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103-7286
(215) 751-2000

MAYER, BROWN, ROWE, & MAW LLP
By: Lauren R. Goldman
1675 Broadway
New York, New York 10019
(212) 506-2500

MAYER, BROWN, ROWE, & MAW LLP
By: Evan M. Tager
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorneys for Appellant

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

I. CORESTATES IS ENTITLED TO JUDGMENT 3

A. The Gist-Of-The-Action Doctrine Bars Plaintiffs' Tort Claims 3

B. Plaintiffs Failed To Adduce Clear And Convincing Evidence Of Fraud 5

1. Fred Levy's Testimony Is Insufficient To Support The Fraud Verdict 5

2. Plaintiffs' New Theories Of Fraud Cannot Support The Judgment 8

3. Plaintiffs Failed To Prove Intent To Defraud 9

4. Plaintiffs Failed To Adduce Clear And Convincing Evidence Of Reasonable Reliance 11

C. CoreStates Is Entitled To Judgment On Plaintiffs' Fiduciary-Duty Claim 12

1. The Borrower-Lender Relationship Is Not Fiduciary 12

2. The Evidence at Trial Disproved the Existence of a Fiduciary Duty 13

D. CoreStates Is Entitled To Judgment On Negligent Misrepresentation 14

E. Plaintiffs Failed To Prove A Breach Of Contract 14

1. Corestates Was Entitled To Invoke Section 601(b) Of The Agreement, Which Expressly Authorized The Bank's Conduct 14

a. Plaintiffs' new arguments are waived 14

b. Plaintiffs failed to prove equitable estoppel 15

2. Corestates Had No Obligation To Continue Lending To B. Levy, Even Absent A Default 17

II. PLAINTIFFS FAILED TO ADDUCE COMPETENT PROOF OF DAMAGES 19

A. Howard Platt's Testimony Was Impermissibly Speculative 20

B. The Flaws In Gocial's Model Rendered His Testimony Inadmissible 21

III. EXCLUSION OF THE PAZZO EVIDENCE REQUIRES, AT A MINIMUM, A NEW TRIAL 22

IV. THE PUNITIVE DAMAGES AWARD CANNOT STAND 23

V. THE AWARD OF PREJUDGMENT INTEREST IS THE PRODUCT OF ERROR 24

TABLE OF AUTHORITIES

Page

Cases

Advent System Ltd. v. Unisys Corp.,
925 F.2d 670 (3d Cir. 1991)....................21

Am. Ass'n of Meat Processors v. Cas. Reciprocal Exch.,
527 Pa. 59, 588 A.2d 491 (1991)....................2

Asousa P'ship v. Smithfield Foods, Inc.,
No. 01-12295DWS, 2006 WL 1997426 (Bankr. E.D. Pa. June 15, 2006)....................12

Bach v. First Union Nat'l Bank,
2005 WL 2009272 (6th Cir. Aug. 22, 2005)....................24

Baker v. Family Credit Counseling Corp.,
440 F. Supp. 2d 392 (E.D. Pa. 2006)....................3

Blue Line Coal Co. v. Equibank,
683 F. Supp. 493 (E.D. Pa. 1988)....................13

Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.,
247 F.3d 79 (3d Cir. 2001)....................3

Buczek v. First Nat'l Bank,
366 Pa. Super. 551, 531 A.2d 1122 (1987)....................12

Coleman v. Sears, Roebuck & Co.,
319 F. Supp. 2d 544 (W.D. Pa. 2003)....................11

Commonwealth v. Ryan,
909 A.2d 839 (Pa. Super. 2006)....................2

Delahanty v. First Pa. Bank, N.A.,
318 Pa. Super. 90, 464 A.2d 1243 (1983)....................6

DiSalle v. P.G. Pub'g Co.,
375 Pa. Super. 510, 544 A.2d 1345 (1988)....................2

eToll, Inc. v. Elias/Savion Adver., Inc.,
811 A.2d 10 (Pa. Super. 2002)....................3, 5, 14

Fed. Land Bank v. Fetner,
269 Pa. Super. 455, 410 A.2d 344 (1980)....................12

Fernandez v. Levin,
519 Pa. 375, 548 A.2d 1191 (1988)....................25

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

FL Receivables Trust 2002-A v. Bagga,
No. Civ.A. 03-CV-5108, 2005 WL 563535 (E.D. Pa. Mar. 8, 2005) 12

Frank B. Bozzo, Inc. v. Elec. Weld Div.,
345 Pa. Super. 423, 498 A.2d 895 (1985) 24

Gerfin v. Colonial Smelting Co.,
374 Pa. 66, 97 A.2d 71 (1953) 5, 6

Ginley v. E.B. Mahoney Builders, Inc.,
2005 WL 27534 (E.D. Pa. 2005) 3

Grace v. Moll,
285 Pa. 353, 132 A. 171 (1926) 12

In re Fink's Estate,
310 Pa. 453, 165 A. 832 (1933) 6

Huff v. Nationwide Ins. Co.,
167 B.R. 53 (W.D. Pa. 1992) 6

Hutchison v. Sunbeam Coal Corp.,
513 Pa. 192, 519 A.2d 385 (1986) 15

Jodek Charitable Trust, R.A. v. VerticalNet, Inc.,
412 F. Supp. 2d 469 (E.D. Pa. 2006) 3

Kreutzer v. Monterey County Herald Co.,
560 Pa. 600, 747 A.2d 358 (2000) 15, 16

Kripp v. Kripp,
578 Pa. 82, 849 A.2d 1159 (2004) 15

Laughlin v. McConnel,
201 Pa. Super. 180, 191 A.2d 921 (1963) 6

Meeting House Lane v. Melso,
427 Pa. Super. 118, 628 A.2d 854 (1993) 2

Mellon Bank Corp. v. First Union Real Estate & Mort. Invs.,
951 F.2d 1399 (3d Cir. 1991) 16

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

Merion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.,
315 Pa. Super. 469 (1983)....................21

Novelty Knitting Mills v. Siskind,
500 Pa. 432, 457 A.2d 502 (1983)....................11, 15

Omicron Sys., Inc. v. Weiner,
860 A.2d 554 (Pa. Super. 2004)....................19

Pa. Mfrs. Ass'n Ins. Co v. L.B. Smith, Inc.,
831 A.2d 1178 (Pa. Super. 2003)....................4

Simon v. San Paolo U.S. Holding Co.,
113 P.3d 63 (Cal. 2005)....................24

Spang & Co. v. U.S. Steel Corp.,
519 Pa. 14, 545 A.2d 861 (1988)....................19

Standard Pipeline Coating Co. v. Solomon & Teslovich, Inc.,
344 Pa. Super. 377-78, 496 A.2d 840 (1985)....................6

State Farm Mut. Auto Ins. Co. v. Campbell,
538 U.S. 408 (2003)....................23, 24

Strategic Learning, Inc. v. Wentz,
2006 WL 3437531 (M.D. Pa. Nov. 29, 2006)....................3

Thatcher's Drug Store v. Consol. Supermarkets,
535 Pa. 469, 636 A.2d 160 (1994)....................16, 17

Urmann v. Rockwood Cas. Ins. Co.,
905 A.2d 513 (Pa. Super. 2006)....................19

Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.,
399 F.3d 224 (3d Cir. 2004)....................24

Rules

PA. R. APP. PRO. 1925....................2

PA. R. APP. PRO. 2116(a)....................2

INTRODUCTION

Plaintiffs' attempt to salvage the $23 million jackpot that they hit after shutting down their unprofitable business only reveals the critical weaknesses in their case. Their fraud claim, for example, rests entirely on the self-serving testimony of Fred Levy – testimony contradicted by Levy's own correspondence from the relevant period – and on demonstrably incorrect descriptions of the documentary record. Plaintiffs' contract claim rests on theories that they abandoned before trial and on an unpersuasive attempt to distinguish binding precedent from the Pennsylvania Supreme Court. And their defense of their damages evidence rests on an argument that a company's historical financial results are irrelevant to its value.

Space constraints do not permit us to respond to every distortion of the record in plaintiffs' counter-statement of the facts, but a few general points bear mention. Plaintiffs repeatedly take snippets from CoreStates memos and letters out of context (*e.g.*, Pl. Br. 7-8, 15) to suggest that the bank had unconditionally promised future financing but internally had made an irreversible decision to stop lending. By contrast, our opening brief provided long quotes from each of the memos that plaintiffs selectively cite. In context, all of the documentary evidence tells a consistent story: CoreStates ***was***, at all relevant times, willing to extend additional credit, but only if (i) the Levys began to comply with their obligation under the Agreement to provide timely financial reporting, and (ii) they supported their company with either a personal guaranty or an equity investment. The Levys chose not to satisfy either of those conditions. Additionally, plaintiffs argue (on the one hand) that the memos can be ignored because they were deliberately drafted to protect the bank in litigation (*see*, *e.g.*, Pl. Br. 26) – and (on the other) that the memos are evidence, indeed the ***only*** evidence, on which the jury could have relied to find key elements of their claims, including scienter. *See, e.g.*, *id.* at 28-30.

Plaintiffs also portray the Loan Agreement in a misleading light. The collateral that secured the loans – *i.e.*, B. Levy's inventory and receivables, which the Levys liquidated in the spring of 1996 – was central to the Agreement. CoreStates agreed to lend only in exchange for security interests in those assets, and B. Levy's credit limit was expressly tied to the level of available collateral. Yet in their three-page discussion of the contract (at 4-6), plaintiffs never

even mention that the loan was secured. Similarly, in emphasizing the allegedly early repayments that they made from time to time, plaintiffs ignore the fundamental nature of the lending arrangement. Under a line of credit, the borrower can raise or lower the outstanding loan balance as desired, thereby incurring interest obligations only when necessary. Thus, B. Levy's repayments were hardly a gratuitous favor to the bank.

Rather than engaging many of our arguments, plaintiffs place their faith in an extremely broad view of waiver, under which a party must preserve not only every appellate issue but every conceivable ***argument*** that it might want to raise in support of each issue. As to plaintiffs' arguments regarding the scope of our Questions Presented (*see* Pl. Br. 33, 39, 54 n.24, 62 n.32, 67-68); the plain text of Rule 2116(a) requires that the Questions Presented be set forth "in the briefest and most general terms" and allows the court to review all points raised in the Questions ***or*** "suggested thereby." *See also*, *e.g.*, *Commonwealth v. Ryan*, 909 A.2d 839, 841 (Pa. Super. 2006). All of the points that plaintiffs claim we waived are, at a bare minimum, "suggested" by the "general terms" used in our Questions Presented.

Similarly, as to their arguments regarding our Rule 1925 Statement and post-trial briefs (*see* Pl. Br. 33, 39, 64), the law is clear that an appellant must raise ***issues*** – rather than precise arguments – in such submissions to preserve them for appeal. *See*, *e.g.*, *DiSalle v. P.G. Pub'g Co.*, 375 Pa. Super. 510, 546, 544 A.2d 1345, 1363-64 (1988). Each of our challenges to the verdict was preserved both at trial and in the post-trial brief. *See* CS Br. 18. Moreover, to the extent that our opening brief presents any arguments that differ in tone or emphasis from those made at trial or in the post-trial brief, it is because the trial court's 137-page opinion on the post-trial motions raised new theories in support of the verdict[1]; arguments in response to these theories are clearly not waived. *See Am. Ass'n of Meat Processors v. Cas. Reciprocal Exch.*, 527 Pa. 59, 66-67, 588 A.2d 491, 495 (1991); *Meeting House Lane v. Melso*, 427 Pa. Super. 118, 124-25, 628 A.2d 854, 857 (1993).

---

[1] The trial court identified several new theories of fraud at Op. 45, for example; plaintiffs claim that our discussion of those theories (at CS Br. 31-35) is waived. Pl. Br. 27-28.

ARGUMENT

I. CORESTATES IS ENTITLED TO JUDGMENT.

A. The Gist-Of-The-Action Doctrine Bars Plaintiffs' Tort Claims.

Breach of fiduciary duty. In response to our argument (at 22) that the gist-of-the-action doctrine bars a claim that the defendant breached a fiduciary duty arising from a contractual relationship rather than from social policy,[2] plaintiffs assert (at 45-46) that Pennsylvania has adopted a blanket rule shielding ***all*** fiduciary-duty claims from the gist-of-the-action doctrine. That assertion finds absolutely no support in the caselaw. *Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.*, 247 F.3d 79 (3d Cir. 2001), the primary case on which plaintiffs rely, enunciated a narrow and uncontroversial rule that is simply the corollary of what we said in our opening brief: Where the relationship between the parties ***is*** one that is traditionally viewed as fiduciary, the defendant owes the plaintiff duties that go beyond the contract. *Id.* at 104-05.[3]

Relatedly, all of plaintiffs' examples of relationships in which one party owes the other extra-contractual duties are classic fiduciary relationships: trustee-beneficiary; partner-partner; lawyer-client. *See* Pl. Br. 45-46. We do not suggest that claims arising from such relationships are barred; plaintiffs' concern that "the relatively new gist of the action doctrine would wipe out centuries of common law protecting the public from breaches of fiduciary duty" (Pl. Br. 46) is, therefore, without basis. Our point is much narrower: In the lender-borrower relationship – which is universally viewed as ***non-fiduciary*** in nature – the lender's duties are limited to those

---

[2] Citing *Baker v. Family Credit Counseling Corp.*, 440 F. Supp. 2d 392 (E.D. Pa. 2006), plaintiffs contend that the case we cited for this proposition – *Ginley v. E.B. Mahoney Builders, Inc.*, No. Civ. A. 04-1986, 2005 WL 27534 (E.D. Pa. Jan. 5, 2005) (unpub.) – has been discredited. Although *Baker* took issue with the categorical nature of *Ginley*'s statement (440 F. Supp. 2d at 418 n.36), several more recent decisions have stated the rule exactly as *Ginley* did. *See*, *e.g.*, *Strategic Learning, Inc. v. Wentz*, No. 1:05-CV-0467, 2006 WL 3437531, at *6 (M.D. Pa. Nov. 29, 2006) (dismissing fiduciary duty claim that "ar[ose] solely because of the contractual arrangement between the parties"); *Jodek Charitable Trust, R.A. v. VerticalNet Inc.*, 412 F. Supp. 2d 469, 479-80 (E.D. Pa. 2006) (dismissing claim where plaintiff did "not establish that any specific duty . . . has been imposed by social policy and not mutual consensus").

[3] Plaintiffs misconstrue *eToll, Inc. v. Elias/Savion Adver., Inc.*, in which this Court expressly declined to "address this issue because we have held that no fiduciary relationship existed in this case." 811 A.2d 10, 24 n.13 (Pa. Super. 2002).

set forth in the contract (CS Br. 36-37; pp. 15-19 *infra*), and a claim that the defendant breached a fiduciary duty by failing to lend money is barred by the gist-of-the-action doctrine.

Fraud. Plaintiffs assert that their fraud claim is "extra-contractual" because it "would be just as valid even if the Loan Agreement had not existed." Pl. Br. 47. True, if the parties had not had a comprehensive contract that governed every aspect of their relationship, then the gist of the action might not lie in contract. But given that such a contract did exist, and did give rise to the claims at issue, the question is not whether plaintiffs pled each element of fraud, but whether the ***gist*** of the action is directed at rights and duties within or outside the parties' contractual relationship. *See Pa. Mfrs. Ass'n Ins. Co. v. L.B. Smith, Inc.*, 831 A.2d 1178, 1182 (Pa. Super. 2003) (doctrine is "concerned with the nature of the action as a whole"). If the rule were otherwise, the doctrine would ***never*** apply when a plaintiff has adequately pled fraud. Moreover, it is not true that the Levys would have a valid fraud claim in the absence of the Agreement; the only misrepresentations relate to an alleged implied promise not to exercise a contractual default provision and an alleged promise to renew the contract.

Finally, plaintiffs contend that their tort claims arising from events after February 29, 1996, when the bank declared B. Levy in default, are not barred by the gist doctrine. Pl. Br. 48-49. First of all, any such claims were collateral at best; the "action as a whole" centered on the declaration of default. Second, plaintiffs simply ignore the dispositive fact that they made a strategic decision at trial to ***disavow*** any reliance on post-default events, including the negotiations for a new loan agreement. *See* CS Br. 25, 33; p. 8 *infra*. Third, in response to our argument (at 24) that the Agreement did not in fact terminate after the notice of default, plaintiffs contend only that they could not have cured their default once the liquidation had begun. Whether B. Levy could actually have cured the default is irrelevant, because the contract laid out the parties' rights and duties during a continuing default (*see* R. 2624a-25a, 2628a-29a, 2630a-31a, 2640a); plaintiffs do not dispute that the contract still governed the relationship at that point. Fourth, plaintiffs offer ***no*** substantive response to our argument (at 24-25 and notes 13-14) that none of the allegedly extra-contractual acts relied upon by the trial court constituted either a

misrepresentation or a breach of fiduciary duty. Fifth, and most critically, plaintiffs fail to address the basic point that their tort claims were based upon a ***duty*** – to lend money – that could be imposed only by a contract, and not by a generally-applicable social policy. CS Br. 24.[4]

B. Plaintiffs Failed To Adduce Clear And Convincing Evidence Of Fraud.

1. Fred Levy's Testimony Is Insufficient To Support The Fraud Verdict.

Plaintiffs do not even contend that the evidence they submitted at trial met the clear-and-convincing evidence standard. Their failure to comment on the standard of proof is unsurprising, as their theory at trial – that CoreStates promised financing for the wholesale arm of B. Levy conditioned solely on the liquidation of the company's retail division, when in fact the bank planned to declare a default based on that liquidation – rested entirely on the testimony of a single, interested witness: Fred Levy. Fred's theory that the bank planned to default B. Levy all along is pure speculation; it is not supported by a single document (or even the testimony of any other witness). And the alleged promise was corroborated by no other witness; not even Fred's cousin Rick, who was present at the meeting at which the promise supposedly was made, backed it up, and Fred's story was contradicted by a mountain of documents – many of which were authored by the Levys themselves. CS Br. 28-30.

Plaintiffs essentially concede this (Pl. Br. 26), but assert: "The fact that this evidence is contrary to Fred Levy's testimony is simple [*sic*] an instance of the 'he said/she said' nature of trials. Unfortunately for the bank, the power to determine which side to believe is solely the province of the jury." Not so. First of all, this case is not so much "he said/she said" as "he said/they said, they wrote, and he wrote at the time." *See* CS Br. 28-30; pp. 5-8 *infra*. In reviewing sufficiency, moreover, the Court must look at the evidence as a whole; it cannot single out a few pieces of evidence and assume that the jury could have discredited everything else, particularly unequivocal and uncontradicted documentary evidence. *See*, *e.g.*, *Gerfin v. Colonial Smelting & Ref. Co.*, 374 Pa. 66, 73-74, 97 A.2d 71, 74-75 (1953) (court must assess record

---

[4] Plaintiffs offer no response to our argument (at 22-23) that, just as in *eToll*, the parties' "duties . . . were created and grounded in the parties' contract" (811 A.2d at 20-21), and the contract and fraud claims seek the same damages. *Id.*

"taken as a whole"); *In re Fink's Estate*, 310 Pa. 453, 456, 165 A. 832, 833 (1933) (same). More fundamentally, whether plaintiffs met the clear-and-convincing standard is a question of law: The ***Court*** must assess "whether the proof of every element of fraud has met [this] exacting standard" (*Delahanty v. First Pa. Bank, N.A.*, 318 Pa. Super. 90, 110, 464 A.2d 1243, 1253 (1983)), which requires evidence that "is not only found to be credible, but of such weight and directness as to make out the facts alleged ***beyond a reasonable doubt***." *Gerfin*, 374 Pa. at 72, 97 A.2d at 74 (internal quotation omitted and emphasis added). The case that plaintiffs cite for the proposition that weighing the evidence is "solely the province of the jury" (Pl. Br. 26) was not a fraud case, and the court applied the preponderance standard. *Standard Pipeline Coating Co. v. Solomon & Teslovich, Inc.*, 344 Pa. Super. 367, 377-78, 496 A.2d 840, 845 (1985).[5]

Finally, while the testimony of a single witness ***may*** be enough to support a fraud claim, it is insufficient when that testimony not only is illogical but is contradicted by volumes of contemporaneous documentary evidence. *Delahanty* – the very case upon which plaintiffs rely (at Pl. Br. 27) – holds that, in order to support a fraud claim, a witness's "testimony [must be] so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction ***without hesitancy***, of the truth of the precise facts in issue." 318 Pa. Super. at 110-11; 464 A.2d at 125 (internal quotation omitted and emphasis added); *see also Huff v. Nationwide Ins. Co.*, 167 B.R. 53, 61 (W.D. Pa. 1992); *aff'd* 989 F.2d 487 (3d Cir. 1993).[6]

Apart from Fred Levy's testimony, the evidence cited by plaintiffs in support of this

---

5 None of the other five decisions plaintiffs cite (Pl. Br. 22-23) for this proposition involved fraud claims, and so none applied the clear-and-convincing-evidence standard.

6 We cited *Laughlin v. McConnel*, 201 Pa. Super. 180, 184, 191 A.2d 921, 923 (1963), for the proposition that "[t]he oral testimony of one witness ***which is uncorroborated and unsupported by any other evidence, and which is diametrically opposed by the testimony of another witness***, cannot be considered evidence of such weight as to make out a case beyond a reasonable doubt." (Emphasis added.) Plaintiffs' suggestion that *Delahanty* overruled *Laughlin* (Pl. Br. 27) is unfounded. *Delahanty* merely said that it is ***not impossible*** for testimony by a single witness to constitute clear and convincing proof; when such testimony is not contradicted by other evidence, it can be sufficient to support a fraud claim. 318 Pa. Super. at 110, 464 A.2d at 1253. The two cases are not inconsistent, and *Laughlin* – unlike *Delahanty* – provides a perfect description of the record in this case.

claim is composed of snippets of documents taken out of context and outright misstatements of the record. None of it shores up Fred's story. First, plaintiffs cite the testimony of Frank Heston, CoreStates's loan officer. Pl. Br. 25. But Heston did not testify that he (or Robert Spencer or any other bank officer) ever ***promised*** such financing, or even suggested that it would be forthcoming as a direct result of the liquidation. Similarly, the February 6 CoreStates memo that plaintiffs cite (*id.*) merely identified possible structures for future financing of the wholesale business; the memo did not indicate that the bank had ***promised*** anything.

Plaintiffs' claim that in a January 16 CoreStates memo, "representatives of the Bank stated that it 'certainly agreed in general and supported [B. Levy's] plan'" (Pl. Br. 25; *see also id.* at 8) exemplifies their habit of selective quotation. That memo did ***not*** endorse the liquidation; it stated that liquidation would be tolerable only if the Levys complied with their financial reporting requirements – *i.e.*, one of the two conditions that the bank had consistently set for additional financing. The bank was concerned "that additional reporting requirements would be placed upon Fred during a time in which he would be facing added pressures," because it was "apparent that implementation and [financial] reporting were going to be key issues for us going forward." R. 2900a. A letter to the Levys dated two days later reiterated the bank's concern about reporting and emphasized the need for an equity infusion or personal guaranty "to cover the many pitfalls that could impede any liquidation." R. 2902a. The bank's concern was understandable, given that the proposed liquidation involved the disposition of most of the collateral that secured the outstanding loans.

Plaintiffs' next assertion – that "two of the other Levys corroborated Fred's testimony" (Pl. Br. 25) – is simply false. While Rick Levy testified that the bank demanded liquidation, he notably did not testify to any promise to finance the wholesale business, even though he was present at the meeting in which CoreStates allegedly made that promise. CS Br. 28. Similarly, Irwin's statement that the bank demanded liquidation (Pl. Br. 26) does not support the claim that the bank made an unconditional – or any other – promise of financing.

Plaintiffs fare no better in their attempt to explain away the documentary evidence. In his

January 11, 1996 letter to Frank Heston, discussed at CS Br. 30 and Pl. Br. 25, for example, Fred Levy wrote: "I beleive [*sic*] we should liquidate our Retail business." R. 2896a-97a. If the Levys went through with this course of action, Fred continued, "I would ***expect*** that the Bank ***would commit*** to an adequate banking facility" for the wholesale business. *Id.* (emphasis added). Not only does this letter fail to mention the alleged promise that plaintiffs now claim was the whole motivation for the liquidation, it makes it very clear that Levy did ***not*** believe that the bank had ***already*** made such a commitment. Plaintiffs' story – that Fred was "afraid that, if the Bank became annoyed with how his claims or requests were phrased, it might immediately abandon its promise" (Pl. Br. 26-27) – cannot be reconciled with the text of the letter.

2. Plaintiffs' New Theories Of Fraud Cannot Support The Judgment.

Evidently recognizing that the fraud theory they presented at trial was unsupported by the evidence, plaintiffs now allege two other misrepresentations. First, they claim that CoreStates "promised that it would honor certain checks" and then bounced them. Pl. Br. 23. Second, they claim that CoreStates negotiated in bad faith for a new line of credit for the wholesale business in and after May 1996. *Id.* Both of those claims can be dispatched quickly.

First, both allegations concern events after CoreStates declared B. Levy to be in default on February 29, 1996. They therefore are irrelevant as a matter of law: Plaintiffs affirmatively took the position, both in the Complaint and at trial, that their tort claims were based entirely on communications that took place ***prior to*** the default notice. CS Br. 25, 33.[7] They also argued, at trial and again in their brief, that "The Bank's Declaration of a 'Default' Destroyed B. Levy's Business." Pl. Br. 11. Post-default actions thus could not have caused their damages.

Plaintiffs' new theories are defective for other reasons as well. The evidence at trial showed that CoreStates ***was*** genuinely willing to negotiate a new financing agreement, but that the Levys made demands that the bank was unwilling – and had no obligation – to meet: They

[7] Plaintiffs' choice was tactical: They sought to exclude CoreStates's proffered evidence on Pazzo on the ground that it postdated the default. *See* R. 5078a ("[CoreStates] confus[es] the events which give rise to liability which happened on February 29, 1996 and before. We could stop the picture at that point but for the fact that you need to show some damage.").

asked for a forbearance agreement plus additional letters of credit totaling $2 million when they were already overextended under the borrowing formula. CS Br. 13. The evidence plaintiffs now cite (Pl. Br. 15) shows only the parties' ***disagreement***.

Plaintiffs also fail to support their claim that CoreStates tried to back out of the supposed deal by adding onerous new terms; the only "new" terms they identify relate not to the loan but to procedural rights in litigation, and plaintiffs offered no proof that the terms were "new" or that the terms – which were set forth in all caps – were misrepresented in any manner. *See* Pl. Br. 29 (waiver of jury trial, limitations on bank's liability and damages); *id.* at 15 (same). Rather, plaintiffs' emphasis on the litigation-related terms of the proposed agreement is additional proof that, in this time frame, they were focused on their plan "to set up [a] lender's liability suit" (*see* CS Br. 15 (quoting R. 3907a)): They were willing to let their allegedly valuable business fail in order to sue the bank in their preferred forum. And the notion that the terms offered by CoreStates after May 2 were unfair to the Levys (Pl. Br. 29-30) is belied by the evidence that the Levys' own lawyer advised them to take the deal and that the bank had made more concessions than he had expected. *See* CS Br. 14, 34; R. 3903a-05a. Plaintiffs do not respond to this point.[8]

As for the check-bouncing allegation, plaintiffs offered no evidence that at the time the bank allegedly promised to honor the checks, it did not intend to do so; thus, the allegation cannot support a fraud claim. *See* CS Br. 25 n.1 (citing cases). Plaintiffs offer no response.

3. Plaintiffs Failed to Prove Intent to Defraud.

Plaintiffs' brief barely touches upon our argument (at 31-34) that CoreStates internally anticipated exactly what it was telling the Levys: that it would continue to finance the wholesale

---

[8] The theory underlying this argument – the idea that CoreStates strung the Levys along so that they would complete the liquidation, which the bank believed they could handle better than it could – appears for the first time in plaintiffs' appellate brief. It was not presented to the jury at trial or to the trial court in the post-trial briefs. And the bank clearly was ***not*** confident of the Levys' ability to manage the liquidation, as demonstrated by its January 12 memo (R. 2898a-99a), January 16 memo (R. 2900a), January 18 letter (R. 2901a-02a), February 6 memo (R. 2903a-04a), March 7 letter (R. 3858a), April 25 letter (R. 3891a), and May 10 memo (R. 3899a). Indeed, plaintiffs assert that the bank "forced B. Levy to expend upwards of $100,000 to hire" a consultant to run the liquidation, rather than encouraging management to handle it themselves. Pl. Br. 36.

business ***if*** the Levys turned over the required financial information and made a personal guarantee. First, plaintiffs offer the undisputed point that the internal CoreStates memos demonstrate that the bank did not expect to extend financing ***in the absence of those conditions***. Because (as discussed above and at CS Br. 28-30) plaintiffs failed to offer clear and convincing evidence of an unconditional promise, that argument does not advance their fraud claim. The December 27 memo, in particular, makes clear that the bank would want to "exit the facility" only if the bank's two conditions for additional financing went unmet:

> Our staying in the line facility will hinge upon the Levy's willingness to support the company, the reasonableness of their projection and acceptance of our requirement of an independent financial consultant going forward. We expect to have these answers within a few days and have notified the owners of our lack of appetite for ***otherwise*** continuing the facility. We would ***then*** look to exit, preferably prior to the facility's 5/31/96 expiration.

R. 2894a-95a (emphasis added). Notwithstanding plaintiffs' characterization of this memo as "secret" and "never given to Plaintiffs" (Pl. Br. 28) – hardly unusual for a bank's internal file memo – its key point was highlighted in Frank Heston's letter to Fred Levy of the same date. R. 2892a-93a; *see also* CS Br. 32.[9]

Second, plaintiffs assert that a May 10 CoreStates memo "stated that the Bank should immediately take steps to terminate its relationship with B. Levy, with a final decision and termination within sixty days." Pl. Br. 29 n.12. The memo actually said that CoreStates would conduct a "more formal determination during the next sixty days" of whether to place B. Levy in the asked to leave ("ATL") category. R. 3900a. Whatever the significance of the ATL designation, moreover, the memo also discussed actual, imminent financing for B. Levy: "On the positive side it appears that if any new [letters of credit] are issued for BLS, they will be back stopped by a PNC L/C. At this writing the L/C is not confirmed nor have we seen the language." R. 3899a. When it turned out that the PNC letter depended on CoreStates subordinating its own

---

[9] Plaintiffs contend that that letter was "negate[d]" by "two bank officers' later representations and other correspondence" (Pl. Br. 31), but they cite no such "correspondence," and the only evidence of the alleged "representations" is, once again, the unsupported and uncorroborated testimony of Fred Levy.

lien, the bank realized that the deal was not as attractive as it had appeared. R. 3910a-11a.

4. Plaintiffs Failed To Adduce Clear And Convincing Evidence Of Reasonable Reliance.

Plaintiffs offer little substantive response to our argument that it would have been unreasonable as a matter of law for them to liquidate their business in reliance on an alleged promise of financing that was oral, did not specify any terms, required a default on the existing credit line, and was contradicted by a letter dated five days later that expressly threatened default. First, they contend that the absence of agreed-upon terms is irrelevant because they "had no reason to think that [the continued financing] would be on any terms other than those set forth in the Loan Agreement." Pl. Br. 30. But the liquidation involved the ***sale of nearly all of the collateral*** that secured the original line of credit, an event that would lead any reasonable businessman to wonder whether the bank would continue to lend on the same terms.

Plaintiffs next argue (at 30) that it is "disingenuous for the Bank to suggest that B. Levy's reliance on the Bank's demand to take an action that otherwise might be a default under the Loan Agreement was unreasonable." But misrepresentation and reasonable reliance are two separate elements of a fraud claim; even assuming that CoreStates demanded the liquidation, plaintiffs are still required to show, by clear and convincing evidence, that it would have been reasonable for B. Levy to understand that demand to constitute a waiver of CoreStates's rights under the Agreement. A rule that a misrepresentation automatically estops a defendant from arguing reasonability would, as a practical matter, eliminate the element of reasonable reliance from a fraud claim. That independent requirement serves an important function: Fraud claims – especially those that rest solely on the testimony of interested witnesses – pose serious difficulties of proof. In order to reduce the risk of erroneous liability findings, Pennsylvania limits recovery, as a matter of law, to those cases in which the plaintiff could not have protected himself through the exercise of diligence or common sense. *See, e.g.*, *Novelty Knitting Mills, Inc. v. Siskind*, 500 Pa. 432, 435, 457 A.2d 502, 503 (1983).[10]

[10] Plaintiffs try to distinguish *Coleman v. Sears, Roebuck & Co.*, 319 F. Supp. 2d 544 (W.D. Pa. 2003), on the ground that "the court [there] rejected a claim that a plaintiff justifiably relied on promises that its relationship with licensor would not change, contrary to the terms of the

Finally, plaintiffs argue that Heston's December 27 letter did not render reliance unreasonable despite its clear threat of a default, because the bank indicated its intention to provide financing "on several other occasions after Heston sent this letter." Pl. Br. 30. Needless to say, none of those supposed occasions either was documented or is supported by any evidence other than Fred Levy's testimony.

Plaintiffs next argue that the inherent absurdity of their fraud claim (*see* CS Br. 27-28) is irrelevant because motive is not an element of fraud. Pl. Br. 31-32. But an understanding of CoreStates's interests is essential to evaluating whether Fred Levy's hotly disputed testimony is convincing. Any reasonable juror would treat as dubious testimony that a bank had devised an incredibly complicated scheme that was highly likely to delay and imperil the repayment of funds to which it was already entitled.

C. CoreStates Is Entitled To Judgment On Plaintiffs' Fiduciary-Duty Claim.

1. The Borrower-Lender Relationship Is Not Fiduciary.

Plaintiffs assert (at 34) that there is "only a presumption" that the borrower-lender relationship is non-fiduciary. But they have ***never identified a single case*** in which a court has found a fiduciary relationship between a bank and its borrower.[11] Even if the presumption is

---

written agreement." Pl. Br. 31 n.13. Here, likewise, the alleged promises were that (i) the relationship would not change after liquidation and (ii) the bank would waive its right not to renew the agreement, both of which directly contradict the contract. *See* R. 2620a (§ 1.03); R. 2636a (§ 6.01(b)).

[11] In *Asousa Partnership v. Smithfield Foods, Inc.*, No. 01-12295DWS, 2006 WL 1997426 (Bankr. E.D. Pa. June 15, 2006), an unpublished Bankruptcy Court decision, the defendant was a controlling shareholder of the borrower, not a mere lender; moreover, the court found a fiduciary relationship between the defendant and the other creditors, not between the defendant and the borrower. *Grace v. Moll*, 285 Pa. 353, 132 A. 171 (1926), did not involve a borrower and lender at all. And it is unclear why plaintiffs cite *FL Receivables Trust 2002-A v. Bagga*, No. Civ.A. 03-CV-5108, 2005 WL 563535 (E.D. Pa. Mar. 8, 2005), a fraudulent conveyance decision that does not even mention the word "fiduciary." All *Buczek v. First National Bank* said was that "the Complaint fails to allege any facts which could transform the debtor-creditor relationship between the Buczeks and appellees into a fiduciary relationship." 366 Pa. Super. 551, 556, 531 A.2d 1122, 1124 (1987). Similarly, *Federal Land Bank v. Fetner* held only that "[o]rdinarily, the relationship between the borrower and lender does not create a confidential relationship, and none was shown to exist in this case." 269 Pa. Super. 455, 461, 410 A.2d 344, 348 (1980) (citation omitted).

rebuttable (a remote possibility that we recognized in our opening brief (at 37)), moreover, plaintiffs have failed to rebut it here. The rule that they ask this Court to adopt – that a bank owes a fiduciary duty to any borrower that could not survive without financing (Pl. Br. 36) – would mean that ***every*** business in financial distress could impose on its lender a fiduciary duty to act in the borrower's interest at its own expense. The adoption of such a rule would make banks extremely reluctant to lend money to small businesses in Pennsylvania.[12]

2. The Evidence at Trial Disproved the Existence of a Fiduciary Duty.

Trust and reliance. We showed (at 37-38) that the Levys' testimony that they distrusted and did not rely on CoreStates is fatal to their fiduciary-duty claim. In response, plaintiffs contend that "the Bank can cite no legal authority denying recovery to victims who have less than full trust in those who deal falsely with them." Pl. Br. 37. Not so: We cited ***several*** cases, which plaintiffs simply ignore, stating the black-letter rule that trust and confidence are the cornerstones of the entire fiduciary-duty doctrine. CS Br. 37.

Plaintiffs then argue that, to show the absence of trust and confidence, we relied "mostly on quotes from the record . . . [that] predate the December 22, 1995 meeting." That assertion (though inaccurate, as noted below) proves our point. A history of distrust ***prior*** to the meeting negates any possibility that a fiduciary relationship existed – or could have been breached – at that time. Nor could such a relationship have arisen – or been breached – in the two-month period between the meeting and the default letter, during which Fred Levy received Heston's December 27 letter threatening default and responded by drafting a letter that said: "***we beleive [*sic*] that you do not want to continue our relationship***." R. 3852a-54a (emphasis added). We also cited a host of record sources demonstrating that the relationship became even more strained after the February 29 default letter – including Fred Levy's May 3, 1996 memo to the B. Levy

[12] Plaintiffs expressly disavow any reliance on the trial court's unorthodox legal analysis of the fiduciary duty claim and its reliance on *Blue Line Coal Co. v. Equibank*, 683 F. Supp. 493 (E.D. Pa. 1988) (*see* Pl. Br. 35-36 & n.15) but still rest their fiduciary-duty analysis on the "day-to-day control" and "unusual transactions" standards, which have never been adopted by a Pennsylvania court (other than in the decision below), are drawn wholly from *Blue Line*, and are in any event not met here.

partners, which stated that the bankers "do not trust us . . . and we do not trust them." R. 3895a.[13]

Surrender of control. Plaintiffs concede (at 34-35) that evidence of a ***surrender*** of control is a prerequisite for a finding of a fiduciary duty, but they can point to no evidence of a surrender here. They argue only that CoreStates had leverage over B. Levy because it was B. Levy's source of credit. *Id.* at 35. Mere leverage does not engender a fiduciary duty, absent a knowing and reasonable relinquishment of control. CS Br. 39-40 (citing *eToll*, 811 A.2d at 23).[14]

D. CoreStates Is Entitled To Judgment On Negligent Misrepresentation.

Plaintiffs still offer no comprehensible theory of negligent misrepresentation. *See* CS Br. 36. Their only hope is waiver (Pl. Br. 32-33), which we addressed at page 2, *supra*.

E. Plaintiffs Failed To Prove A Breach Of Contract.

1. CoreStates Was Entitled To Invoke Section 6.01(b) Of The Agreement, Which Expressly Authorized the Bank's Conduct.

Plaintiffs present three arguments in support of their claim that CoreStates could not legitimately invoke the Agreement's liquidation default provision. The first two are waived, and the third is meritless.

a. Plaintiffs' new arguments are waived.

1. Plaintiffs start by contending that "[t]he jury could have concluded, based on the evidence at trial, that a reasonable, good faith interpretation of this provision prohibited the Bank from using [Section 6.05(1)] where the bank instigated the liquidation." Pl. Br. 39. Even apart from the fact that it directly contradicts the clear language of the contract, which gave CoreStates an unconditional right to declare default upon liquidation, this contention is meritless because plaintiffs ***did not present it to the jury***. Plaintiffs' own cases recognize that "[t]he intent of the parties is to be ascertained from the document itself when the terms are clear and unambiguous"

---

[13] The breadth and depth of feeling reflected in this correspondence renders the notion that "any disputes between the Bank and Plaintiffs were minor and usually resolved by Plaintiffs giving in to the Bank" (Pl. Br. 37) unpersuasive.

[14] Plaintiffs offer no response at all to our argument that there can be a fiduciary relationship only if one party relies on the other for counsel, and that plaintiffs specifically testified that they did ***not*** seek or want CoreStates's advice. *See* CS Br. 38-39.

and that "[t]he court, as a matter of law, determines the existence of an ambiguity." *Hutchison v. Sunbeam Coal Corp.*, 513 Pa. 192, 200-01, 519 A.2d 385, 390 (1986); *see also Kripp v. Kripp*, 578 Pa. 82, 90, 849 A.2d 1159, 1163 (2004). Plaintiffs never asked for a ruling that the contract was ambiguous, did not present evidence concerning the parties' understanding of the term, and did not request a jury instruction on the subject.

2. Plaintiffs next seek to defend the verdict on a theory that the parties "modified" the contract. Pl. Br. 40. But, as we noted in our opening brief (at 43 n.34), ***CoreStates*** asked the trial court to instruct the jury on the law of modification, and ***plaintiffs*** successfully objected and requested an instruction on equitable estoppel instead. R. 1266a, 1308a. As a result, the jury never found (i) a subsequent agreement, (ii) consideration, or (iii) any of the indicia of contract formation. Plaintiffs' post-hoc modification theory therefore cannot save the verdict.

In any event, "[i]t is hornbook law that a contract . . . may be modified [only] by a subsequent agreement which is supported by legally sufficient consideration or a substitute therefor and meets the indicia of contract formation." *Kreutzer v. Monterey County Herald Co.*, 560 Pa. 60, 606-07, 747 A.2d 358, 362 (2000). Plaintiffs' position at and after trial was that they did not even know that liquidation was a default. *See* R. 869a; 547a-49a, 785a, 2557a, 2661a. The Levys could not have agreed, with all of "the indicia of contract formation," to modify a contract provision of which they were ignorant. Plaintiffs now attempt to mask that problem by saying that "***the Bank*** agreed to modify the Loan Agreement" (Pl. Br. 40), ignoring the requirement that modification (as distinct from estoppel) must be explicit and mutual.

b. Plaintiffs failed to prove equitable estoppel.

Plaintiffs are thus left with only the argument they put to the jury – that CoreStates was equitably estopped from invoking Section 6.01(b). As with fraud, an equitable estoppel claim must be supported by "clear, precise and unequivocal evidence." *Novelty Knitting Mills*, 500 Pa. at 436, 457 A.2d at 504. This case shows precisely why that standard is necessary: The jury could find breach of contract only by deleting a key contract term – a provision allowing default based on liquidation of the collateral securing the loan – based on the heavily-contradicted

testimony of one interested witness. Plaintiffs neither acknowledge the heightened standard of proof nor identify evidence sufficient to meet it.

Culpable inducement. In response to our argument that the Levys' testimony cannot support an estoppel claim because it is contradicted by the documentary record as well as by the bank's witnesses (CS Br. 44, citing *Kreutzer*, 560 Pa. at 607, 747 A.2d at 362), plaintiffs try to distinguish *Kreutzer* on the ground that there was ***no*** evidence to support the inducement claim in that case. But that is incorrect: The plaintiffs there offered proof that the defendant "behaved in ways that led the distributors to believe that [the defendant] either would remain in business longer than it did or that it would pay them for their distributorships if it went out of business." 560 Pa. at 603, 747 A.2d at 360. More fundamentally, the Pennsylvania Supreme Court set forth a clear rule of law that unsupported testimony is not enough to support an estoppel claim on "any matter of importance." 506 Pa. at 607, 747 A.2d at 362.

Reasonable reliance. Plaintiffs utterly fail to explain how their estoppel claim can be squared with the Pennsylvania Supreme Court's clear holding that it is *per se* unreasonable for a party to rely on a counter-party's informal, oral promise not to invoke its contractual rights. *Thatcher's Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc.*, 535 Pa. 469, 476-77, 636 A.2d 156, 160 (1994).[15] The "evidentiary, cautionary and deterrent functions" served by the *Thatcher's* requirements – *i.e.*, formalization of the parties' understanding and confirmation of the defendant's promise to waive its contractual rights – clearly are not satisfied by plaintiffs' testimony about oral discussions in which it is ***undisputed*** that the contract was never mentioned, and during which plaintiffs claim ignorance of the ***existence*** of the allegedly-waived provision.[16]

[15] Plaintiffs' attempt (at 42 n.18) to distinguish the other cases we cited for this proposition is no more persuasive. For instance, their description of *Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Investments*, 951 F.2d 1399, 1412 (3d Cir. 1991), in which "the plaintiff asserted that the defendant was estopped from making a prepayment that was specifically permitted in the parties' agreement" (Pl. Br. 42 n.18) applies equally to this case, in which plaintiffs assert that the bank was estopped from declaring a default that was specifically permitted in the parties' agreement.

[16] Plaintiffs' reliance argument also depends on an oversimplification of the facts. Aside from the dispute as to whether CoreStates or the Levys initiated the liquidation, CoreStates did not "repeatedly t[ell] them it supported" that strategy. Rather, CoreStates repeatedly said that,

Thatcher's is dispositive of plaintiffs' estoppel argument, and thus of their contract claim.[17]

Strangely, plaintiffs contend that the multiple written communications in which CoreStates employees specifically warned plaintiffs that ***any*** additional wholesale financing would "hinge upon" a financial guarantee from the Levys and their compliance with financial reporting requirements were irrelevant because "these documents refer only to the impact of issues unrelated to the liquidation on the Bank's willingness to continue funding B. Levy." Pl. Br. 41. The point, however, is that CoreStates repeatedly raised the prospect of a default, thereby putting B. Levy on notice that the bank was prepared to take that step and rendering unreasonable any assumption that silence constituted a waiver of that right.

2. CoreStates Had No Obligation To Continue Lending To B. Levy, Even Absent a Default.

In response to our alternative argument (at 47-48) that the declaration of default cannot have caused plaintiffs any damage because B. Levy was not contractually entitled to any additional funds, plaintiffs assert, first, that CoreStates could not have declared a default until it received B. Levy's annual financial statements, which were not due until May 31, 1996. But B. Levy was also in default of the Agreement's separate requirement that it produce unaudited financials 45 days after the end of each calendar quarter (R. 2633a (§ 5.01(A)(i))); it had been delinquent on that requirement for at least the last two quarters (R. 2892a), and the unaudited financial statements for the quarter ending on December 31, 1995 were due on February 14, 1996. Moreover, a different covenant required B. Levy to "maintain" a ratio of cash flow to debt service of greater than 1.2 to 1; the Agreement provided that this ratio would be "***calculated*** at

---

while liquidation might benefit the Levys and be acceptable to the bank ***provided*** that they prepared financial statements documenting, among other things, current collateral levels, the Levys' failure to turn over that information would cause "delays to the start of the liquidation." R. 2901a-02a (Jan. 18 letter from Heston to Fred Levy). The default letter was no different: It reiterated both that CoreStates would not consent to a liquidation while being kept in the dark and the bank's willingness to support the liquidation if the Levys cooperated. R. 2905a-06a.

[17] Contrary to plaintiffs' suggestion (Pl. Br. 43 n.19), we do not contend that oral contract modifications (whether by agreement or estoppel) are ***never*** valid, only that modifications of critical provisions should not be inferred from undocumented conversations in which the contract was never mentioned. That proposition is drawn directly from *Thatcher's*. 535 Pa. at 478-79, 636 A.2d at 161.

fiscal/calendar year end" (R. 2635a (§ 5.01(I)) (emphasis added)), not that it could only be enforced four months after year-end or whenever the borrower deigned to produce financial statements. In December 1995, Heston specifically threatened default on that basis. R. 2892a.

Next, plaintiffs contend that, if CoreStates had declared a default based on the financial covenants, B. Levy would have availed itself of its contractual opportunity to cure, either by paying down the loan or by "put[ting] additional money into B. Levy." Pl. Br. 38. That assertion is belied by the record: CoreStates consistently told the Levys, both before and after declaring the default, that if they injected additional funds into the company – in the form of either debt repayment or equity (*see*, *e.g.*, R. 2902a) – the bank would continue to offer financing.[18] The Levys fully understood that an infusion of capital would result in continued loan availability. Irwin Levy himself wrote, in an April 23 letter to his brother Robert Levy, that "Core States Bank has no interest in continuing to be involved in financing our business under any circumstances, ***with the exception of being willing to provide letters of credit in an amount equal to 80% of liquid collateral pledged to them.***" R. 3888a. In Irwin's view, however, that was "not financing the business at all," because it required additional money from the Levys. *Id.* The record makes clear that the Levys simply did not want to throw good money after bad, even if their refusal meant losing the company. *See* CS Br. 60; R. 1823.5a (Fred Levy's testimony that any provision that placed risk on the partners, rather than the bank, was a deal-killer).[19]

In an even more blatant stretch of the record, plaintiffs claim that "for a significant part of the period after the Bank declared a default and refused to lend additional funds, B. Levy in fact had additional availability under the borrowing-base formula." Pl. Br. 38.[20] B. Levy was in

---

[18] *See*, *e.g.*, R. 2892a (Frank Heston's December 27, 1995 letter to Fred Levy: "a significant personal enhancement to our existing position . . . material personal sureties, equity, or a pledge of marketable collateral" would satisfy the bank); R. 1087a; R. 2902a,.

[19] Plaintiffs' only response to the argument that they failed to mitigate damages is that B. Levy could not secure letters of credit ***from other banks*** without CoreStates's help (Pl. Br. 57-58); they fail to address their considered decision not to invest ***their own*** money in the company.

[20] Plaintiffs have no record support for their claim that CoreStates had made it clear that it would not advance additional funds regardless of how much was available under the Agreement. For this proposition, they cite to R. 985a, Fred Levy's testimony that the bank rejected B. Levy's request for letters of credit that ***exceeded*** availability (*see* R. 4293a, R. 4294a); to R. 1087a,

compliance with the formula only from April 10 to May 22, and even then the ***peak*** availability, which lasted for only one week, was $146,000 – not even close to the $2 million that plaintiffs were demanding. R. 4295a, 4299a, 4300a.[21]

II. PLAINTIFFS FAILED TO ADDUCE COMPETENT PROOF OF DAMAGES.

Plaintiffs concede that "'the fact-finder may not engage in sheer conjecture or guesswork'" in assessing damages. Pl. Br. 50 (quoting *Urmann v. Rockwood Cas. Ins. Co.*, 905 A.2d 513, 518 (Pa. Super. 2006)).[22] It is difficult to conceive of a financial model more reliant on conjecture and guesswork than the one constructed by the Levys' experts. Acceptance of plaintiffs' claim that the jury was free to base an eight-figure damage award on a valuation that both experts admitted arose from a platonic ideal of a profitable shoe seller and had ***no connection*** to plaintiffs' real business would require this Court to ignore the entire body of Pennsylvania law governing proof of damages.

Plaintiffs contend that our challenges to their damages evidence go only to weight, and not to admissibility or sufficiency. Pl. Br. 50, 54. Not so: Pennsylvania law provides that where, as here, the testimony of plaintiffs' damages experts is speculative and divorced from reality, it cannot support an award as a matter of law. *Spang & Co. v. U.S. Steel Corp.*, 519 Pa. 14, 25-26, 545 A.2d 861, 866 (1988); *Omicron Sys., Inc. v. Weiner*, 860 A.2d 554, 564 (Pa. Super. 2004).

Young's testimony that "[w]e asked them to secure the collateral ***overadvance*** that was existing and asked them to provide security for the issuance of new letters of credit" (emphasis added); and to R. 1087a-88a, Young's testimony that he never offered to extend B. Levy letters of credit for the precise amount of availability when they were asking for amounts ***in excess of*** availability. Importantly, Young did not testify that he would have rejected a request for letters of credit in amounts that were available to B. Levy under the agreement. Nor did the Levys testify that those minimal amounts would have made any difference to the business.

[21] Plaintiffs do not defend their claim that CoreStates breached a duty of good faith, and with good reason. *See* CS Br. 48-49.

[22] *Urmann* involved claims for wrongful death and loss of consortium; the Court's acceptance of "a measure of speculation" in the calculation of damages rested on its recognition that that type of claim is not susceptible to more precise valuation. 905 A.2d at 518. This case, by contrast, involves the valuation of an existing business; plaintiffs' experts had access to both B. Levy's financial statements and those of comparable companies, and certainly ***could have*** constructed a permissibly concrete and realistic damages model.

Plaintiffs also argue that their adoption of contradictory positions on the legal question of whether their business was "new," and thus subject to a higher standard of proof on damages, or "established," making its financial history relevant, somehow goes only to "weight-of-the-evidence." Pl. Br. 50 n.21. But that inconsistency caused the trial court to both (i) allow plaintiffs' experts to ignore the firm's unfavorable history and (ii) refuse to instruct the jury that a new business must present especially substantial proof in order to recover lost profits – errors of law that necessitate a new trial. CS Br. 50-51.

Finally, plaintiffs contend, as to both Platt (at 52-53) and Gocial (at 54, 55-56), that any flaws in the experts' methodologies were harmless because CoreStates was permitted to cross-examine the experts, and because the jury awarded less than the full amount that B. Levy requested. Neither of those rationales, of course, can salvage the verdict, because there is no way to know what a jury untainted by the improperly admitted evidence would have awarded. Accordingly, at a minimum, CoreStates is entitled to a new trial.

A. Howard Platt's Testimony Was Impermissibly Speculative.

Plaintiffs offer no response to our argument that the testimony of Howard Platt, plaintiffs' industry expert, was impermissibly speculative because he refused to describe or identify his "industry comparables," precluding both the court and the jury from evaluating whether they were truly similar to B. Levy. As to our argument that Platt ignored B. Levy's historical results, which were far inferior to the assumptions he employed to value the company on a going-forward basis, plaintiffs first argue that "Platt ***reviewed*** financial information and documents produced in the litigation concerning B. Levy and met with the Levys extensively." Pl. Br. 51 (emphasis added). That carefully-worded response may be true, but it is irrelevant. Plaintiffs' bolder – and citation-less – assertion that "Platt ***based his opinions*** in significant part on his assessment of B. Levy and its plans" (*id.* (emphasis added)) is indisputably false. Platt admitted at trial that he knew nothing about the key measures of B. Levy's actual performance – *e.g.*, profit margins and inventory turnover and composition. R. 1895a-96a. Further, he affirmatively ignored any data of which he ***was*** aware: "***I didn't use any numbers from the B. Levy*** in

coming up [with] . . . the report." R. 1902a (emphasis added); *see also* R. 2096a ("***both BLS or B. Levy and the economy are irrelevant*** to my projections") (emphasis added).[23]

Plaintiffs next contend that Platt's decision to ignore B. Levy's history was "entirely sensible" because "this information came from a period before the losses occurred" and therefore "was not information of the sort that has 'a close relationship to . . . the relevant economic and financial conditions . . . .'" Pl. Br. 52 (quoting *Merion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.*, 315 Pa. Super. 469, 488, 462 A.2d 686, 696 (1983)).[24] This argument rests on the premise that a company's historical performance has ***no bearing at all*** on its future and therefore is irrelevant to its value. The law is precisely to the contrary. *See Merion Spring*, 315 Pa. Super. at 488, 462 A.2d at 696; *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991).

B. The Flaws In Gocial's Model Rendered His Testimony Inadmissible.

Plaintiffs' responses to our arguments regarding the deeply flawed testimony of Morris Gocial are insufficient to salvage that testimony. First, while plaintiffs contend (without support) that Gocial "***reviewed*** both B. Levy's history and economic trends during 1996-2001" (at 54-55 (emphasis added)), they fail to address Gocial's intentional decision to exclude B. Levy's historical performance from his ***model***, and to rely instead on the ambitions of Fred Levy – a clearly inappropriate basis for expert testimony. *See* cases cited at CS Br. 53.

Second, plaintiffs assert that Gocial "carefully selected" the comparable companies for

---

[23] Plaintiffs' waiver argument at Pl. Br. 50-51 is baseless. CoreStates made the same objections to Platt in its post-trial brief, arguing that Gocial's testimony was inadmissible because Platt's figures formed an impermissible basis for Gocial's calculations. R. 2502a-04a. Whether Platt was allowed to testify is not the point; CoreStates has consistently objected to the admissibility of his made-up figures as a basis for Gocial's valuation.

[24] Plaintiffs accuse us of misquoting *Merion Spring*, claiming that the Court "clearly intended only that an expert had to fit his information to the individual firm as best he could, as Platt did." Pl. Br. 51 n.22. The full quotation reads: "Because there is no business history from which to reasonably predict subsequent events, the evidence must be substantial and it must be shown to have a close relationship to the individual firm in question as well as the relevant economic and financial conditions prevailing at the time the losses occurred." 315 Pa. Super. at 488, 462 A.2d at 696. The Court surely did not mean that evidence need be substantial and related to the plaintiff firm ***only*** when there is no history and that, when "there ***is*** . . . business history," plaintiffs are free to ignore it in favor of more lucrative hypothetical numbers.

his analysis, but offer no explanation for his decision to rely on large, profitable, publicly-traded companies to value a small, unprofitable, privately-held concern – or for his decision to ***exclude*** Pazzo, which was clearly the closest possible comparable. CS Br. 56 & n.41. Indeed, Gocial admitted that the only real criterion for inclusion in his comparable group was that the companies were in the business of selling shoes. R. 2132a. Nor do plaintiffs address the cases we cited (at 56) for the proposition that Gocial's reliance on non-comparable companies was inappropriate.

Third, plaintiffs cite Gocial's self-serving testimony that his methodology was generally accepted – but they do not address his admission that none of his treatises approved of his failure to discount either projected profits or the company's terminal value back to the valuation date (January 1, 1996). R. 2071a, 2073a, 2079a, 2081a. Indeed, on the very page of the transcript that plaintiffs cite (R. 2072a), Gocial conceded that he did not follow the business valuation treatises that he had cited at trial and at the *Frye* hearing, all of which require discounting to the valuation date. Rather, he sought support for his novel methodology in a litigation guide that specifically warned that it should not be used for business valuations. R. 2147a.

Fourth, plaintiffs offer no response to our observation (CS Br. 58) that Gocial relied extensively and impermissibly on the analysis of his business partner, who was not available to be cross-examined, other than to say that the trial judge rejected this objection. Pl. Br. 55 n.27. That, of course, is no answer to the argument that the trial court's ruling was erroneous.[25]

III. EXCLUSION OF THE PAZZO EVIDENCE REQUIRES, AT A MINIMUM, A NEW TRIAL.

Plaintiffs do not deny that the Pazzo evidence shows that B. Levy's only real assets remained in the family, rendering their damages claim infirm as a matter of law. Their principal response to our argument (at 58-59) that this evidence entitles CoreStates to judgment is that "the evidence the jury heard could have led the jury to reject the bank's theories and conclude that Pazzo had no impact on the damages." Pl. Br. 57. That is surely true: The liability jury did not know that Pazzo even existed.

---

[25] Plaintiffs also claim that this point was waived because it was not briefed in the post-trial motions. That is incorrect. *See* R. 2501a-02a.

Plaintiffs offer little by way of response to our argument that the trial court's exclusion from the liability phase of all evidence relating to Pazzo necessitates a new trial. First, they suggest (at 59) that CoreStates's request to bifurcate the trial estops it from objecting to the exclusion of evidence from the liability phase on the ground that it was "more appropriate" to damages. Excluding crucial relevant and unprejudicial evidence from one phase only because it is even ***more*** relevant to the other phase is not a valid "case management technique." *Id.*[26] Second, plaintiffs argue that the exclusion was harmless because business destruction was only one of several theories of harm that they presented in the liability phase. There is no way to know, however, which theory formed the basis for the liability jury's verdict.[27]

IV. THE PUNITIVE DAMAGES AWARD CANNOT STAND.

Plaintiffs' argument on punitive liability and punitive damages largely amounts to a dramatic rehashing of the evidence that they claim supports the fraud verdict. They offer no response, however, to our argument that, even if the evidence was minimally sufficient to support the fraud verdict, it cannot support a $7 million award of punitive damages, particularly in light of (i) the closeness of the case on liability and (ii) the fact that the conduct giving rise to this litigation – the default declaration – was specifically authorized by contract.

Plaintiffs identify the five *State Farm* factors (at 65), but fail to explain how those factors can possibly support a $7 million award in this case. It is undisputed that the harm in this case was economic and that there was no disregard for health or safety. B. Levy's financial vulnerability – which stemmed entirely from the Levys' own mismanagement and their refusal to put additional equity into the company – did not render the company among "the elderly, the

---

[26] Plaintiffs' assertion (at 60 n.30) that "the Bank later agreed that most of the Pazzo evidence was irrelevant at the damages trial, too" is unsupported by the record. All defense counsel said was that she did not plan to discuss Pazzo's exact profit levels after 1997. She made clear that she wanted to ask Gocial about the fact that the business on which his entire wholesale valuation was based was never destroyed. R. 1505a-06a.

[27] Like the trial court, plaintiffs address only the evidence that B. Levy's business was carried on through Pazzo in 1997 and thereafter; they ignore entirely the proof that as early as March 1996 – while they were still negotiating with CoreStates for a new credit line – the Levys were planning the "transfer [of] the business from the third to the fourth generation," as Fred Levy put it. R. 3887a (Robert Levy quoting Fred Levy).

poor, and other consumers who are least knowledgeable about their rights." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 433 (2003) (Ginsburg, J., dissenting). Plaintiffs' contention (at 66) that they identified a "pattern of abandoning well-established Scranton businesses" is baseless; plaintiffs' record cites all refer to Sugerman's, a CoreStates borrower that went bankrupt: There was no allegation that CoreStates "abandoned" it.[28] Finally, plaintiffs fail to identify any evidence that CoreStates was motivated by ill will or malice. This is the wrong case in which to uphold the largest award in Pennsylvania since *State Farm*.

V. THE AWARD OF PREJUDGMENT INTEREST IS THE PRODUCT OF ERROR.

Apart from a specious waiver argument,[29] plaintiffs offer little real response to our argument on prejudgment interest. They cannot deny that, as a result of the punitive award, if the judgment is affirmed they will receive far more than the damages that the jury found they had suffered. CS Br. 67. Interest is available only when withholding it would work some injustice to the plaintiffs; here, there is no basis for concluding that interest is "necessary to ensure that in the particular circumstances of the case, the plaintiff has been fully compensated." *Frank B. Bozzo, Inc. v. Elec. Weld Div.*, 345 Pa. Super. 423, 435, 498 A.2d 895, 901 (1985).[30]

---

[28] The notion that CoreStates committed repeated misconduct by repeating the alleged misrepresentations on more than one occasion, even if it were supported by the record (*but see* CS Br. 31-34 and pp. 5-9 *supra*), is not supported by the caselaw. "The 'repeated conduct' cited in [*BMW*] involved not merely a pattern of contemptible conduct within one extended transaction . . . but rather specific instances of similar conduct by the defendant in relation to ***other parties***." *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232 (3d Cir. 2005) (emphasis added). *See also, e.g.*, *Bach v. First Union Nat'l Bank*, No. 04-3899, 2005 WL 2009272, at *9 (6th Cir. Aug. 22, 2005) (unpub.); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005).

[29] CoreStates did not concede this issue. Rather, defense counsel conceded that prejudgment interest is available on some contract claims. R. 1450a. At that point in time, plaintiffs' counsel had not yet taken the position that the contract damages did not have to be discounted to present value; to the contrary, at the *Frye* hearing Gocial had testified that he ***did*** plan to account for the time value of money, which would have rendered a straight award of interest at least somewhat more defensible. Moreover, the jury awarded $7 million in punitive damages, which are available only in tort. CS Br. 68.

[30] Any ambiguity in the case law regarding the propriety of considering punitive damages in this context likely arises from the fact that punitive damages and prejudgment interest are awarded on mutually exclusive sets of claims (tort and contract) and should not appear in the same case. CS Br. 68.

As to the date on which the damages began to accrue, there is no way to reconcile plaintiffs' position that the proper damage award is "the amount that would have been just compensation had it been paid when performance was due [*i.e.*, in 1996]" (Pl. Br. 68 (internal quotation omitted)) with their defense of Gocial's decision not to discount pre-trial lost profits back to 1996. *See* CS Br. 68-69. At trial, plaintiffs affirmatively argued that their damages had ***not*** accrued as a lump sum on February 29, 1996: Counsel argued that interest "runs on different amounts at different times. . . . The calculation is not so simple as taking one number over a period of time times six percent" (R. 1441a), which is exactly what the trial judge did.[31]

Respectfully submitted,

____

Elizabeth K. Ainslie (I.D. No. 35870)
Bruce P. Merenstein (I.D. No. 82609)
Alison C. Finnegan (I.D. No. 88519)
Schnader Harrison Segal & Lewis LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
(215) 751-2000
(215) 751-2205 (fax)

Lauren R. Goldman
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, New York 10019-5820
(212) 506-2500

Evan M. Tager
Mayer, Brown, Rowe & Maw LLP
1909 K Street N.W.
Washington, D.C. 20006-1101
(202) 263-3000

Attorneys for Defendant
Wachovia Bank, N.A.

January 16, 2007

31 Plaintiffs' reliance on *Fernandez v. Levin*, 519 Pa. 375, 548 A.2d 1191 (1988) is misplaced: That case concerned the calculation of interest on a debt – *i.e.*, an amount certain, due on a date certain – and not on business destruction damages.