No. 15-_____

In The

Supreme Court of the United States

ANGINO & ROVNER, P.C.; KING DRIVE CORP.;
A LA CARTE ENTERPRISES;
RICHARD C. ANGINO; and ALICE K. ANGINO,

Petitioners,

v.

SANTANDER BANK, N.A.,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania, Middle District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do banks enjoy a unique special exemption to the implied covenant of good faith in contract interpretation contrary to the Uniform Commercial Code's definition of "good faith" and §205 Duty of Good Faith and Fair Dealing, Restatement (Second) of Contracts, particularly with respect to their actions following the worst recession since the Great Depression and Congressional action that followed commencing with the fall of 2008 Emergency Economic Stabilization Act, Pub. L. No. 110-343, 122 Stat. 3767, the Troubled Asset Relief Program (TARP), *Dodd-Frank*, and hundreds of Circuit, District, State Appellate and lower court cases throughout the country interpreting the implied covenant of good faith as applicable to banks?

PARTIES TO THE PROCEEDING

Petitioners are Angino & Rovner, P.C., King Drive Corp., A La Carte Enterprises, Richard C. Angino & Alice K. Angino, H/W.

Respondent is Santander Bank, N.A.

Weir & Partners LLP and Cushman & Wakefield National Corporation were parties in the proceedings below but are not respondents to this Petition.

RULE 29.6 DISCLOSURE

Petitioners King Drive Corp., A La Carte Enterprises, and Angino & Rovner, P.C. are privately held corporations; there is no parent or publicly held company owning 10% or more of the corporations' stock. Petitioners Richard C. Angino and Alice K. Angino are individuals, not a corporation.

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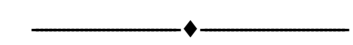
PETITION FOR WRIT OF CERTIORARI

Petitioners previously identified under the heading "Parties to the Proceeding" (hereafter "Petitioners," "Debtors," "Lendees," or "Borrowers") who were Plaintiffs in the Superior Court of Pennsylvania No. 489 MDA 2014 (Debtors) (Berks County contract action) and Defendants in the Superior Court of Pennsylvania No. 2436 EDA 2014 (Santander's Philadelphia Confession of Judgment Action) respectfully seek a Writ of Certiorari on the basis that the Superior Court of Pennsylvania in the two related actions erroneously decided that Santander Bank (hereafter "Santander," "Bank," "Creditor," or "Lender") did not have a duty of good faith as defined under the Uniform Commercial Code and §205 of the Restatement (Second) of Contracts because there is no duty of good faith in a commercial lender/lendee situation; banks, including Santander Bank, are exempt from the duty of good faith in a commercial lender/lendee situation.



OPINIONS BELOW

The Superior Court Memorandum Opinion and Order filed April 28, 2015, to No. 2346 EDA 2014, appears in the Appendix to the companion Petition.

The Superior Court Memorandum Opinion and Order of January 28, 2015, to No. 489 MDA 2014, affirming the Trial Court under virtually the same facts,

appears at App. 1. The April 2, 2015, Order denying reargument appears at App. 24.

The Berks County No. 489 MDA 2014 Trial Court Opinion and Orders appear at App. 25, and App. 38, 40 and 41, respectively.

The Philadelphia Court of Common Pleas Confession of Judgment Opinion and Order, No. 03330, March Term, 2014 (C.P. Phila. 2014), appears in the Appendix to the companion Petition.

The Supreme Court's denial of the Petition for Allowance of Appeal carrying the date of August 25, 2015 appears at App. 42.

JURISDICTION

The Supreme Court has jurisdiction pursuant to 28 U.S.C. §1257(a) based upon the Pennsylvania Superior Court's Opinion and Order in No. 489 MDA 2014 of January 28, 2015 (App. 1), *rearg. denied*, April 2, 2015 (App. 24), the Superior Court Memorandum Opinion and Order of April 28, 2015, No. 2346 EDA 2014, and the Supreme Court's denial of both Petitions on August 25, 2015 (App. 42 and in the Appendix to the companion Petition) with respect to the "Contracts Clause" of U.S. Const. Art. I, §10, Cl. 1, Congressional action commencing with the fall of 2008 Emergency Economic Stabilization Act, Pub. L. No. 110-343, 122 Stat. 3767, the Troubled Asset Relief Program (TARP), *Dodd-Frank* Wall Street Reform

and Consumer Protection Act, Pub. L. No. 111-203, July 21, 2010, and hundreds of Circuit, District, State Appellate and lower court cases throughout the country interpreting the implied covenant of good faith in commercial and consumer context.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Art. I, §10, Cl. 1.

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]

STATEMENT OF THE CASE

Debtors reference the Amended Complaint in the Berks County Debtors' Contract action against Santander to 489 MDA 2014 for the factual background of the case. *See* Berks County Trial Court Opinion and Order (App. 25, 38, 40, 41), and Superior Court Memorandum and Order (App. 1, 24).

> 7. The Anginos, husband and wife, are officers and sole shareholders of A la Carte Enterprises and King Drive Corporation. Since the 1960s, they have worked together at the Angino & Rovner law office and have been virtual partners in acquiring land, creating gardens and businesses, giving to charity, and developing respected names in the central Pennsylvania community.

8. From 1981 through 2012, through A la Carte Enterprises and King Drive Corporation, the Anginos invested on average $1,000,000 per year from earnings and loans, for a total investment in excess of $40,000,000, for the purposes of acquiring, obtaining approvals, constructing roads, installing infrastructures, building, expanding, and remodeling buildings with respect to a 60 acre, 17 lot subdivision in Silver Spring Township, Cumberland County, Pennsylvania (hereinafter, "Willow Lake") and a 750 acre resort, which includes a golf course, spa, and "green" community in Middle Paxton Township, Dauphin County, Pennsylvania (hereinafter, "Felicita"). [Loan Balances indicate total loans of $18,611,689.60 plus lines of credit totaling $1,350,000 or approximately $20,000,000 and current balances as of July 2013 of $8,452,661.97 and $1,350,000 or approximately $10,000,000.] [The King Drive Corporation Trial Balance of June 30, 2013 indicates an investment of $32,110,193,64.]

* * *

17. From the 1980s through 2004, the Anginos and their various corporations – Angino & Rovner, P.C., King Drive Corp., and A La Carte Enterprises – had continuing banking relations with Hamilton Bank, which became CoreState, which became First Union, which became Wachovia, and which is now Wells Fargo.

18. From the 1980s through 2004, Wachovia and its predecessors in "good faith"

assisted Plaintiffs as to personal, business, and development needs through mortgages, loans, and lines and letters of credit, utilizing appraisals and providing copies of appraisal to Plaintiffs with respect to the mortgage on their primary residence in Dauphin County; the acquisition, expansion, and operations of the Angino law practice; their second home in South Carolina (Pawley's Island); the Willow Lake subdivision in Silver Spring Township, Cumberland County; and the Felicita resort "green community."

19. In 2002, Plaintiffs had in excess of $13 million in loans with First Union (later Wachovia) that provided financing for the Anginos' acquisition, development, and operation of their land holdings and law firm . . .

20. On December 30, 2002, Joseph Grosso wrote to Richard Angino soliciting a business relationship with Waypoint Bank.

* * *

[From 2004 through November 28, 2007, Santander became the Anginos' Bank advancing approximately $11 million with respect to the Anginos' South Carolina home and three commercial developments.]

45. In the midst of the housing depression in 2009, Sovereign demanded note modifications to extend maturity dates with loan interest increases of one month LIBOR *plus 500 bps*, maintaining a minimum of $100 million [sic thousand not million] with Sovereign Bank, and a pacing requirement of

three lot closings with Willow Lake and *five lot closings per year at Mockingbird*, and $11,727.75 assessed for the extension. (emphasis supplied in the original)

[Debtors refused to accede to the changes in the contract terms demanded by Santander.]

* * *

48. On October 29, 2009, Richard Angino communicated to Sovereign Bank the fact that the Anginos had fully complied with all of their obligations under the financing agreements, except for the sale of the number of housing units in the Mockingbird and Mockingbird Extended development at the annual rate anticipated in the financing documents, because of the residential meltdown/depression and the impossibility of obtaining funding under the current conditions.

* * *

51. Despite Richard Angino's letter of September 4, 2009, opting to renew the Sovereign loans to November 2010, Weir & Partners, LLP sent by certified mail to all of the Plaintiffs, including Angino & Rovner, P.C., a foreclosure letter dated May 5, 2010, as to the following loans:

a) Mortgage Loan Note issued by King Drive Corp. dated November 28, 2007 in the Principal Amount of $3,500,000 ("Loan No. 1");

b) Line of Credit Promissory Note from King Drive Corp. as Borrower to Sovereign Bank as Lender dated November 28, 2007, in the Principal Amount of $750,000 ("Loan No. 2");

c) Line of Credit Promissory Note from A La Carte Enterprises, Inc. as Borrower to Sovereign Bank as Lender dated November 28, 2007, in the Principal Amount of $750,000 ("Loan No. 3");

d) Site Development Loan Note issued by King Drive Corp. dated July 3, 2007, in the Principal Amount of $2,000,000 ("Loan No. 4");

e) Letter of Credit No. 5347 in the Amount of $264,159 with an expiration date of July 3, 2010;

f) Letter of Credit No. 5348 in the Amount of $221,670.30 with an expiration date of July 3, 2010; and

g) Promissory Note issued by King Drive Corp. dated October 29, 2004, in the Principal Amount of $1,400,000 ("Loan No. 5").

* * *

58. The true basis for Sovereign's May 5, 2010 foreclosure notice was the subprime mortgage crisis which began in late 2008, overwhelmed the capital markets, and continued to deepen and spread in 2009. As

of the year end of 2009, 140 banks had been placed in receivership, administered by the Federal Deposit Insurance Corporation (FDIC) which resulted in Congress passing the Dodd Frank Act in 2010. See, Michael P. Malloy, Principles of Bank Regulation, Concise Hornbooks, 336, 164-165 et seq. (3d ed. 2011).

59. Undoubtedly, Sovereign was substantially affected by the meltdown because of its substantial commitment to housing and residential development.

60. The true basis for the foreclosure notice was Sovereign's financial condition, which was the result of its inappropriate, fraudulent, misleading, and deceptive practices which created the unsustainable bubble in the residential housing industry which collapsed during the recession/depression of 2008-2010.

61. In addition to the recession and collapse in the housing market, Sovereign was experiencing a substantial reduction in LIBOR-related interest from 8% in December 2007; to 7% in January 2008; to 6%, to 5%, and 4.0450% in December 2008; to 3.28% in February 2009; and finally to 3.09% in April 2011.

62. With the threat of foreclosure and the potential devastating effect upon the Anginos' law practice and their personal reputations, Plaintiffs signed an extortionary agreement dated July 14, 2011.

63. The coerced, extortionary Loan Modification Agreement set a maturity date of December 31, 2013, with loan payments commencing December 31, 2011, of $240,000; June 30, 2012, of $500,000; December 31, 2012, of $500,000; June 30, 3013, of $500,000; and the balance due on December 31, 2013.

64. The coerced, extortionary Loan Modification Agreement required an increase to 4% over LIBOR to replace lower interest loans.

65. The coerced, extortionary-based Loan Modification Agreement accelerated all of the loan documents so as to require payment of all principal in 2.5 years instead of the anticipated 20 or 30 years, thus requiring payment of $6,400,000 of principal in 2.5 years instead of the anticipated 20 or 30 years.

66. The coerced, extortionary Loan Modification Agreement also required a $750,000 third mortgage as to the Angino's South Carolina Pawley's Island home and $8,744,252.10 additional mortgage with regard to the Anginos' primary home.

The issue was presented in the Berks County action by Santander filing preliminary objections and decided under the applicable Standard of Review of Preliminary Objections with the Trial Court holding as a matter of law that banks have a special exemption under the Restatement (Second) of Contracts, §205 Duty of Good Faith and Fair Dealing.

The Superior Court affirmed and the Superior Court refused to consider the issue *en banc*. The Supreme Court of Pennsylvania refused Debtors' Petition for Allowance of Appeal. The Philadelphia Confession of Judgment action tracked the Berks County Contract action on the basis of precedent.

REASONS RELIED UPON FOR ALLOWANCE OF PETITION FOR WRIT OF CERTIORARI

I. Petitioners present a procedural and factual background wherein the Pennsylvania Superior Court, following the worst recession since the Great Depression, held that banks have a special exemption to the Commercial Code's definition of "good faith" and the Restatement (Second) Contracts §205 Duty of Good Faith and Fair Dealings.

Petitioners had complied with all of the terms and conditions required under their land development loans that included the reasonable expectation of the payout of $200,000 per year on the Felicita $5,000,000 mortgage with the consequential expected payout over 25 years. Petitioners were also current with respect to paying Santander a certain amount when each lot was sold with respect to the development projects.

Contrary to the reasonable expectations of the Parties, the past six-year history, Santander on May 5,

2010 accelerated, cross-collateralized, and demanded $6,400,383.92 to be paid in 15 days.

Petitioners contend that such a demand under the circumstances violated the Uniform Commercial Code's definition of good faith and §205 of the Restatement (Second) of Contracts.

Petitioners commenced the contract bad faith action against Santander which was unsuccessful based upon the Superior Court's reliance upon the 1989 Superior Court Opinion *Creeger Brick and Bldg. Supply, Inc. v. Mid-State Bank & Tr. Co.*, 385 Pa. Super. 30, 560 A.2d 151 (1989). See Superior Court and Trial Court Opinions relying upon *Creeger*.

Petitioners contend that Pennsylvania is unique in providing an exemption to banks with respect to the doctrine of good faith and fair dealings, with respect to hundreds, if not thousands of cases throughout the country.

Petitioners assert that Santander's accelerating, cross-collateralizing, and demanding $6,400,383.92 to be paid in 15 days violated the Uniform Commercial Code's definition of "good faith" and §205 of the Restatement (Second) of Contracts.

Petitioners are only one of presumably thousands of similar Debtors to become victims of the banking industry's practice following the banks causing the worst recession since the Great Depression.

The Santander's actions in Pennsylvania, in this particular case, were sanctioned based upon the 1989

Superior Court Opinion in *Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Tr. Co.*, 385 Pa. Super. 30, 560 A.2d 151 (1989). See Superior Court and Trial Court Opinions referencing and relying upon *Creeger*. App. 11-15, 33.

II. The implied covenant of good faith in contract interpretation has a lengthy history spanning more than 150 years.

"The implied covenant of good faith contract performance has become a fundamental concept of modern day contract jurisprudence." Harold Dubroff, *The Implied Covenant of Good Faith In Contract Interpretation And Gap-Filling: Reviling A Revered Relic*, 80 St. John's L. Rev. 559, 560 (2006).

Petitioners reference three law review articles that deal with the issue presented with this case: Daniel R. Fischel, *The Economics of Lender Liability*, 99 Yale L.J. 131 (1989); Emily Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?* (2005). University of Cincinnati College of Law Faculty Articles and Other Publications, Paper 103, Utah L. Rev. (2005-1-1); and Dubroff; hereafter referred to as "Fischel," "Houh" and "Dubroff."

> The *Restatement (Second) of Contracts* provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." The Uniform Commercial Code, adopted by every state except Louisiana, defines good faith as "honesty in fact and the observance

> of reasonable commercial standards of fair dealing," and it explicitly imposes a good faith obligation on the performance and enforcement of every contract falling within its scope. Moreover, while the United Nations Convention on Contracts for the International Sale of Goods – to which the United States is a signatory – does not directly impose a good faith obligation, it does state that, "[i]n the interpretation of this Convention, regard is to be had to . . . the need to promote uniformity in its application and the observance of good faith in international trade."

Houh, at 1 (footnotes omitted).

The Dubroff St. John's Law Review Article, p. 561, references the number of cases from 1945 through 2004, in which the phrase "Implied Covenant of Good Faith" appeared. The decade of 1945-1954 referenced 11 cases; 1955-1964, 51 cases; 1965-1974, 80 cases; 1975-1984, 494 cases; 1985-1994, 3,656 cases; 1995-2004, 6,423 cases. From 2005-2015, there have been 18,627 cases including 11,340 federal cases. To date in 2015, there have been 1071 cases, including 61 appellate circuit cases, 7 of which are bank-related. For the two prior years 2013-2014, there were 150 circuit court cases where the "Implied Covenant of Good Faith" was mentioned, 21 of which are bank-related. Many of the federal, district and circuit court cases, including the phrase "Implied Covenant of Good Faith" are in the context of congressional and regulatory actions since 2008.

Pennsylvania District Court cases dealing with good faith and particularly with good faith and lender/lendee circumstances are being decided almost weekly: *Roberts Tech Grp., Inc. v. Curwood, Inc*., 2015 U.S. Dist. LEXIS 127369 (E.D. Pa. Sept. 23, 2015); *Gratz College v. Synergis Educ., Inc*., 2015 U.S. Dist. LEXIS 135268 (E.D. Pa. Oct. 5, 2015); *Herzfeld v. 1416 Chancellor, Inc.*, 2015 U.S. Dist. LEXIS 95256 (E.D. Pa. Jul. 22, 2015); *Behr v. Fed. Home Loan Mortg.*, 2015 U.S. Dist. LEXIS 116919 (W.D. Pa. Jul. 29, 2015).

The Seventh Circuit on August 18, 2015 decided *Bible v. United Student Aid Funds, Inc.*, 2015 U.S. App. LEXIS 14503 (7th Cir. Aug. 18, 2015), discussing the inter-relationship between congressional legislation and student loans referencing breach of contract claims.

Morris v. Wells Fargo Bank N.A., 2012 U.S. Dist. LEXIS 127487, 2012 WL 3929805 (W.D. Pa. Sept. 7, 2012) presents the concept of good faith in the context of allegedly improper charges and expenses incurred as a result of unnecessary and unauthorized flood insurance placed on real estate.

IV. Breach of the Covenant Of Good Faith and Fair Dealing.

Plaintiffs' attempt to maintain an independent cause of action for breach of the covenant of good faith and fair dealing is misplaced. The covenant is presumed to exist in every contract governed by Pennsylvania

> law. *Donahue v. Federal Express Corp*., 2000 PA Super. 146, 753 A.2d 238, 242 (Pa. Super. 2000). Nevertheless, the covenant operates only "as an interpretive tool to determine the parties' justifiable expectations in the context of a breach of contract action" and "cannot be used to override an express contractual term." *Northview Motors, Inc. v. Chrysler Motors Corp*., 227 F.3d 78, 91-92 (3d Cir. 2000) (citing *Duquesne Light Co. v. Westinghouse Elec. Corp*., 66 F.3d 604, 617-18 (3d Cir. 1995) and *USX Corp. v. Prime Leasing, Inc.*, 988 F.2d 433, 438 (3d Cir. 1993)). Thus, an implied duty of good faith claim cannot stand "where the allegations of bad faith are 'identical to' a claim for 'relief under an established cause of action.'" *Id*. at 92 (quoting *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 701-02 (3d Cir. 1993)). It likewise cannot be used where the parties' dispute is premised on expressed obligations they chose to address in their agreement. *Id*. at 93; *accord LSI Title Agency, Inc. v. Evaluation Servs., Inc.*, 2008 PA Super 126, 951 A.2d 384, 391-92 (Pa. Super. 2008).
>
> * * *
>
> Notwithstanding the above ruling, plaintiffs' allegations under the breach of good faith claim are an extension of and augment those advanced in the breach of contract claim.

Morris, 2012 U.S. Dist. LEXIS 127487 at *22-*24.

There are a number of circuit cases dealing with good faith in the context of Congressional legislation

following the worst recession since the Great Depression.

Young v. Wells Fargo Bank, N.A., 717 F.3d 224 (1st Cir. 2013) is typical. The *Young* opinion is in the context of a borrower suing a mortgage lender under a number of counts, including breach of contract in the context of the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654, and the Helping Families Save their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (HAMP). There are also claims under negligent infliction of emotional distress and unfair debt collection practices.

Dealing specifically as to the breach of the covenant of good faith and fair dealing, *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224 (1st Cir. 2013) states:

> B. Breach of the Covenant of Good Faith and Fair Dealing
>
> Under Massachusetts law, "'[e]very contract implies good faith and fair dealing between the parties to it.'" *T.W. Nickerson, Inc. v. Fleet Nat'l Bank*, 456 Mass. 562, 924 N.E.2d 696, 703-04 (Mass. 2010) (quoting *Anthony's Pier Four, Inc. v. HBC Assocs*., 411 Mass. 451, 583 N.E.2d 806, 820 (Mass. 1991)). The covenant of good faith and fair dealing requires that "neither party shall do anything that will have the effect of destroying or injuring the right of the other party to the

fruits of the contract." *Id*. at 704 (citation omitted) (internal quotation marks omitted).

In order to prevail, the plaintiff must "present[ ] evidence of bad faith or an absence of good faith." *Id*. at 706; *see also id*. at 704 ("There is no requirement that bad faith be shown; instead, the plaintiff has the burden of proving a lack of good faith."); *Liss v. Studeny*, 450 Mass. 473, 879 N.E.2d 676, 680 n.3 (Mass. 2008) (same). Lack of good faith "carries an implication of a dishonest purpose, conscious doing of wrong, or breach of duty through motive of self-interest or ill will." *Hartford Accident & Indem. Co. v. Millis Roofing & Sheet Metal, Inc*., 11 Mass. App. Ct. 998, 418 N.E.2d 645, 647 (Mass. App. Ct. 1981). Evidence that a party behaved in a manner "unreasonable under all the circumstances" may indicate a lack of good faith, *Nile v. Nile*, 432 Mass. 390, 734 N.E.2d 1153, 1160 (Mass. 2000), but the core question remains whether the alleged conduct was motivated by a desire to gain an unfair advantage, or otherwise had the effect of injuring the other party's rights to the fruits of the contract. *Compare id*. (finding lack of good faith where defendant's conduct destroyed party's right to fruits of agreement), *with T.W. Nickerson*, 924 N.E.2d at 707 (holding that there was no breach of implied covenant when "plaintiff presented no evidence that [the defendant] terminated the trust in order to gain an advantage for itself").

> The concept of good faith "is shaped by the nature of the contractual relationship from which the implied covenant derives," and the "scope of the covenant is only as broad as the contract that governs the particular relationship." *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367, 822 N.E.2d 667, 684 (Mass. 2005). As a consequence, the implied covenant cannot "create rights and duties not otherwise provided for in the existing contractual relationship," and instead focuses on "the manner of performance." *Id.* (internal citation omitted) (quotation marks omitted); *see also Speakman v. Allmerica Fin. Life Ins.*, 367 F. Supp. 2d 122, 132 (D. Mass. 2005) ("The essential inquiry is whether the challenged conduct conformed to the parties' reasonable understanding of performance obligations, as reflected in the overall spirit of the bargain, not whether the defendant abided by the letter of the contract in the course of performance.").

Young, 717 F.3d at 237-238.

The Third Circuit in *Emerson Radio Corp. v. Orion Sales, Inc.*, 253 F.3d 159 (3d Cir. 2001) citing New Jersey precedent held:

> In addition to its breach of contract claim, Emerson included in its complaint a claim for breach of the implied covenant of good faith and fair dealing. The District Court dismissed this claim on summary judgment as a matter of law, relying upon "the express terms of the parties' agreements, the history

of the parties' relationship, the character and sophistication of the parties, [and] the lack of any fundamental frustration of the purpose of the contract or destruction of a substantial reliance interest." *Emerson III*, 80 F. Supp. 2d at 320.

An implied covenant of good faith and fair dealing is present in all contracts governed by New Jersey law. See *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420, 690 A.2d 575, 587 (1997). Good faith is defined in the Uniform Commercial Code, as adopted in New Jersey, as "honesty in fact in the conduct or transaction concerned." N.J. Stat. Ann. 12A:1-201(19). Although the UCC is inapplicable to the Emerson-Orion License Agreement, which was not a contract for the sale of goods, it is unlikely the concept of good faith would be defined differently by the New Jersey Supreme Court merely because the contract at issue is a license.

This obligation to perform contracts in good faith has been interpreted in New Jersey to mean that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Sons of Thunder*, 148 N.J. at 420, 690 A.2d at 587 (quotations omitted). Under the contract at issue in *Sons of Thunder*, defendant Borden was to purchase clam meat from plaintiff for up to five years. The contract permitted Borden to terminate in a year but it was plaintiff's expectation that the contract would run for five

years. Borden, with new managers, terminated the contract, plaintiff sued, and the jury found that Borden breached its obligation of good faith and fair dealing. The Appellate Division overturned the verdict. In reinstating the verdict, the New Jersey Supreme Court, while emphasizing the plaintiff's "desperate financial straits" and overall economic dependency on the defendant, determined there was sufficient evidence for the jury to have found that the implied covenant of good faith was breached because defendant's conduct "destroyed [plaintiff's] reasonable expectations and right to receive the fruits of the contract." *Id*. at 425, 690 A.2d at 589.

Other courts have similarly interpreted the implied covenant of good faith and fair dealing. See *Beraha*, 956 F.2d at 1444 (implied covenant requires that "a party vested with discretion . . . exercise that discretion reasonably, with proper motive and in a manner consistent with the reasonable expectations of the parties") (emphasis omitted); *Comprehensive Care Corp. v. RehabCare Corp.*, 98 F.3d 1063, 1066 (8th Cir. 1996) ("The implied covenant simply prohibits one party from depriving the other party of its expected benefits under the contract.") (quotation omitted) (brackets in original); Restatement (Second) of Contracts § 205, cmt. a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.").

> Under this authority, the inquiry looks to the reasonable expectations of the contracting parties.
>
> New Jersey law also holds that a party to a contract can breach the implied duty of good faith even if that party abides by the express and unambiguous terms of that contract if that party "acts in bad faith or engages in some other form of inequitable conduct." *Black Horse Lane Assoc. v. Dow Chem. Corp.*, 228 F.3d 275, 288 (3d Cir. 2000). In *Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc.*, 69 N.J. 123, 130, 351 A.2d 349, 352 (1976), the New Jersey Supreme Court held that "defendant's selfish withholding from plaintiff of its intention seriously to impair its distributorship although knowing plaintiff was embarking on an investment substantially predicated upon its continuation constituted a breach of the implied covenant of dealing in good faith."

Emerson Radio, 253 F.3d at 169-170.

The Third Circuit on June 11, 2015 in the case of *Wu v. Capital One, N.A.*, 2015 U.S. App. LEXIS 9746 (3d Cir. 2015) provides the Third Circuit's interpretation of breach of contract and breach of the covenant of good faith and fair dealing under Pennsylvania law.

III. Pennsylvania is unique in providing a special exemption to the banks with respect to the implied covenant of good faith in contract interpretation and gap filling of the 18,627 cases that have included the phrase "Implied Covenant of Good Faith" in the past ten years.

Petitioners' research of the case law over the past 10 years and particularly in 2015, has failed to provide another state that provides a special exemption to banks and financial institutions with respect to the Commercial Code and Restatement (Second) Contracts §205.

IV. The Superior Court panel failed to reference, let alone distinguish, other Superior Court and Federal cases such as *Somers v. Somers*, 613 A.2d 1211 (Pa. Super. 1992) and *Seal v. Riverside Federal Savings Bank*, 825 F. Supp. 686 (E.D. Pa. 1993).

The general duty of good faith and fair dealing in the performance of a contract as found in The Restatement (Second) of Contracts § 205, has been adopted in this Commonwealth in *Creeger Brick & Building Supply Inc. v. Mid-State Bank & Trust Co.*, 385 Pa.Super. 30, 35, 560 A.2d 151, 153 (1989), and *Baker v. Lafayette College*, 350 Pa.Super. 68, 84, 504 A.2d 247, 255 (1986), *aff'd*, 516 Pa. 291, 532 A.2d 399 (1987). A similar requirement has been imposed upon contracts within the Uniform Commercial

> Code by 13 Pa.C.S. § 1203. The duty of "good faith" has been defined as "[h]onesty in fact in the conduct or transaction concerned." See 13 Pa.C.S. §1201.
>
> The obligation to act in good faith in the performance of contractual duties varies somewhat with the context, *Baker*, *supra*, 350 Pa. Superior Ct. at 84, 504 A.2d at 255, and a complete catalogue of types of bad faith is impossible, but it is possible to recognize certain strains of bad faith which include: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. Restatement (Second) of Contracts, § 205(d).

Somers, 613 A.2d at 1213.

As recently as 2013, the Federal Courts have held that the Superior Court Panel Decisions have created ambiguity and uncertainty as to the contractual duty of good faith in banking situations.

> Turning to the merits, because Plaintiffs have not identified a specific contractual provision which was allegedly breached, their claim is ostensibly predicated on a breach of the implied covenant of good faith and fair dealing. The Pennsylvania Supreme Court has noted that there is considerable confusion about whether such an implied covenant arises in every contract under Pennsylvania

law. *Ash v. Cont'l Ins. Co.*, 593 Pa. 523, 932 A.2d 877, 884 n.2 (Pa. 2007) (citations omitted). In the past, this Court has echoed those sentiments, opining that "this area of Pennsylvania jurisprudence, like that of many other states, is in 'turmoil' . . . [A] series of 'misunderstandings and missteps' has led to an imprecise and 'internally inconsistent' body of case law." *GNC Franchising, Inc. v. O'Brien*, 443 F. Supp. 2d 737, 751 (W.D. Pa. 2006) (Lancaster, J.) (quoting Seth William Goren, Looking for Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith Performance, 37 Univ. San Fran. L. Rev. 257 (2003)).

Having done its best to wade through this thicket, the Court agrees with those courts that have held that an implied covenant of good faith and fair dealing is incorporated into every Pennsylvania contract. See, e.g., *Haywood v. Univ. of Pittsburgh*, 976 F. Supp. 2d 606, 2013 U.S. Dist. LEXIS 140263, 2013 WL 5466958, at *15 (W.D. Pa. Sept. 30, 2013) (reviewing case law from Pennsylvania and federal district courts); *McHolme/Waynesburg, LLC v. Wal-Mart Real Estate Bus. Trust*, No. 08-961, 2009 U.S. Dist. LEXIS 38934, 2009 WL 1292808, at *2-3 (W.D. Pa. May 7, 2009) (surveying developments in Pennsylvania law and concluding that the "prevailing rule" is that the implied covenant arises in every contract). It follows that a claim for breach of the implied covenant is cognizable under Pennsylvania law – not as a separate, tort-based cause of action but as a variation of an

> ordinary breach of contract claim. In other words, a plaintiff cannot bring claims for both breach of an express contractual provision along with a separate claim for breach of the implied covenant of good faith, as the implied covenant claim is "subsumed" within the breach of contract claim. *Vassalotti v. Wells Fargo Bank, N.A.*, 815 F. Supp. 2d 856, 862 n.12 (E.D. Pa. 2011) (citation and quotation marks omitted). But in certain cases a plaintiff is permitted to bring a breach of contract claim predicated solely on breach of the implied covenant of good faith. See *Kamco Indus. Sales, Inc. v. Lovejoy, Inc.*, 779 F. Supp. 2d 416, 426 n.8 (E.D. Pa. 2011) (explaining that "a plaintiff pursuing an implied duty theory must bring a breach of contract action, not an independent cause of action for breach of the covenant of good faith and fair dealing"). Therefore, "in order to survive [CitiMortgage's] motion to dismiss the breach of contract claim founded upon a breach of the implied covenant of good faith and fair dealing, Plaintiff[s] need only allege facts sufficient to support a claim that the implied covenant was breached, as opposed any other specific contractual duty." *Gallo v. PHH Mort. Corp.*, 916 F. Supp. 2d 537, 551 (D.N.J. 2012) (applying Pennsylvania law).

Hersh v. CitiMortgage, Inc., 2013 U.S. Dist. LEXIS 180926 (W.D. Pa. 2013) at *12-*15. Also see, *McHolme/Waynesburg, LLC v. Wal-Mart Real Estate Bus. Trust*, 2009 U.S. Dist. LEXIS 38934 (W.D. Pa.

2009); and *LJL Transp., Inc. v. Pilot Air Freight Corp.*, 962 A.2d 639 (Pa. 2009).

Cases continue in 2014 and 2015 without the Pennsylvania Supreme Court addressing the issue.

See also Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 Oregon L. Rev. 227 (2005) which discusses good faith/bad faith in the context of reasonable expectations of the parties at pp. 231-232, stating that good faith is a tool of equity, p. 232, et seq. "Equitable defenses and remedies are intended to 'do justice.'" *Id*. at 233.

The panel in the instant case adds to the "considerable confusion about whether such an implied covenant [good faith/bad faith] arises in every contract under Pennsylvania law" . . . and the application of the Doctrine of Reasonable Expectations.

V. Pennsylvania is also unique in being one of few states that permit the Confession of Judgment procedure to preclude defenses such as "bad faith."

The U.S. Supreme Court in *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) referred to the confession of judgment procedure as:

> The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the

> appearance, on the debtor's behalf, of an attorney designated by the holder. It was known at least as far back as Blackstone's time. 3 W. Blackstone, Commentaries *397. In a case applying Ohio law, it was said that the purpose of the cognovit is "to permit the note holder to obtain judgment without a trial of possible defenses which the signers of the notes might assert." *Hadden v. Rumsey Products, Inc.,* 196 F.2d 92, 96 (CA2 1952). And long ago the cognovit method was described by the Chief Justice of New Jersey as "the loosest way of binding a man's property that ever was devised in any civilized country." *Alderman v. Diament*, 7 N. J. L. 197, 198 (1824). Mr. Dickens noted it with obvious disfavor. Pickwick Papers, c. 47. The cognovit has been the subject of comment, much of it critical.

D. H. Overmyer Co., 405 U.S. at 176-177.

The Supreme Court concluded that the cognovit clause is not per se violative of the 14th amendment due process. However:

> 2. Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.

D. H. Overmyer Co., 405 U.S. at 188.

In re PCH Assoc., 122 B.R. 181, 1990 Bankr. LEXIS 2679 (S.D.N.Y. 1990) states in its discussion of the validity of confession of judgment with respect to Pennsylvania Courts:

> Pennsylvania, however, is one of a few states which maintains this statutory scheme.

In re PCH Assoc., 122 B.R. at 192.

The Superior Court refused to consider separately the validity of Santander's confession of judgment under the circumstances of this case. See Appendix to the companion Petition.

VI. Two adjoining states, Pennsylvania and New Jersey, both part of the Third Circuit and New York, and virtually all states interpret the doctrine of "good faith" completely different.

See the New Jersey cases of *Gallo v. PHH Mortg. Corp*., 916 F. Supp. 2d 537 (D.C. N.J. Dec. 31, 2012); *Abeer Tutanji v. Bank of America*, 2012 U.S. Dist. LEXIS 75271 (D.C. N.J. May 31, 2012); and, *Andrichyn v. TD Bank, N.A.*, 2015 U.S. Dist. LEXIS 34802 (E.D. Pa. Mar. 20, 2015).

> Both Pennsylvania and New York recognize that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *W. Run Student Hous. Associates, LLC v. Huntington Nat. Bank*, 712 F.3d 165, 170 (3d Cir. 2013) (quotation marks omitted); see also

> *Fishoff v. Coty Inc.*, 634 F.3d 647, 653 (2d Cir. 2011) ("Under New York law, a covenant of good faith and fair dealing is implied in all contracts."). In both states, the implied covenant is described as an obligation to not "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Sec. Plans, Inc. v. CUNA Mut. Ins. Soc.*, 769 F.3d 807, 817 (2d Cir. 2014) (quotation marks omitted); see also *Hart v. Arnold*, 2005 PA Super 328, 884 A.2d 316, 333 (Pa. Super. 2005). Or more simply, the "implied covenant ensures that parties to a contract perform the substantive bargained-for terms of their agreement." *Geren v. Quantum Chem. Corp.*, 832 F. Supp. 728, 732 (S.D.N.Y. 1993) (internal quotation marks omitted). The Restatement provides the following examples of conduct that could violate the covenant: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts §205 [Duty of Good Faith and Fair Dealing].

Andrichyn, 2015 U.S. Dist. LEXIS 34802 at *22.

Also see *Smith v. Saxon Mortg. Servs.*, 2013 U.S. Dist. LEXIS 66101 (E.D. Pa. May 9, 2013), and *Jackson v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 158639 (W.D. Pa. Nov. 6, 2013).

There is of course no independent cause of action for breach of the implied duty of good faith. *Morris*, 2012 U.S. Dist. LEXIS 127487, 2012 WL 3929805 at *12; *LSI Title Agency. Inc. v. Evaluation Servs., Inc.*, 2008 PA Super 126, 951 A.2d 384, 391-92 (Pa. Super. 2008) (Pennsylvania does not recognize an action for breach of the covenant of good faith and fair dealing that is independent of a breach of contract claim.). In other words, the covenant cannot be used to displace the expressed provisions of a contract. *Hutchison*, 519 A.2d at 388. Nor can it be used to create an implied duty that duplicates a matter expressly covered in the parties' written agreement. *Id.: Stonehedge Square Limited Partnership v. Movie Merchants. Inc.*. 454 Pa. Super. 468, 685 A.2d 1019, 1025 (Pa. Super. 1996).

Nevertheless, the covenant is to be taken into account in interpreting the expressed duties and obligations of the parties and assessing their performance of them. *Northview Motors, Inc.*, 227 F.3d at 91. Section 205 of the Restatement (Second) of Contracts (1979) indicates that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." The Pennsylvania Superior Court has expressly adopted this section. *Creeger Brick and Bldg. Supply, Inc. v. Mid-State Bank and Trust Co.*, 385 Pa. Super. 30, 560 A.2d 151, 153 (Pa. Super. 1989); *Baker v. Lafayette College*, 350 Pa. Super. 68, 504 A.2d 247, 255 (Pa. Super. 1986).

> Determining whether a party has complied with a duty or obligation in good faith "varies somewhat with the context." *Baker v. Lafayette*, 350 Pa. Super. 68, 504 A.2d 247, 255 (Pa. Super. 1986). While a comprehensive listing of the examples of bad faith is not possible, the Pennsylvania courts have recognized that certain patterns of conduct may evidence bad faith. These include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *Somers v. Somers*, 418 Pa. Super. 131, 613 A.2d 1211, 1213 (Pa. Super. 1992).

Jackson, 2013 U.S. Dist. LEXIS 158639 at *38-*40.

VII. The Pennsylvania Supreme Court, with two recent resignations, has been operating with five Supreme Court Justices, one will step down, and three new justices will assume positions on the Court in January of 2016.

At the present time, there are only five sitting justices, one of the four will not continue after January 2016. The Internal Operating Procedure for the Supreme Court assumes a Court of seven justices with an affirmative vote of three or more justices as allowing a petition for allowance of appeal to be granted. See, §6. The Internal Operating Procedure

also provides for holding a Petition under certain circumstances which apply in the instant case.

The Supreme Court will have the new justices in January and presumably this new court will resolve the good faith issue consistent with New Jersey, New York, Massachusetts and virtually all of the states, prior Pennsylvania Superior Courts, the Third Circuit, and Pennsylvania district courts.

Your Court should accept this Petition for Certiorari to remove the confusion in Pennsylvania created by the Superior Court in the instant two cases where the Pennsylvania Supreme Court has refused to accept Debtors' Petition for Allowance of Appeal.

CONCLUSION

This Court should accept the Petition for Writ of Certiorari particularly with respect to congressional action following the worst recession since the Great Depression.

Respectfully submitted,

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**NON-PRECEDENTIAL DECISION –
SEE SUPERIOR COURT I.O.P. 65.37**

ANGINO & ROVNER, PC, KING DRIVE CORP., A LA CARTE ENTERPRISES, RICHARD C. ANGINO & ALICE K. ANGINO, Appellants, v. SANTANDER BANK, N.A., WEIR PARTNERS, LLP, AND CUSHMAN & WAKEFIELD NATIONAL CORPORATION	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 489 MDA 2014

Appeal from the Order Entered February 19, 2014
In the Court of Common Pleas of Berks County
Civil Division at No(s): 13-1563

BEFORE: BOWES, J., OTT, J., and STABILE, J.

MEMORANDUM BY OTT, J.:

FILED JANUARY 28, 2015

Angino & Rovner, PC, King Drive Corp., A La Carte Enterprises, Richard C. Angino & Alice K. Angino (collectively "the Anginos") bring this appeal from the order entered on February 19, 2014, in the Court of Common Pleas of Berks County, sustaining the preliminary objections of Santander Bank, N.A. ("Bank") and Weir and Partners, LLP ("W & P")[1], and

[1] Weird [sic] and Partners, LLP is Bank's counsel.

dismissing the Anginos' Amended Complaint with prejudice.[2] In this appeal, the Anginos raise the following questions, which we quote:

1. Does there exist a duty of good faith and fair dealing in the lender/lendee context in Pennsylvania in certain situations?

2. Do the factual averments in the Amended Complaint and the supporting documents state a claim of breach of contract under the duty of care and fair dealing in the lender/lendee context under the special situation exception?

3. Do the factual averments in [the Anginos'] Amended Complaint and the supporting documents evidence state a claim for breach of contract under the reasonable expectations doctrine?

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[2] On June 25, 2013, the trial court sustained the preliminary objections of defendant, Cushman and Wakefield National Corporation ("Cushman and Wakefield"), and dismissed the complaint against Cushman and Wakefield with prejudice. After the Anginos took this appeal from the June 25, 2013 and February 19, 2014 orders, Cushman and Wakefield filed an Application to Dismiss Appeal, contending the Anginos had failed to preserve issues as to the June 25, 2013 Order in their Pa.R.A.P. 1925(b) statement. On October 9, 2014, this Court quashed the Anginos' appeal from the June 25, 2013 Order pursuant to Pa.R.A.P. 1972(a)(5), finding that the Anginos' Pa.R.A.P. 1925(b) statement failed to preserve any issues related to that Order, and dismissed the appeal as to Cushman and Wakefield. ***See*** Order, 10/9/2014.

4. Do the factual averments in [the Anginos'] Amended Complaint and the supporting documents evidence state a claim for breach of contract under the defense of impracticability?

5. Do the factual averments in [the Anginos'] Amended Complaint and the supporting documents evidence state a claim for breach of contract under waiver and/or estoppel.

6. Do the factual averments in [the Anginos'] Amended Complaint and the supporting documents state a claim for which relief may be granted with respect to [Bank's] breach of its contract by refusing to renew approximately $730,000 of irrevocable letters of credit which were an integral part of the 2007 Mockingbird/Mockingbird Extended Construction Loan and although renewing the Willow Lake 2005 Letter of Credit of $94,252.10 refusing to honor same?

7. Do the factual averments in [the Anginos'] Amended Complaint and supporting documents state a claim for which relief may be granted with respect to [Bank's] breach of contract by refusing to accept [the Anginos'] option to extend the security agreement with respect to the Mockingbird/Mockingbird Extended

Construction Development Loan from 2009 to 2010?[3]

8. Do the facts as pleaded and the supporting exhibits state a claim for which relief may be granted under the tort of civil conspiracy?

9. Do the facts as pleaded and the supporting exhibits state a claim for which relief may be granted under the tort of defamation?

10. Do the facts as pleaded and the supporting exhibit state a claim for which relief may be granted under the tort of fraud?

11. Are [the Anginos'] tort claims not barred by the gist of action doctrine?

The Anginos' Brief, at 5-6. In addition, although not listed in the Statement of Questions Involved, the Anginos' argument section separately addresses the following issue: "Plaintiffs have pleaded sufficient factual claims to set forth a cognizable claim for intentional infliction of emotional distress".[4] ***See id.*** at

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[3] We note that the Anginos do not present a separate argument in their brief regarding this issue. Therefore, we will not consider it. ***See Bolick v. Commonwealth***, 69 A.3d 1267, 1269 (Pa. Super. 2013), *appeal denied*, 84 A.3d 1061 (Pa. 2014) (finding issue waived pursuant to Pa.R.A.P. 2119(a) because appellant failed to present an argument in support of the issue).

[4] We note that the Anginos include this issue in the Table of Contents. ***See*** The Anginos Brief at ii. However, failure to include the issue in the Statement of Questions Involved violates Pa.R.A.P. 2116(a) ("No question will be considered unless it is

(Continued on following page)

42-43, Argument H. Based upon the following, we affirm.

The Honorable Jeffrey K. Sprecher has ably stated the facts of this case in his Pa.R.A.P. 1925(a) opinion, which we reiterate as follows:

> The following are the procedural facts:
>
> > On February 1, 2013, plaintiffs filed their original complaint against Weir & Partners LLP (W & P), Cushman & Wakefield National Corporation (Cushman & Wakefield), and Santander Holdings USA, Inc. (SHUSA), the holding company of Sovereign, now Santander (Bank). All three defendants filed preliminary objections. On May 30, 2013, the parties stipulated to dismiss SHUSA with prejudice as a defendant, that Bank would be added as the proper defendant, and that SHUSA's preliminary objections would continue to be advanced on Bank's behalf. On June 25, 2013, Judge Schmehl sustained the preliminary objections of the three defendants. Cushman & Wakefield was dismissed with prejudice, and plaintiffs were granted leave to file an amended complaint against the remaining defendants.

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stated in the statement of questions involved or is fairly suggested thereby."). Nevertheless, we decline to find waiver as "nothing substantially impedes our ability to review appellant[s'] argument[]." ***Rock v. Meakem***, 61 A.3d 239, 249 (Pa. Super. 2013), *appeal denied*, 80 A.3d 778 (Pa. 2013).

On July 11, 2013, plaintiffs filed an amended complaint with very similar allegations. W & P and Bank filed preliminary objections which this court sustained, and this court dismissed with prejudice the complaint against the remaining defendants.

The pertinent facts gleaned from the record are as follows.

Plaintiff, Richard C. Angino, is an attorney. He and his wife, Alice K. Angino, are the sole owners of plaintiffs King Drive Corporation and A La Carte Enterprises. These businesses are for residential land development and the operation of Felicita Resort. Plaintiff, Angino & Rovner, P.C., is Mr. Angino's law firm.

The Anginos are sophisticated borrowers and land developers. From 1971 through 2007, they invested an average of $1 million per year and borrowed $10 million to $12 million per year for a total investment of more than $50 million. Before 2004 they used Wells Fargo for their banking needs. In 2004, they entered into a series of loan transactions with Waypoint Bank, Bank's predecessor, and Bank: (1) a loan made by Waypoint Bank to King Drive on October 29, 2004, in the original principal amount of $1,400,000.00; (2) a loan made by Bank to King Drive on September 2, 2005, in the original principal amount of $94,252.10; (3) a site development loan made by Bank to King Drive on July 3, 2007, in the original

principal amount of $2,000,000.00; (4) a mortgage loan made by Bank to King Drive on November 28, 2007, in the original principal amount of $3,500,000.00; (5) a line of credit made by Bank to King Drive on November 28, 2007, in the original principal amount of $750,000.00; and (6) a line of credit made by Bank to A La Carte dated November 28, 2007, in the original principal amount of $750,000.00. The loans contained one, two, and three year maturity dates.

Plaintiffs allege in their amended complaint that from 2004 through 2008, Bank automatically renewed plaintiffs' loans and lines and letters of credit despite plaintiffs' inability to sell the requisite number of lots referenced in the financial documents. In 2007, the residential housing market collapsed, and plaintiffs were unable to sell the lots at the sales pace required in the loan documents. In 2008, plaintiffs wanted to borrow additional funds from Bank but were denied, because the lines were failing to generate the anticipated cash flow. Plaintiffs contend that beginning in 2008, Bank commenced a plan to divest itself of residential loans, lines of credit, and letters of credit by changing its prior practice of waiving compliance with the technical contract terms, including time and lot sales, and refusing to continue payments under its lines and letters of credit commitments.

By mid-2009, plaintiffs were in default of the loan documents for failing to sell lots

at the required sales pace. Bank offered to modify the loans to extend the maturity dates, but plaintiffs refused this offer.

Bank notified plaintiffs on March 24, 201[0], that they were in default of the loans. [On May 5, 2010,] W & P, Bank's counsel, sent plaintiffs a letter advising that the loans were immediately due and payable. On July 14, 2011, Bank entered into a Loan Modification agreement. The Modification extended the maturity dates for the loans, modified the interest rates, and required additional security for the loans. Plaintiffs released all claims against the Bank, its employees, officers, directors, agents, representatives, attorneys, consultants, and advisors. The Modification was negotiated by all of the plaintiffs and their counsel, and defendants.

Plaintiffs were unable to make the required June 30, 2012 principal payment of $500,000.00; therefore, on July 19, 2012, Bank agreed to amend the Loan Modification under the terms of the First Amendment which plaintiffs and their legal counsel approved and executed. This amendment, *inter alia*, reduced the amount of June 30, 2012 principal payment and provided additional time for payment. Under the terms of this amendment, plaintiffs released all claims again against defendants.

Plaintiffs were again unable to make the principal payment due on December 31, 2012. Bank again agreed to amend the loan for a second time. Under the terms of the

Second Amendment, plaintiffs again released all claims.

Plaintiffs requested that Bank make payments to them under letters of credit. Bank refused because plaintiffs were not the named beneficiaries and, therefore, not entitled to payment. Furthermore, under the terms of the Loan Modification, no further advances were permitted. Moreover, two of the letters of credit had expired prior to the extension of the Modification agreement and were not renewed.

Plaintiffs amended complaint contains six causes of action, but within each cause of action are several claims. Defendants filed preliminary objections to the amended complaint. After argument and a review of the record, this court sustained defendants' preliminary objections. Plaintiffs did not substantially amend the complaint against these defendants in any salient manner, so this court dismissed the amended complaint against defendants with prejudice. Plaintiffs filed a timely appeal.

. . .

This court ordered plaintiffs to file a Concise Statement of Errors Complained of on Appeal. Plaintiffs complied with this directive; however, this court notes that plaintiffs' statement consists of sixteen pages with five attached exhibits, so it is far from concise. . . .

Trial Court Opinion, 5/13/2014, at 1-5.

At the outset, we state our standard of review:

The standard of review we apply when reviewing a trial court's order granting preliminary objections in the nature of a *demurrer* is as follows:

> Our standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
>
> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011) (citation omitted).

In the first two issues, the Anginos assert that there exists a duty of good faith and fair dealing in the lender/lendee context in Pennsylvania in certain situations, and that the Amended Complaint states a valid cause of action.

The duty of good faith and fair dealing in Pennsylvania was addressed in ***Cable & Assocs. Ins. Agency v. Commercial Nat'l Bank***, 875 A.2d 361 (Pa. Super. 2005):

> In ***Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank and Trust***, 385 Pa. Super. 30, 560 A.2d 151 (Pa. Super. 1989), we explained the legal concept of "good faith" with regard to the law of contracts in the following fashion:
>
> > Section 205 of the Restatement (Second) of Contracts suggests that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." A similar requirement has been imposed upon contracts within the Uniform Commercial Code by 13 Pa.C.S. § 1203. The duty of "good faith" has been defined as "honesty in fact in the conduct or transaction concerned." ***See***: 13 Pa.C.S. § 1201; Restatement (Second) of Contracts § 205, Comment a. Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts. ***AM/PM Franchise Association v. Atlantic Richfield Co.***, 373 Pa. Super. 572, 579,

> 542 A.2d 90, 94 (1988); [see ***also***] ***Clay v. Advanced Computer Applications, Inc.***, 370 Pa. Super. 497, 505 n. 4, 536 A.2d 1375, 1379 n. 4 (1988), *allocatur granted*, 518 Pa. 647, 544 A.2d 959 (1988).

Creeger, 560 A.2d at 153.

> The courts of this Commonwealth have, in addition to the general contractual concept of "good faith," recognized a duty of "good faith" inherent in certain types of legal relationships, such as insurer and insured. ***Creeger***, 560 A.2d at 153. Such an inherent duty of good faith does ***not*** extend to the lender-borrower relationship. ***Id.***, 560 A.2d at 154. As we explained in ***Creeger***, a lending institution does not violate a separate duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights as a creditor. ***Id.***, 560 A.2d at 154. However, a borrower may plead sufficient facts to make out a claim that a lender violated its general duty of "good faith" arising out of the law of contracts. ***See, e.g.***, ***Corestates Bank, N.A. v. Cutillo***, 1999 PA Super 14, 723 A.2d 1053 (Pa. Super. 1999). Therefore, the creation of a separate duty of good faith between lender and borrower is unnecessary due to the existence of this "good faith" cause of action sounding in contract, as well as the existence of other causes of action such as fraud, slander, or interference with prospective contractual relations,

> which sound in tort. ***Creeger***, 560 A.2d at 154.
>
> A party proceeding on the theory that a lender violated its contractual duty of good faith must demonstrate more than the fact that a lender negotiated terms of a loan which are favorable to itself. ***Creeger***, 560 A.2d at 154. Further, the duty of good faith imposed upon contracting parties does not compel a lender to surrender rights granted by statute or conferred to the lender by the terms of the loan contract. ***Id.***, 560 A.2d at 154. As such, a lender generally is not liable for harm caused to a borrower by refusing to advance additional funds, release collateral, or assist in obtaining additional loans from third persons. ***Id.***, 560 A.2d at 154.

Id. at 364.

Here, the trial court rejected the Anginos' claim that the Amended Complaint stated a cause of action for breach of the duty of good faith and fair dealing, stating:

> Plaintiffs' third assertion is that the amended complaint is legally sufficient to state a claim for a breach of the duty of good faith and fair dealing. This contention fails and must be dismissed. Plaintiffs cite cases in which the court held or in *dicta* stated that a duty of good faith and fair dealing can be breached by a party; however, plaintiffs' cases are inapposite to the instant case. Plaintiffs and Bank have a relationship of

> borrowers and lender. A lending institution does not violate a duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights against a creditor. ***Creeger Brick and Building Supply Inc. v. Mid State Bank and Trust Company***, 385 Pa. Super. 30, 560 A.2d 151 (1989). In the case at bar, Bank simply adhered to the parties' agreement and enforced its legal rights as plaintiffs' creditor.

Trial Court Opinion, 5/13/2014, at 7. We agree with the court's analysis. Moreover, ***Corestates Bank, N.A. v. Cutillo***, 723 A.2d 1053 (Pa. Super. 1999), relied upon by the Anginos, is distinguishable.

In ***Corestates Bank, N.A.***, appellant borrower was sued by lender to collect a debt owed following appellant's default under a loan agreement. The borrower counterclaimed, alleging, *inter alia*, the lender's "failure to deal in good faith." ***Id.*** at 1058. The counterclaim set forth the following averments:

> For an extended period of time, [appellant] dealt with [the Bank] almost exclusively with regard to the financial needs of [appellant] and of [appellant's] various commercial enterprises.
>
> Over the course of 19 years, [appellant] established a relationship with [the Bank] of trust and reliance.
>
> By way of refusing to satisfy numerous outstanding mortgages which were in amounts

> greatly in excess of the borrowings of [appellant] from [the Bank], and by refusing to advance the $50,000.00 promised by [the Bank] to [appellant] in consideration for the $50,000.00 Mortgage obtained by [the Bank] from [appellant], [the Bank] breached its duty to [appellant] to deal in good faith in the various business transactions entered into by the parties.

Id. at 1059. The trial court granted the bank's preliminary objections to the counterclaim. On appeal, a panel of this Court reversed the trial court, stating:

> In Pennsylvania, the duty of good faith has been recognized in limited situations. ***Creeger Brick & Building Supply, Inc. v. Mid-State Bank & Trust***, 385 Pa. Super. 30, 560 A.2d 151 (1989). While a lending institution does not violate a separate duty of good faith by adhering to its agreements with a borrower or enforcing its contractual rights as a creditor, ***see id.*** 560 A.2d at 154, due to the longstanding relationship between the parties in this case, we cannot say that the parties have not, as a matter of law, developed a relationship wherein the Bank owes appellant a duty of good faith.

Id. at 1059.

The Anginos claim that the holding in ***Corestates Bank, N.A.*** supports its position that a valid claim exists in this case for breach of the duty of good faith and fair dealing. We disagree and find the

Anginos' reliance on ***Corestates Bank, N.A.***, to be misplaced.

In ***Corestates Bank, N.A.***, when the borrower counterclaimed against the lender, the borrower expressly pleaded lender's breach of duty of good faith in failing to perform its oral promise to lend the borrower $50,000, after the lender executed a mortgage in favor of the lender pursuant to the parties' agreement. Such is not the case here.

In the present case, the averments of the Amended Complaint do not establish anything other than Bank's decision to enforce its legal and contractual rights against the Anginos. As such, the Amended Complaint fails to allege the existence of facts and circumstances to support a claim for breach of the implied covenant of good faith and fair dealing. ***See Cable & Assoc. Ins. Agency***, ***supra*** at 364 ("[A] lender generally is not liable for harm caused to a borrower by refusing to advance additional funds, release collateral, or assist in obtaining additional loans from third persons."). Accordingly, the trial court properly determined that the Amended Complaint failed to state a claim for a breach of the duty of good faith and fair dealing.

Next, the Anginos claim that the Amended Complaint and referenced documentary exhibits state a theory of recovery for breach of contract under the reasonable expectation doctrine. According to the Anginos:

The averments in [the Anginos'] Amended Complaint and referenced exhibits clearly provide a theory of recovery based upon the parties' reasonable expectations as detailed in an exchange of communications from 2002 through 2004, including [the Anginos'] submission in 2004 of its long-range plan to develop a green sustainable multi-use community.

The Restatement (Second) of Contracts § 211 standardized agreement provides that in construing and applying a standardized contract, the construction must effectuate the reasonable expectation of the average member of the public who accepts it. It is clear from the averments in the Amended Complaint and the documents attached as exhibits that the reasonable expectations of the parties were to extend beyond the one year maturity dates of lines and letters of credit and two year maturity dates of the documents themselves and even beyond the "pacing" requirements of the documents. The "pacing" requirements of three per year for Willow Lake would require at least four to five years to sell the remaining 13 or 14 lots. The "pacing" requirement for Mockingbird/ Mockingbird Extended of five lots per year would also require at least five to six years to sell 28 lots. The $200,000 annual payments toward principal for the $5,000,000 mortgage and two lines of credit necessitated 25 years for total payment of principal.

The Anginos' Brief, at 31-32. This argument is unavailing.

"[A] party may not claim its reasonable expectations are inconsistent with clear contract language." ***Gustine Uniontown Associates, Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc.***, 892 A.2d 830, 837 (Pa. Super. 2006). Here, the Anginos present a theory of recovery for breach of contract based upon the reasonable expectation doctrine. However, the Anginos present no authority, nor has our research revealed, that a cause of action for breach of contract exists based upon the reasonable expectation doctrine. Accordingly, no relief is due on this claim.

In the next two issues (Issues 4 and 5), the Anginos claim (1) that the Amended Complaint and numerous documentary exhibits establish a theory of recovery for breach of contract under waiver and estoppel, and (2) the Amended Complaint and supporting exhibits state a viable theory of recovery for breach of contract under impracticability and impossibility. However, as the trial court correctly points out, these doctrines are affirmative defenses, not causes of action. ***See*** Trial Court Opinion, 5/13/2014, at 8; Pa.R.C.P. 1030 ("[A]ll affirmative defenses including but not limited to the defenses of . . . estoppel, . . . impossibility of performance, . . . and waiver shall be pleaded in a responsive pleading under the heading "New Matter".). Accordingly, we reject this argument without further discussion.

In the sixth issue, the Anginos argue that the Amended Complaint states a theory of recovery based upon Bank's breach of contract by refusing to renew irrevocable letters of credit, refusing to honor letters of credit, and interpreting letters of credit erroneously. Specifically, the Anginos rely upon allegations that Bank refused to renew two letters of credit – for Mockingbird/Mockingbird Extended, and although continuing to renew a third letter of credit – for Willow Lake, and refused to reimburse the Anginos for expenses incurred for roads and infrastructure beyond the 2009 maturity date. Here, however, there are no averments that Bank failed to abide by the written terms of the letters of credit. Therefore, our review confirms the Amended Complaint fails to state a cause of action based upon this theory.

In the remaining issues, the Anginos claim that the Amended Complaint sets forth causes of action for the torts of civil conspiracy, defamation, fraud, and intentional infliction of emotional distress. The Anginos also contend that the tort claims are not barred by the gist of the action doctrine.

The trial court has succinctly and properly rejected these arguments. We therefore adopt the trial court's discussion as dispositive of the final five issues raised by the Anginos in this appeal, as follows:

> Plaintiffs next argue that the complaint is legally sufficient to state a claim for civil conspiracy. This contention is without merit and should be dismissed. A civil conspiracy is a combination of two or more persons who

engage in an unlawful or criminal act or accomplish a lawful act by unlawful means or for an unlawful purpose. In the instant case, the defendants are the Bank and its attorneys; therefore, there is no conspiracy because it is impossible for a principal and agent to enter into a conspiracy. Even assuming arguendo, that a conspiracy existed between the defendants, they did nothing illegal or for an unlawful purpose against plaintiffs.

Plaintiffs' next argument is that the complaint was legally sufficient to state a claim for the intentional infliction of emotional distress. This contention fails. Intentional infliction of emotional distress occurs when one, intentionally and recklessly, by extreme and outrageous conduct, causes severe emotional distress to another. This court notes that all plaintiffs assert this action, but businesses are unable to suffer emotional distress. The only allegations to support this claim are that Bank's employees made telephone calls to the individual plaintiffs regarding their failure to make timely loan payments and they made "irresponsible threats of foreclosure." Bank pursued its legal rights and warned plaintiffs of its intent to foreclose due to the lack of payments. Hence, Bank's actions are legal, not irresponsible. If plaintiffs suffered emotional distress, it was the result of their unhappiness over Bank's pursuit of its legal remedies.

Plaintiffs assert that the complaint is legally sufficient to state a claim for fraud. This allegation is meritless. Pa.R.C.P. 1019 states that averments of fraud or mistake must be averred with particularity. Plaintiffs contend only that the defendants committed fraud and misrepresentations pertaining to their position regarding appraisals, obligations, and letters of credit. Plaintiffs do not delineate what was fraudulent or why an action was fraudulent. Plaintiffs do not agree with defendants' appraisals of their properties, but their appraisals do not constitute fraud. For these reasons, this issue should be dismissed.

Plaintiffs submit that the amended complaint is legally sufficient to state a claim for defamation. This complaint is a frippery. Plaintiffs do not state what statements were defamatory. Moreover, defendants did not publish any statements to the public. The public's knowledge gained through the publicity of a legal proceeding is not defamation.

Plaintiffs' [next] contention is that their tort claims are not barred by the gist of the action doctrine. The gist of the action doctrine precludes tort claims that are collateral to claims sounding in contract. The doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort claims and, as a practical matter, precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. ***The Brickman Group, LTD. v. CGU Insurance***

> ***Company***, 865 A.2d 918 (Pa. Super. 2004). lf plaintiffs had pled legitimate intentional tort claims, perhaps they would have withstood the gist of the doctrine test; however, this court dismissed plaintiffs' tort claims because they were legally deficient. For this reason this assertion fails.

Trial Court Opinion, 5/13/2014, at 9-10.[5]

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[5] We simply add that the Pennsylvania Supreme Court recently addressed the "gist of the action" doctrine in ***Bruno v. Erie Ins. Co.***, ___ A.3d ___ [2014 PA LEXIS 3319] (Pa. December 15, 2014). The ***Bruno*** Court held that the "gist of the action" doctrine did not bar the plaintiffs'-insureds' negligence claim against its insurer for false assurances made by the insurer's adjuster and the engineer regarding mold discovered in the insureds' home. The Supreme Court explained:

> [T]he mere existence of a contract between two parties does not, *ipso facto*, classify a claim by a contracting party for injury or loss suffered as the result of actions of the other party in performing the contract as one for breach of contract. Indeed, our Court has long recognized that a party to a contract may be found liable in tort for negligently performing contractual obligations and thereby causing injury or other harm to another contracting party. . . .
>
> Consequently, a negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract. Instead, the contract is regarded merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed.

Id. at *57-*58.

(Continued on following page)

Having considered the arguments raised by the Anginos, and finding that none presents a basis upon which to disturb the decision of the trial court, we affirm the order that dismissed the Anginos' Amended Complaint with prejudice.

Order affirmed.

Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/28/2015

We note that in ***Bruno***, the issue of the "gist of the action" doctrine was decided prior to the issue regarding whether the negligence claim was otherwise legally cognizable, and therefore the Pennsylvania Supreme Court remanded the case to this Court to fully consider the parties' arguments on that issue. ***See id.*** at *61-*62.

Here, the Anginos argue that their tort claims are not barred by the "gist of the action" doctrine because the claims arose from conduct separate and apart from the subject contracts. The Anginos' argument assumes the legally sufficiency of their intentional tort claims. However, we have concluded that the trial court properly sustained the demurrers and dismissed the intentional tort claims. It follows, as the trial court determined, that the Anginos' argument regarding the "gist of the action" doctrine is moot.

**IN THE SUPERIOR COURT
OF PENNSYLVANIA
MIDDLE DISTRICT**

ANGINO & ROVNER, PC, KING DRIVE CORP., A LA CARTE ENTERPRISES, RICHARD C. ANGINO & ALICE K. ANGINO, Appellant [sic], v. SANTANDER BANK, N.A., WEIR PARTNERS, LLP, AND CUSHMAN & WAKEFIELD NATIONAL CORPORATION	No. 489 MDA 2014

ORDER

(Filed Apr. 2, 2015)

IT IS HEREBY ORDERED:

THAT the application filed February 4, 2015, requesting reargument of the decision dated January 28, 2015, is DENIED.

PER CURIAM

ANGINO & ROVNER, P.C., KING DRIVE CORP., A LA CARTE ENTERPRISES, INC., RICHARD C. ANGINO and ALICE K. ANGINO, Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA
VS.	:	CIVIL ACTION – LAW
SOVEREIGN BANK, N.A. and WEIR & PARTNERS, LLP., Defendants	:	No. 13-1563

Richard G. Angino, Esquire
Attorney for plaintiffs

Walter Weir, Jr., Esquire
Attorney for defendants

OPINION, JEFFREY K. SPRECHER, J.

MAY 13, 2014

Plaintiffs appeal the Orders dated February 28, 2014, and February 19, 2014, which sustained defendants' preliminary objections and dismissed plaintiffs' amended complaint with prejudice and the Order dated June 25, 2013, signed by the Honorable Jeffrey L. Schmehl which sustained the preliminary objections of a third defendant, Cushman & Wakefield National Corporation, and dismissed the complaint against it with prejudice. This Opinion is filed pursuant to Pa. R.A.P. 1925 and will address the Orders of the undersigned. Judge Schmehl is no longer a Pennsylvania judge of the court of common pleas, so there will be no opinion regarding the issues related to his Order.

FACTS

The following are the procedural facts.

On February 1, 2013, plaintiffs filed their original complaint against Weir & Partners LLP (W & P), Cushman & Wakefield National Corporation (Cushman & Wakefield), and Santander Holdings USA, Inc. (SHUSA), the holding company of Sovereign, now Santander (Bank). All three defendants filed preliminary objections. On May 30, 2013, the parties stipulated to dismiss SHUSA with prejudice as a defendant, that Bank would be added as the proper defendant, and that SHUSA's preliminary objections would continue to be advanced on Bank's behalf. On June 25, 2013, Judge Schmehl sustained the preliminary objections of the three defendants. Cushman & Wakefield was dismissed with prejudice, and plaintiffs were granted leave to file an amended complaint against the remaining defendants.

On July 11, 2013, plaintiffs filed an amended complaint with very similar allegations. W & P and Bank filed preliminary objections which this court sustained, and this court dismissed with prejudice the complaint against the remaining defendants.

The pertinent facts gleaned from the record are as follows.

Plaintiff, Richard C. Angino, is an attorney. He and his wife, Alice K. Angino, are the sole owners of plaintiffs King Drive Corporation and A La Carte Enterprises. These businesses are for residential land

development and the operation of Felicita Resort. Plaintiff, Angino & Rovner, P.C., is Mr. Angino's law firm.

The Anginos are sophisticated borrowers and land developers. From 1971 through 2007, they invested an average of $1 million per year and borrowed $10 million to $12 million per year for a total investment of more than $50 million, Before 2004 they used Wells Fargo for their banking needs. In 2004, they entered into a series of loan transactions with Waypoint Bank, Bank's predecessor, and Bank: (1) a loan made by Waypoint Bank to King Drive on October 29, 2004, in the original principal amount of $1,400,000.00; (2) a loan made by Bank to King Drive on September 2, 2005, in the original principal amount of $94,252.10; (3) a site development loan made by Bank to King Drive on July 3, 2007, in the original principal amount of $2,000,000.00; (4) a mortgage loan made by Bank to King Drive on November 28, 2007, in the original principal amount of $3,500,000.00; (5) a line of credit made by Bank to King Drive on November 28, 2007, in the original principal amount of $750,000.00; and (6) a line of credit made by Bank to A La Carte dated November 28, 2007, in the original principal amount of $750,000.00. The loans contained one, two, and three year maturity dates.

Plaintiffs allege in their amended complaint that from 2004 through 2008, Bank automatically renewed plaintiffs' loans and lines and letters of credit despite plaintiffs' inability to sell the requisite number

of lots referenced in the financial documents. In 2007, the residential housing market collapsed, and plaintiffs were unable to sell the lots at the sales pace required in the loan documents. In 2008, plaintiffs wanted to borrow additional funds from Bank but were denied, because the lines were failing to generate the anticipated cash flow. Plaintiffs contend that beginning in 2008, Bank commenced a plan to divest itself of residential loans, lines of credit, and letters of credit by changing its prior practice of waiving compliance with the technical contract terms, including time and lot sales, and refusing to continue payments under its lines and letters of credit commitments.

By mid-2009, plaintiffs were in default of the loan documents for failing to sell lots at the required sales pace. Bank offered to modify the loans to extend the maturity dates, but plaintiffs refused this offer.

Bank notified plaintiffs on March 24, 2013, that they were in default of the loans. W & P, Bank's counsel, sent plaintiffs a letter advising that the loans were immediately due and payable. On July 14, 2011, Bank entered into a Loan Modification agreement. The Modification extended the maturity dates for the loans, modified the interest rates, and required additional security for the loans. Plaintiffs released all claims against the Bank, its employees, officers, directors, agents, representatives, attorneys, consultants, and advisors. The Modification was negotiated by all of the plaintiffs and their counsel, and defendants.

Plaintiffs were unable to make the required June 30, 2012 principal payment of $500,000.00; therefore, on July 19, 2012, Bank agreed to amend the Loan Modification under the terms of the First Amendment which plaintiffs and their legal counsel approved and executed. This amendment, *inter alia*, reduced the amount of June 30, 2012 principal payment and provided additional time for payment. Under the terms of this amendment, plaintiffs released all claims again against defendants.

Plaintiffs were again unable to make the principal payment due on December 31, 2012. Bank again agreed to amend the loan for a second time. Under the terms of the Second Amendment, plaintiffs again released all claims.

Plaintiffs requested that Bank make payments to them under letters of credit. Bank refused because plaintiffs were not the named beneficiaries and, therefore, not entitled to payment. Furthermore, under the terms of the Loan Modification, no further advances were permitted. Moreover, two of the letters of credit had expired prior to the extension of the Modification agreement and were not renewed.

Plaintiffs' amended complaint contains six causes of action, but within each cause of action are several claims. Defendants filed preliminary objections to the amended complaint. After argument and a review of the record, this court sustained defendants' preliminary objections. Plaintiffs did not substantially amend the complaint against these defendants in any

salient manner, so this court dismissed the amended complaint against defendants with prejudice. Plaintiffs filed a timely appeal.

ISSUES

This court ordered plaintiffs to file a Concise Statement of Errors Complained of on Appeal. Plaintiffs complied with this directive; however, this court notes that plaintiffs' statement consists of sixteen pages with five attached exhibits, so it is far from concise. This court winnowed the following complaints from this voluminous document, the bulk of which reads like a brief.

1. The amended complaint is legally sufficient to state a claim for breach of contract.

2. The amended complaint is legally sufficient to state a claim for breach of fiduciary duty.

3. The amended complaint is legally sufficient to state a claim of the duty of good faith and fair dealing.

4. Whether this court erred in dismissing the first cause of action and the second cause of action because they attempt to assert affirmative defenses as independent causes of action.

5. The amended complaint is legally sufficient to state a claim for civil conspiracy.

6. The amended complaint is legally sufficient to state a claim for intentional infliction of emotional distress.

7. The amended complaint is legally sufficient to state a claim for fraud.

8. The amended complaint is legally sufficient to state a claim for defamation,

9. Plaintiffs' tort claims are not barred by the gist of the action doctrine.

10. The amended complaint is legally sufficient to state a claim for the violation of the Dodd-Wall Street Reform and Consumer Protection Act.

DISCUSSION

Preliminary objections in the nature of a demurrer should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action. *Lerner v. Lerner*, 954 A.2d 1229 (Pa. Super. 2008). In the case *sub judice*, this court found that plaintiffs failed to assert any legally cognizable claim. It will address plaintiffs' issues *seriatim*.

Plaintiffs first submit that the amended complaint is legally sufficient to state a claim for breach of contract. This complaint is without merit. A basic tenet of contract law is that when the language of a contract is clear and unambiguous its meaning must be determined by an examination of the content of

the contract itself. The court must construe the agreement only as written and may not modify the plain meaning under the guise of interpretation: *Little v. Little*, 441 Pa. Super, 185, 657 A.2d 12 (1995).

In the instant case, there is no question that the plaintiffs breached the Loan Modification and its amendments. By their own admission, they failed to sell the requisite numbers of lots per year, and they missed payments that were due under the various loan documents. Plaintiffs explain everything that they failed to do as "mere technicalities" and contend that Bank breached the agreements because it refused to ignore mere technicalities. A bank may refuse to extend credit or modify a loan if it wishes to do so. Here, Bank had ample reasons to deny requests for more funds and to foreclose. Plaintiffs want Bank to be punished because it had waived the provision of the requisite lot sales in the past. A bank is under no obligation to continue to waive pertinent provisions, especially if circumstances do not improve.

Plaintiffs next argue that the complaint is legally sufficient to state a claim for a breach of fiduciary duty. This contention is meritless. Plaintiffs have alleged no facts that create a fiduciary relationship between Bank and them. Usually, there is no confidential relationship between a borrower and a lender unless the lender exercises substantial control over the borrower's business affairs. In the case *sub judice*, Bank is not involved in the daily management and operations of the businesses, and it does not have the

ability to compel plaintiffs to engage in unusual transactions. Bank did not compel plaintiffs to enter into the Loan Modification and its amendments. The terms were negotiated by the parties' attorneys when the plaintiffs were unable to meet their financial obligations. For these reasons, this issue must be dismissed.

Plaintiffs' third assertion is that the amended complaint is legally sufficient to state a claim for a breach of the duty of good faith and fair dealing. This contention fails and must be dismissed. Plaintiffs cite cases in which the court held or in *dicta* stated that a duty of good faith and fair dealing can be breached by a party; however, plaintiffs' cases are inapposite to the instant case. Plaintiffs and Bank have a relationship of borrowers and lender. A lending institution does not violate a duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights a creditor. *Creeger Brick and Building Supply inc. v. Mid State Bank and Trust Company*, 385 Pa. Super. 30, 560 A.2d 151 (1989). In the case at bar, Bank simply adhered to the parties' agreement and enforced its legal rights as plaintiffs' creditor.

Plaintiffs maintain that it is error to dismiss the first and second causes of action because they attempt to assert affirmative defenses as an independent cause of action. Unquestionably, these actions state a litany of the affirmative defenses which are listed in Pa. R.C.P. 1030: coercion, adhesion,

impossibility, waiver and estoppel, fraud, and misrepresentation. Even assuming *arguendo* that these affirmative defenses are the basis of a complaint, plaintiffs have not shown that any of these grounds exist in this case.

An adhesion contract is a standard form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms. A contract is unconscionable, and therefore avoidable, where there is a lack of meaningful choice in the acceptance of the challenged provision, and the provision unreasonably favors the party asserting it. *Bayne v. Smith*, 965 A.2d 26 (Pa. Super. 2009). In the case *sub judice*, the Mr. Angino is a noted attorney, not an unsophisticated consumer, and the parties negotiated the Loan Modification and the amendments thereto with their attorneys; there were no terms of adhesion or misrepresentations. Plaintiffs defaulted on their loans, so they may not have been in a strong bargaining position, but they were never coerced to sign any documents. Plaintiffs' real estate venture may be collapsing due to the economy, but Bank does not have to loan plaintiffs more money when they are having trouble paying off their present loans. A bank is a business and giving money to poor credit risks is not a good business practice.

Plaintiffs next argue that the complaint is legally sufficient to state a claim for civil conspiracy. This contention is without merit and should be dismissed. A civil conspiracy is a combination of two or more

persons who engage in an unlawful or criminal act or accomplish a lawful act by unlawful means or for an unlawful purpose. In the instant case, the defendants are the Bank and its attorneys; therefore, there is no conspiracy because it is impossible for a principal and agent to enter into a conspiracy. Even assuming *arguendo*, that a conspiracy existed between the defendants, they did nothing illegal or for an unlawful purpose against plaintiffs.

Plaintiffs' next argument is that the complaint was legally sufficient to state a claim for the intentional infliction of emotional distress. This contention fails. Intentional infliction of emotional distress occurs when one, intentionally and recklessly, by extreme and outrageous conduct, causes severe emotional distress to another. This court notes that all plaintiffs assert this action, but businesses are unable to suffer emotional distress. The only allegations to support this claim are that Bank's employees made telephone calls to the individual plaintiffs regarding their failure to make timely loan payments and they made "irresponsible threats of foreclosure." Bank pursued its legal rights and warned plaintiffs of its intent to foreclose due to the lack of payments. Hence, Bank's actions are legal, not irresponsible. If plaintiffs suffered emotional distress, it was the result of their unhappiness over Bank's pursuit of its legal remedies.

Plaintiffs assert that the complaint is legally sufficient to state a claim for fraud. This allegation is meritless. Pa.R.C.P. 1019 states that averments of

fraud or mistake must be averred with particularity. Plaintiffs contend only that the defendants committed fraud and misrepresentations pertaining to their position regarding appraisals, obligations, and letters of credit. Plaintiffs do not delineate what was fraudulent or why an action was fraudulent. Plaintiffs do not agree with defendants' appraisals of their properties, but their appraisals do not constitute fraud. For these reasons, this issue should be dismissed.

Plaintiffs submit that the amended complaint is legally sufficient to state a claim for defamation. This complaint is a frippery. Plaintiffs do not state what statements were defamatory. Moreover, defendants did not publish any statements to the public. The public's knowledge gained through the publicity of a legal proceeding is not defamation.

Plaintiffs' penultimate contention is that their tort claims are not barred by the gist of the action doctrine. The gist of the action doctrine precludes tort claims that are collateral to claims sounding in contract. The doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort claims and, as a practical matter, precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. *The Brickman Group, LTD. v. CGU Insurance Company*, 865 A.2d 918 (Pa. Super. 2004). If plaintiffs had pled legitimate intentional tort claims, perhaps they would have withstood the gist of the doctrine test; however, this court dismissed plaintiffs' tort claims because they were legally deficient. For this reason this assertion fails.

Plaintiffs' last argument is that the amended complaint is legally sufficient to state a claim for a violation of the Dodd-Wall Street Reform and Consumer Protection Act. This argument is without merit. Plaintiffs aver that Bank violated the letter and spirit of the Act, but they do not state what the "spirit" is and what provision is violated. The Act has 161 titles and over 500 sections, Defendants should not have been made to guess exactly what section they are accused of violating and what section applies to commercial loans which are the subject of this proceeding.

In accordance with the foregoing Opinion, this court submits that its decision should be affirmed and the complaint dismissed.

/s/ Jeffrey K. Sprecher
JEFFREY K. SPRECHER, J.

IN THE COURT OF COMMON PLEAS
BERKS COUNTY, PENNSYLVANIA

ANGINO & ROVNER, P.C., KING DRIVE CORP., A LA CARTE ENTERPRISES, INC., RICHARD C. ANGINO and ALICE K. ANGINO, Plaintiffs, v. SANTANDER BANK, N.A., formerly d/b/a SOVEREIGN BANK, N.A., WEIR & PARTNERS LLP Defendants.	IN THE COURT OF COMMON PLEAS BERKS COUNTY CIVIL ACTION – LAW – EQUITY NO. 13-1563

ORDER

AND NOW this 28 day of February, 2014, after inadvertently entering an Order on February 19, 2014 using an incorrect caption in the above matter, it is hereby ORDERED that this Court's February 19, 2014 Order is amended as follows:

Upon consideration of the Preliminary Objections of Defendant, Weir & Partners LLP to Plaintiffs' Amended Complaint, and any response thereto, it is hereby ORDERED that Defendant Weir & Partners LLP's Preliminary Objections are SUSTAINED.

IT IS FURTHER ORDERED that Plaintiffs' Amended Complaint, is dismissed, with prejudice.

BY THE COURT:

/s/ Jeffrey K. Sprecher, J

J.

IN THE COURT OF COMMON PLEAS
BERKS COUNTY, PENNSYLVANIA

ANGINO & ROVNER, P.C., KING DRIVE CORP., A LA CARTE ENTERPRISES, INC., RICHARD C. ANGINO and ALICE K. ANGINO, Plaintiffs, v. SOVEREIGN BANK, N.A., and WEIR & PARTNERS, LLP Defendants.	IN THE COURT OF COMMON PLEAS BERKS COUNTY, PA CIVIL ACTION – LAW – EQUITY NO. 13-1563

ORDER

AND NOW this 19 day of Feb, 2013~~3~~4, after consideration of the Preliminary Objections of Defendant, Sovereign Bank, N.A. to Plaintiffs' Amended Complaint, and any response thereto, it is hereby ORDERED that Defendant, Sovereign Bank, N.A.'s Preliminary Objections are SUSTAINED.

IT IS FURTHER ORDERED that Plaintiffs' Amended Complaint is dismissed, with prejudice.

BY THE COURT:

/s/ Jeffrey K. Sprecher
J.

ANGINO & ROVNER, P.C., KING DRIVE CORP., A LA CARTE ENTERPRISES, INC., RICHARD C. ANGINO and ALICE K. ANGINO, Plaintiffs, v. SANTANDER HOLDINGS USA INC., formerly d/b/a SOVEREIGN BANCORP, INC., WEIR & PARTNERS, LLP, and CUSHMAN & WAKEFIELD NATIONAL CORPORATION, Defendants.	**IN THE COURT OF COMMON PLEAS BERKS COUNTY, PA** **CIVIL ACTION – LAW – EQUITY** **NO. 13-1563**

ORDER

AND NOW, this 25th day of June 2013, upon consideration of the Preliminary Objections of Defendant Cushman & Wakefield of Washington D.C., Inc. (improperly named in the Complaint as Cushman & Wakefield National Corporation) (hereinafter "C & W") to Plaintiffs' Complaint, it is hereby **ORDERED** that the Preliminary Objections are **SUSTAINED**, and that Plaintiffs' Complaint against C&W is **DISMISSED WITH PREJUDICE**.

/s/ Jeffrey K. Sprecher
J.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ANGINO & ROVNER, PC, KING DRIVE CORP., A LA CARTE ENTERPRISES, RICHARD C. ANGINO & ALICE K. ANGINO, Petitioners, v. SANTANDER BANK, N.A., WEIR PARTNERS, LLP, AND CUSHMAN & WAKEFIELD NATIONAL CORPORATION, Respondents.	: No. 274 MAL 2015 : Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 25th day of August, 2015, the Petition for Allowance of Appeal is **DENIED**.