

No. 1-12-1428

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

O'HARE GROUND TRANSPORT FACILITY, LLC., an Illinois Limited Liability Company,)	Appeal from the Circuit Court of Cook County
)	
Plaintiff-Appellant,)	
)	
v.)	No. 04 CH 8410
)	Consolidated
COMMERCIAL VEHICLE CENTER, LLC, an Illinois Limited Liability Company; THOMAS ROTH; MATTHEW BAINES; CITY OF CHICAGO; KDR, INCORPORATED, an Illinois Corporation; FIRSTMERIT BANK, N.A.; ROSARIO IPPOLITO; MICHAEL R. CAMINO, D.D.S.; and ROBERT FOERSTERLING,)	
)	
Defendants-Appellees.)	Honorable Michael B. Hyman, Judge Presiding.
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CITY OF CHICAGO,)	Appeal from the Circuit Court of Cook County
)	
Plaintiff,)	
)	
v.)	No. 05 CH 6049
)	
COMMERCIAL VEHICLE CENTER, INC., f/k/a O'HARE COMMERCIAL VEHICLE CENTER, LLC,)	
)	
)	
Defendant.)	Honorable Michael B. Hyman, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 **Held:** Bank was not responsible to pay on uncollateralized letters of credit issued by failed predecessor bank, because the purchase agreement governing the failed bank's Federal Deposit Insurance Corporation takeover did not provide that the successor bank would assume liability for the letters of credit.

¶ 2 Plaintiff, O'Hare Ground Transport Facility, LLC (OGT), and defendant, Commercial Vehicle Center, LLC (CVC), entered into a contract (the "development agreement") regarding a commercial limousine staging and service area (the "limousine facility" or "vehicle center") on property at O'Hare International Airport (O'Hare). CVC contracted with OGT to construct the vehicle center on property CVC leased from the City of Chicago (city). To secure performance by CVC, the development agreement required CVC to issue an irrevocable \$1 million letter of credit with OGT as the beneficiary. Ultimately, Mount Prospect National Bank (MPNB) issued four standby letters of credit totaling \$1 million ("the MPNB Letters of Credit" or "Letters of Credit"). MPNB then merged into Midwest Bank (Midwest).

¶ 3 The vehicle center project failed and OGT tried to collect some of its losses by invoking its rights under the Letters of Credit. Stymied at every turn to collect on the Letters of Credit, OGT brought a host of claims against various parties. On May 14, 2010, almost six years after this litigation began, the Federal Deposit Insurance Corporation (FDIC) became receiver of Midwest and sold certain of its assets and liabilities to FirstMerit Bank, N.A. (FirstMerit).

¶ 4 No doubt recognizing that collection from MPNB and Midwest would be difficult, OGT sought to recover from the successor bank, FirstMerit. This appeal only concerns OGT's attempts to recover on the Letters of Credit from FirstMerit. The trial court found in favor of FirstMerit, dismissing OGT's seventh and eighth amended complaints against FirstMerit with prejudice. We affirm.

¶ 5 BACKGROUND

¶ 6 OGT appeals separate trial court orders dismissing the seventh amended complaint and eighth amended complaint against FirstMerit. The claims in the eighth amended complaint are largely unchanged from the seventh amended complaint. Thus, we will refer to the seventh and eighth amended complaints collectively as "the complaint."

¶ 7 Because the facts alleged in the complaint are complex, the following paragraphs of this opinion set forth those facts at some length, and include some of OGT's characterizations of those facts. We emphasize that we have not found these facts to be true, but only assume them to be true, as we must when considering an appeal from the granting of a motion to dismiss. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21 ("A section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise therefrom. Further, when ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party").

¶ 8 The pertinent allegations, taken as true, are as follows: OGT was formed on April 8, 2003 for the sole purpose of developing a commercial limousine staging and service center facility at O'Hare. OGT entered into the development agreement with CVC for this purpose. J.

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Timothy Brugh is a member of OGT and its manager. When OGT and CVC entered into the development agreement, Thomas H. Roth and Matthew Baines owned the controlling membership interest in CVC. CVC is a limited liability company with private investors. The complaint alleges that defendants Roth and Baines manage CVC. Rosario Ippolito, Michael R. Camino, D.D.S., and Robert Foersterling, along with Roth (hereinafter the CVC investors), supplied collateral to secure the Letters of Credit. Other than their involvement in securing the Letters of Credit, the complaint does not allege the nature or degree of Ippolito's, Camino's, or Foersterling's investment in or control of CVC.

¶ 9 CVC leased property at O'Hare that would be the site of the limousine facility. CVC's lease with the city imposed certain requirements on CVC with regard to the property and the limousine facility. Under the lease, CVC agreed to construct the vehicle center on the property. Under the development agreement, OGT agreed to construct portions of the vehicle center, CVC agreed to assign its interest in the lease to OGT after construction, and CVC agreed to sublease the vehicle center and land back from OGT. The parties' contract required CVC to obtain and deliver a \$1 million irrevocable letter of credit to OGT, naming OGT as the beneficiary. The letter of credit was to provide additional security for CVC's performance of its obligations under the development agreement.

¶ 10 OGT began construction of the vehicle facility in September 2003. That same month, OGT requested CVC furnish it with the Letter of Credit and other documents required under the development agreement. CVC did not do so. In October 2003, Roth and Baines learned from the city that other planned development at O'Hare threatened the viability of the leased property

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for their purposes. They rejected alternate sites the city offered them. Roth and Baines chose to continue construction on the original leased property. While this was occurring, OGT had no notice of the communication between the city and Roth and Baines. If it did have notice of the conflict with the city, OGT would have suspended construction of the vehicle center pending resolution of the dispute. In November 2003, OGT again requested the letter of credit and additional documents pursuant to the contract, to no avail. In December 2003 and January 2004, OGT served CVC and CVC's counsel with a notice of default of the development agreement. The notice of default demanded CVC furnish OGT with the letter of credit. CVC again did not do so. In January 2004, OGT informed CVC it would exercise its rights under a provision in the development agreement permitting OGT to accede to the ownership rights of Roth and Baines in CVC.

¶ 11 On February 2, 2004, MPNB issued three Letters of Credit based on collateral provided by Roth, Ippolito, and Camino.¹ MPNB provided the first three letters of credit not to OGT, but to CVC's counsel, acting on instructions from Roth. This violated MPNB's standard operating procedure, which was to issue irrevocable letters of credit directly to the beneficiary and not to the guarantor. Sometime thereafter, MPNB issued a fourth letter of credit based on collateral supplied by Foersterling and provided that letter to CVC's counsel as well.

¶ 12 MPNB was also aware that the MPNB Letters of Credit were not collateralized "to the full extent they appeared to be" because the assets which were pledged to guarantee the credit

¹ To reach the \$1 million total, Roth secured a letter of credit for \$782,000, Ippolito for \$150,000, Camino for \$60,000, and Foersterling for \$8,000.

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underlying the MPNB Letters of Credit had already been pledged to guarantee both a loan and note from MPNB to CVC.

¶ 13 On February 3, 2004, CVC's counsel sent a letter to OGT's counsel stating CVC had obtained the first three MPNB Letters of Credit in favor of OGT, thereby curing CVC's default under the development agreement. The letter stated CVC would withhold those three letters of credit until OGT had obtained certain permits.² By improperly conditioning its tender of the Letters of Credit on OGT's obtaining permits, CVC violated its obligations and defaulted on the contract. In May 2004, Roth instructed CVC's counsel to return the originals of the MPNB Letters of Credit to MPNB, and asked MPNB to void the MPNB Letters of Credit. Because MPNB refused to cancel the letters of credit and release the underlying collateral until December, seven months later, MPNB thereby "acknowledged OGT's superior rights to the Letters of Credit." MPNB voided the MPNB Letters of Credit after receiving false affidavits from Roth and CVC's counsel. MPNB's counsel requested changes to those affidavits which manifest CVC's, Roth's, and MPNB's intent to provide cover for MPNB's knowing and active participation with CVC and Roth in preventing OGT's exercise of its rights under the Letters of Credit.

¶ 14 On May 21, 2004, OGT sent MPNB notice of its dispute with CVC, stating that it was the beneficiary of the MPNB Letters of Credit. OGT asked MPNB not to amend, modify, or revoke

² The February 3, 2004 letter states, in pertinent part, "The originals of the Letters of Credit are in my possession and I ready [*sic*] to deliver them to you. Once your client has complied with Section 3.01 of the Development Agreement by obtaining the Form 7460 permits, construction on the Project should recommence."

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the MPNB Letters of Credit until the parties resolved the dispute. CVC and Roth colluded with MPNB “and caused MPNB to void the MPNB Letters of Credit and return collateral to Roth, Ippolito, Camino and Foersterling, notwithstanding OGT’s May 21, 2004 notice to MPNB.” The Letters of Credit contained an “evergreen clause” under which they renewed automatically and could not be cancelled without 60 days’ written notice to OGT. OGT received no notice of cancellation from CVC, Roth, or MPNB.

¶ 15 Midwest Bank succeeded MPNB through a merger. On February 29, 2008, OGT delivered a sight draft to Midwest Bank to draw the full amount of the MPNB Letters of Credit, attaching thereto a May 21, 2004 assertion of rights. OGT asserted rights based on the trial court’s finding in the already-ongoing litigation that CVC defaulted on its obligations under the lease and, consequently, on its obligations to OGT.

¶ 16 Midwest dishonored the sight draft by letter dated March 2, 2008. Midwest’s response to the sight draft informed OGT that “Midwest Bank, as successor in interest by merger to [MPNB], has no liability to [OGT] under Letters of Credit Nos. 200404, 200400, 2000401 and 200402 for several reasons.” The reasons included that (1) OGT only attached copies of three letters of credit, so its demand to draw on the fourth was invalid; (2) OGT failed to include a draft within the meaning of the Uniform Commercial Code (UCC) with its letter; (3) OGT’s letter did not include appropriate information; (4) OGT did not return the originals of the MPNB Letters of Credit; and (5) OGT did not include required statements signed by the beneficiary.

¶ 17 In October 2009, OGT filed its fifth amended complaint related to these transactions. On May 5, 2010 the trial court granted Midwest’s motion to dismiss counts II, III, and IV of the fifth

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amended complaint, which were the only counts asserted against Midwest, for failure to state a claim. The court dismissed count IV with prejudice.

¶ 18 On May 14, 2010, Midwest failed, and the Illinois Department of Financial and Professional Regulation appointed the FDIC as receiver. The FDIC moved to be substituted as defendant in lieu of Midwest. OGT filed its own motion to substitute FirstMerit as defendant in lieu of Midwest.

¶ 19 OGT's position on substitution was based on a Purchase and Assumption Agreement ("purchase agreement") between the FDIC and FirstMerit. OGT argued that under Section 2.1(g) of the purchase agreement, FirstMerit assumed Midwest's liability on the Letters of Credit, but the FDIC did not. On July 28, 2010, the trial court granted the FDIC's motion to substitute in the FDIC as defendant in lieu of Midwest.

¶ 20 The FDIC then removed the case to federal court. After OGT dismissed its claims against Midwest and the FDIC, the federal court remanded the case to the circuit court of Cook County. On May 19, 2011, OGT filed the seventh amended complaint which, in pertinent part, alleged wrongful dishonor of the sight draft against FirstMerit (count IV), a claim of equitable estoppel against FirstMerit (count V), and breach of contract against FirstMerit (count VI). OGT has abandoned its breach of contract claim in this appeal.

¶ 21 FirstMerit moved to dismiss these three claims on three separate grounds: (1) the defense established by *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447, 458 (1942), and section 1823(e) of Title 12 of the United States Code (12 U.S.C. §1823(e)

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(2004))³; (2) the “no-third-party-beneficiaries” clause in the purchase agreement; and (3) the law of the case doctrine.

¶ 22 The trial court dismissed counts IV, V, and VI of the seventh amended complaint with prejudice pursuant to section 2-619(a)(4) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(4) (West 2008)). The court determined that the law of the case doctrine prevented OGT from relitigating liability on the Letters of Credit. The court noted that in ruling on the competing motions to substitute parties, it held that “(1) any potential liability on the letters of credit was uncollateralized, and (2) any uncollateralized liability remained with the FDIC receiver.” The court held as follows:

“The analyses in both the May 5 and July 10 opinions is sound. OGT has not asked the court to reconsider any of these holdings. *** OGT’s arguments attacking these opinions are not well-taken. As such, these holding are the law of the case. Under the purchase and assumption agreement, FirstMerit does not bear any liability for the letters of credit. Therefore, no claims arising out of the letters of credit may lie against FirstMerit.”

³ In *D’Oench*, the United States Supreme Court held that a party may not assert certain defenses against a bank or its receiver or creditors “where his act contravenes a general policy to protect the institution of banking from *** secret agreements. *** The test is whether the [act] was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.” *Id.*, 315 U.S. at 460. Congress partially codified the *D’Oench* rule at 12 U.S.C. § 1823(e) (2004).

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The trial court declined to address FirstMerit's arguments regarding the no-third-party-beneficiaries clause.

¶ 23 On March 16, 2012, OGT filed the eighth amended complaint. The eighth amended complaint sought, in pertinent part, damages for wrongful dishonor of the sight draft against FirstMerit (count V); again purported to state a claim for "equitable estoppel" against FirstMerit (count VI); and breach of contract against FirstMerit (count VII). On March 23, 2012, OGT filed a motion to reconsider and to vacate the July 2010 and February 2012 orders. On April 4, 2012, the trial court denied that motion, finding "no error in its interpretation and application of the Purchase and Assumption Agreement." On April 4, 2012, the court withdrew its prior reliance on the law of case doctrine, but reached the same result as before, stating:

"While the court agrees that its prior holdings were interlocutory and not the law of the case the interpretation of the language of the agreement is sound. Many of OGT's arguments in favor of reconsideration are irrelevant. The only argument relevant to reconsideration is OGT's assertion that the letters of credit were in fact 'secured.' In support, OGT argues that the Purchase and Assumption Agreement only requires that the letters of credit have a 'book value.' This argument ignores the plain meaning of the word 'secure.' *** Here, because the security behind the letter of credit was released, FirstMerit did not assume liability on the letters of credit." (Internal citation omitted.)

¶ 24 On April 24, 2012, the trial court entered an order finding no just reason for delaying appeal of the following orders: (1) the July 2010 order ruling on motions to substitute parties;

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(2) the February 9, 2012, order dismissing counts IV, V, and VI of OGT's seventh amended complaint concerning the Letters of Credit, with prejudice; (3) an April 4, 2012 order denying OGT's motion for reconsideration and to vacate the February 9, 2012 order and the July 2010 order; and (4) its contemporaneous dismissal of the eighth amended complaint against FirstMerit with prejudice. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). This appeal followed.

¶ 25

ANALYSIS

¶ 26 Although OGT has appealed the July 28, 2010 order substituting the FDIC as defendant in lieu of Midwest Bank, its brief in this court contains no specific argument on the issue.

Therefore, we find that OGT has forfeited the issue. *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010); Ill. S. Ct. R. 341(h)(7) (eff. Jul. 1, 2008). That leaves us only with the question of whether FirstMerit assumed liability on the MPNB Letters of Credit.

¶ 27 A bank that issues a letter of credit substitutes its credit for that of its customer.

“A letter of credit is an efficacious arrangement which assures payment for completion of an obligation by placing the duty to pay on an issuer of good financial reputation. In order to assure a contracting party, usually a seller of goods or services, of payment where the debtor's reliability is uncertain, the debtor arranges for the issuer to undertake to pay the agreed upon sum on the obligee's presentation of specified documents, usually evidencing completion of the underlying transaction. A fundamental principle of letter of credit law is that the issuer is a purchaser of documents only,

obliged to pay if the specified documents are received, without reference to the changing status or desires of the buyer and seller.” *Banco Nacional de Desarrollo v. Mellon Bank, N.A.*, 726 F.2d 87, 91 (3d Cir. 1984).

¶ 28 Letters of credit are commonly issued in connection with construction projects. When properly utilized, they secure a sum of money for the protection of one of the parties involved in the project. The money is held by someone considered trustworthy, usually a bank, to hold it until the letter of credit is mutually released by the parties. When a bank issues a letter of credit for the benefit of a beneficiary, three separate agreements are involved. The first is the contract between the beneficiary and the customer, which is the agreement underlying the letter of credit. Under the second contract, the customer procures a letter of credit, perhaps from a bank, in return for consideration or collateral. The third contract consists of the bank’s agreement to pay the beneficiary the amount of the letter of credit, if the beneficiary complies with the terms of the letter of credit. “Further, there are two basic types of letters of credit. *** [T]he second is a standby or guaranty letter of credit ***, in which the issuer (bank) agrees to pay the beneficiary upon presentment of certain documentation indicating that the purchaser has defaulted on a payment obligation. Both types of credits are governed by article 5 of the Uniform Commercial Code.” *First Arlington National Bank v. Stathis*, 90 Ill. App. 3d 802, 807 (1980).

¶ 29 In this case, the first contract is the development agreement. The second agreement is the agreement between the CVC investors and the bank to procure the MPNB Letters of Credit in return for consideration or collateral. The third agreement is the bank’s agreement to pay the beneficiary as reflected in the MPNB Letters of Credit. The complaint alleges that the CVC

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investors entered into such agreements. MPNB, however, may have violated the agreements by prematurely returning the collateral underlying those agreements to the investors.⁴

¶ 30 Under traditional principles of business law, when one corporation merges into or is bought by another corporation, the successor corporation assumes both the assets and the liabilities of the first corporation. *See, e.g., Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995). However, to protect the integrity of the banking industry and protect depositors, federal law regarding assumption of failed banks departs from this model. How, and whether, creditors of a failed bank (as opposed to depositors) may recover funds owed to them is governed not only by federal law but also by the specific agreements federal banking regulators craft to govern the transfer of the ongoing business of failed banks to successor banks. *Lawson v. Household Bank F.S.B.*, 20 F.3d 786, 788 (7th Cir. 1994).

¶ 31 The key provision here is section 2.1(g) of the Purchase and Assumption Agreement between FirstMerit and the FDIC as receiver of Midwest Bank, which states:

“2.1 Liabilities Assumed by Assuming Institution. [FirstMerit] expressly assumes at Book Value (subject to adjustment pursuant to Article VIII) and agrees to pay, perform, and discharge all of the following liabilities of the [Midwest] Bank as of Bank Closing, except as otherwise provided in this Agreement (such liabilities referred to as ‘Liabilities Assumed’):

⁴FirstMerit notes that OGT might still be able to recover for MPNB’s actions through a claim process established by federal law (12 U. S. C. §1821(d)(3)-(13)) and administered by the FDIC.

* * *

(g) liabilities for any acceptance or commercial letter of credit (including any ‘standby letters of credit’ as defined in 12 C.F.R. Section 337.2(a) issued on the behalf of any Obligor of a Loan acquired hereunder by the Assuming Institution, but excluding any other standby letters of credit); provided that the assumption of any liability pursuant to this paragraph shall be limited to the market value of the Assets securing such liability as determined by the Receiver.”

¶ 32 I. Identification of Relevant Claims and Standard of Review

¶ 33 We must first clarify what specific claims are at issue here. On March 15, 2012, the trial court allowed OGT to file an eighth amended complaint, but ordered that FirstMerit “need not answer or respond to the complaint at this time.” On April 24, 2012, the court dismissed the eighth amended complaint with prejudice and found no just reason for delaying appeal of the order. OGT’s notice of appeal states that it appeals “the Final Order of April 21, 2012 which dismissed counts IV, V, and VI of OGT’s Eighth Amended Complaint *against FirstMerit* ***.” (Emphasis added.) The April 24, 2012 order referred to counts IV, V, and VI of OGT’s eighth amended complaint against FirstMerit, but the counts in the eighth amended complaint against FirstMerit are labeled as counts V, VI, and VII. Because we find the difference results from a clear scrivener’s error, we will construe the trial court’s order as dismissing counts V, VI, and VII of the eighth amended complaint.

¶ 34 FirstMerit correctly notes that it never moved to dismiss the eighth amended complaint because the trial court indicated it need not answer that complaint. However, the trial court entered an appealable order dismissing the eighth amended complaint and the propriety of that order is now before us.

¶ 35 We must also address a dispute regarding the standard of review. OGT claims the trial court erred in dismissing its claims against FirstMerit in the seventh and eighth amended complaints, and contends the trial court did so pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)). FirstMerit responds that this appeal only arises from the dismissal of the seventh amended complaint, and this court should disregard any additional allegations found in the eighth amended complaint. FirstMerit also asserts the trial court's order was based on section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)).

¶ 36 The precise basis for the trial court's dismissal is not critical to resolving this appeal. "A reviewing court should conduct an independent review of the propriety of dismissing the complaint and is not required to defer to the trial court's reasoning." *In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 563 (2003). Our "review of a motion to dismiss under either section 2-615 or section 2-619 is *de novo*." *Carr v. Koch*, 2012 IL 113414, ¶ 27 (2012). We find, however, the trial court dismissed both the seventh and eighth amended complaints pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2008)). The trial court construed the Purchase and Assumption agreement and found that, "because the security behind the letter of credit was released, FirstMerit did not assume liability on the letters of credit." Because the dismissal was based on construction of the contract in light of the allegations of the complaint,

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the dismissal was couched under section 2-619. *Corluka v. Bridgford Foods of Illinois, Inc.*, 284 Ill. App. 3d 190, 195 (1996). See also *Muka v. Estate of Muka*, 164 Ill. App. 3d 223, 227-28 (1987) (decided under section 2-619(a)(9) where “actual basis of the *** defense was that *** obligations under the alleged contract were discharged”).

¶ 37 In ruling on a motion to dismiss under section 2-619 of the Code, “a court must accept as true all well-pleaded facts in plaintiffs’ complaint and all inferences that can reasonably be drawn in plaintiffs’ favor.” *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). We accept the well-pled facts in the complaint at issue as true, as well as any reasonable inferences which may be drawn from those facts, then ask whether there is any set of facts which would entitle the plaintiff to recover. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 14. A section 2-619 motion admits the legal sufficiency of the claim but asserts affirmative matters outside of the pleading that defeats the claim. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2001).

¶ 38 II. Are the MPNB Letters of Credit “Standby Letters of Credit” under Section 337.2(a)?

¶ 39 The parties offer differing constructions of section 2.1(g) of the purchase agreement. OGT contends that it applies to the MPNB Letters of Credit because (1) the MPNB Letters of Credit are “standby letters of credit” within the meaning of Chapter 12, section 337.2(a) of the Code of Federal Regulations (C.F.R.) (12 C.F.R. § 337.2(a) (2004)); and (2) the CVC investors, who acquired the Letters of Credit, are “Obligors” of a “Loan” with Midwest Bank that FirstMerit acquired under the purchase agreement. The “Loans” on which OGT relies are business loan agreements, promissory notes, and “other credit documents” executed in

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connection with the MPNB Letters of Credit. OGT's position is that, having sufficiently alleged the foregoing facts, they have stated a claim based on FirstMerit's assumption of liability on the MPNB Letters of Credit. The remainder of section 2.1(g), according to OGT, only determines the extent of that liability.

¶ 40 Federal regulations define standby letters of credit as follows:

“[A]ny letter of credit, or similar arrangement however named or described, which represents an obligation to the beneficiary on the part of the issuer: (1) to repay money borrowed by or advanced to or for the account of the account party, or (2) to make payment on account of any indebtedness undertaken by the account party, or (3) to make payment on account of any default (including any statement of default) by the account party in the performance of an obligation.” 12 C.F.R. § 337.2(a) (2004).

¶ 41 FirstMerit disputes that the MPNB Letters of Credit are “standby letters of credit” under section 337.2(a). FirstMerit also argues that it is not enough for OGT to simply allege that MPNB issued the MPNB Letters of Credit on behalf of an “Obligor” on a “Loan” for OGT to state a claim against FirstMerit. FirstMerit argues that section 2.1(g) must be read as a whole rather than in two separate parts; and, reading section 2.1(g) as a whole, FirstMerit did not assume liability on the MPNB Letters of Credit because section 2.1(g) would only apply to standby letters of credit that are secured by assets. In other words, section 2.1(g) only applies to collateralized standby letters of credit. FirstMerit argues that the “Loans” on which OGT relies for its position are not assets securing the MPNB Letters of Credit. OGT disagrees. OGT argues

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that, notwithstanding the absence of any language indicating that Section 2.1(g) requires a letter of credit to be collateralized, the “Loans” are, nonetheless, “Assets” securing the MPNB Letters of Credit.

¶ 42 We first address whether the Letters of Credit are standby letters of credit within the meaning of 12 C.F.R. § 337.2(a). The MPNB Letters of Credit state, in relevant part, as follows: “The original of this Letter of Credit must be returned to us with any drawing(s) hereunder for our endorsement of any payment effected.” FirstMerit argues that because OGT never received the original MPNB Letters of Credit, OGT could not make a contractually valid demand on them, and so they were never “issued” within the meaning of section 337.2(a). FirstMerit also argues the MPNB Letters of Credit were never “issued” because the Letters of Credit were returned and cancelled.

¶ 43 The UCC states that “[a] letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary.” 810 ILCS 5/5-106(a) (West 2008). The role of “adviser” is crucial here. Although it is undisputed that OGT never received the Letters of Credit as beneficiary, OGT claims that the MPNB Letters of Credit were “issued” within the meaning of section 5-106(a) because MPNB sent the Letters of Credit to CVC’s counsel, who was “the person requested to advise” OGT of the issuance. However, it is clear that the attorney was not actually an “adviser” as the UCC uses that term.

UCC section 5-107(c) defines “adviser” as someone who “undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or

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advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise.” 810 ILCS 5/5-107(c) (West 2008). In that sense, the adviser does not serve one particular party, but instead is a “middleman between the issuer and the beneficiary of a letter of credit.” *LaBarge Pipe & Steel Co. v. First Bank*, 550 F.3d 442, 452 (5th Cir. 2008). An “adviser,” which is usually a bank, has also been described as “a party that links the issuer and the beneficiary primarily by conveying information between these previously unrelated parties.” *3Com Corp. v. Banco do Brasil, S.A.*, 171 F.3d 739, 741 (2d Cir. 1999). If the bank issuing the letter of credit and the letter’s beneficiary have no prior relationship, another bank may be asked to “advise” the letter of credit as the agent of the issuing bank. “Thus, when a letter of credit is advised to the beneficiary by an advising bank, there is a fourth agreement involved in the letter of credit transaction—an agreement between the issuing bank and the advising bank.” *Sound of Market Street, Inc. v. Continental Bank International*, 819 F.2d 384, 388-89 (3d Cir. 1987).

¶ 44 The official comment to section 5-107 of the UCC, which Illinois has adopted, states as follows:

“No one has a duty to advise until that person agrees to be an adviser or undertakes to act in accordance with the instructions of the issuer. *** When the adviser manifests its agreement to advise by actually doing so (as is normally the case), the adviser cannot have violated any duty to advise in a timely way. *** By advising or agreeing to advise a letter of credit, the adviser assumes a duty to the issuer and to the beneficiary accurately to report what it has received from the

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issuer, but, beyond determining the apparent authenticity of the letter, an adviser has no duty to investigate the accuracy of the message it has received from the issuer. ***.” 810 ILCS 5/5-107, cmt. 2 (West 2010).

¶ 45 CVC’s attorney had a duty of loyalty solely to CVC (Ill. S. Ct. R. Prof’l Conduct 1.7 (eff. Jan. 1, 2010)), but an “adviser” under the UCC has obligations to both parties to the letter of credit. Additionally, it is clear from the allegations that the attorney was not actually acting like an adviser bank to authenticate the letter, or as an intermediary between two parties who did not know each other. Therefore, the attorney was not an “adviser” and the attorney’s role did not qualify the Letters of Credit as “standby letters of credit” under section 2.1(g) of the Purchase and Assumption Agreement. This finding is not dispositive, however, because we find that FirstMerit did not assume liability on the MPNB Letters of Credit under section 2.1(g) of the Purchase and Assumption Agreement.

¶ 46 III. Does Section 2.1(g) of the Agreement Require Collateralization?

¶ 47 The parties disagree on whether section 2.1(g) of the Purchase and Assumption Agreement applies to collateralized or uncollateralized liabilities. OGT suggests that section 2.1(g) must be analyzed in two steps. The first part of the analysis relies on only the language before the words “provided that” to determine whether FirstMerit assumed liability on the MPNB Letters of Credit. The second part of OGT’s analysis applies the second clause, after “provided that,” to determine the *extent* of FirstMerit’s liability.

¶ 48 FirstMerit asserts section 2.1(g) does not require a two-step analysis and must be read as a whole rather than in two separate parts. FirstMerit asserts that under the plain terms of section

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2.1(g), read as a whole, FirstMerit only assumed liabilities that were secured by assets (“the assumption of any liability pursuant to this paragraph shall be limited to the market value of the Assets securing such liability”). Thus, in FirstMerit’s view, section 2.1(g) does not encompass the MPNB Letters of Credit because they were not collateralized when FirstMerit purchased Midwest’s liabilities.

¶ 49 “The basic rules of contract interpretation are well settled. In construing a contract, the primary objective is to give effect to the intention of the parties. A court will first look to the language of the contract itself to determine the parties’ intent. A contract must be construed as a whole, viewing each provision in light of the other provisions. The parties’ intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract.” (Internal citations omitted.) *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011).

A court must enforce a contract as written and will not construe provisions into an unambiguous contract not contained therein to reach a more equitable result. *Henry v. Waller*, 2012 IL App (1st) 102068, ¶ 21. “The interpretation of a contract presents a question of law, which we review *de novo*.” *Id.* ¶ 13.

¶ 50 Under OGT’s construction of the contract, the language after “provided that” in section 2.1(g) only serves to limit the extent of the liabilities already assumed under the words before “provided that.” OGT contends that the two clauses in section 2.1(g) serve two different

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functions. Under this construction, FirstMerit would assume liability on all letters of credit and standby letters of credit described. In the second clause, the damages to which it would be exposed by assuming that liability would be limited to the value of assets securing the liability. This is an untenable reading of section 2.1(g). The language after “provided that” in section 2.1(g), consistent with the purpose of the entire section, expressly refers to “the *assumption* of any liability pursuant to this paragraph ***.” (Emphasis added.) The language after “provided that” describes the initial assumption of liability, not the scope of liability already assumed under the first clause in section 2.1(g). The second clause does not state that “the *extent* of the assumption of any liability pursuant to this paragraph shall be limited to the market value of the Assets securing such liability as determined by the Receiver.” OGT’s construction relies on an implicit term that is not included in the in the plain and unambiguous language of the contract. “[A] court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented.” *Thompson*, 241 Ill. 2d at 449. Under FirstMerit’s construction of the contract, however, the entire clause describes the liabilities that will be assumed. The trial court determined that the liabilities only included collateralized liabilities. We agree. We find as a matter of law that section 2.1(g) of the Purchase and Assumption Agreement provides that FirstMerit only assumed liability on letters of credit and standby letters of credit secured by assets. Both the plain language of the contract and the rules of contract construction require us to find that FirstMerit did not assume liability on any uncollateralized letters of credit pursuant to section 2.1(g) of the Purchase and Assumption Agreement. Therefore, we decline to adopt OGT’s construction of the contract.

¶ 51 Our construction of the contract is also consistent with a reading of the Purchase and Assumption Agreement as a whole. As the trial court correctly found, the contract does not demonstrate that the parties intended that FirstMerit would assume all of Midwest Bank’s liabilities. The contract clearly states that FirstMerit assumes only *particular* liabilities of its predecessors. Section 2.1 of the contract defines “Liabilities Assumed.” Throughout section 2.1, the agreement states a general category of liability, then uses the “provided that” language to limit which liabilities within that category FirstMerit will assume. Similarly, section 2.1 does not demonstrate the parties’ intent for FirstMerit to assume liability on all letters of credit and standby letters of credit described in section 2.1(g). “In the absence of an ambiguity, the intention of the parties at the time the contract was entered into must be ascertained by the language utilized in the contract itself, not by the construction placed upon it by the parties.” (Internal quotation marks omitted.) *Dallas v. Chicago Teachers Union*, 408 Ill. App. 3d 420, 428 (2011). The plain language of the agreement demonstrates the parties’ intent that FirstMerit assume liability only on standby letters of credit secured by assets. For reasons more fully explained below, we further find that section 2.1(g) applies only to collateralized standby letters of credit.

¶ 52 III. Were the MPNB Letters of Credit Collateralized?

¶ 53 OGT argued below that there are “Assets” as defined in the Purchase and Assumption Agreement that substantially secure FirstMerit’s liability to OGT on the MPNB Letters of Credit. It also argued that “credit documents executed by defendants CVC, Roth, Ippolito, Camino and Foersterling at the time the MPNB Letters issued, which are still legally effect [*sic*], constitute

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valuable ‘Assets’ which secure FirstMerit’s obligation to OGT on the MPNB Letters of Credit.” The trial court analyzed OGT’s argument that the Letters of Credit were in fact “secured.” The court found that: “This argument ignores the plain meaning of the word ‘secure.’ *** Here, because the security behind the letter of credit was released, FirstMerit did not assume liability on the letters of credit.” OGT has clearly stated its position that collateralization has “nothing to do with whether or not liability was assumed by FirstMerit on the MPNB Letters of Credit.” Nonetheless, OGT has also asserted that the credit and security documents the CVC investors executed in conjunction with the issuance of the MPNB Letters of Credit are “Assets” securing liability on the MPNB Letters of Credit.

¶ 54 The “secured” language in the Purchase and Assumption Agreement refers to the CVC investors’ obligation to MPNB and its successors. The UCC codifies that obligation. “An issuer that has honored a presentation as permitted or required by this Article: (1) is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds.” 810 ILCS 5/5-108(i) (West 2008). We find the meaning of the word “secure” in section 2.1(g) is clear from the context in which it is used and requires collateralization. OGT offers no alternative meaning for the term. OGT’s argument focuses on the meaning of “Assets” in the Purchase and Assumption Agreement. But “[i]n construing the contract, effect must be given to each clause and word used, without rejecting any words as meaningless or surplusage.” *Hufford v. Balk*, 113 Ill. 2d 168, 172 (1986). Thus, we must construe the contract to give full effect to the meaning of “secured” in the purchase agreement.

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¶ 55 OGT alleged that the CVC investors' obligation to MPNB was secured by certain collateral when the letters issued, but that MPNB wrongfully returned that collateral to the CVC investors. OGT also alleged MPNB entered into certain agreements with the CVC investors, and that those agreements are "Assets" of MPNB as that term is used in the purchase agreement. Specifically, the CVC investors executed promissory notes and entered business loan agreements to secure issuance of the MPNB Letters of Credit. OGT alleges that because FirstMerit purchased these agreements, which it alleged are "Assets" as that term is defined in the Purchase and Assumption Agreement, and because these "Assets" are associated with the MPNB Letters of Credit, it has sufficiently alleged that the liability on the letters is secured. We disagree. Accepting as true OGT's allegation that the supporting documents are "Assets" FirstMerit purchased, MPNB's right to reimbursement by their customers for MPNB's obligation on the MPNB Letters of Credit was not secured when FirstMerit executed the Purchase and Assumption Agreement.

¶ 56 Our review of the remaining issues regarding collateralization requires a review of the specific allegations regarding the return of the collateral. The complaint alleges that "MPNB *** return[ed] the collateral underlying the MPNB Letters of Credit to Roth, Ippolitio, Camino and Foersterling." OGT sought relief from CVC, Roth, and Baines for failing to report their success in having MPNB "refund to Roth, Ippolito, Camino and Foersterling collateral pledged to underwrite the MPNB Letters of Credit." OGT's claim that FirstMerit should be estopped from refusing to pay on the MPNB Letters of Credit is based, in part, on an allegation that "MPNB concealed *** the voiding of the MPNB Letters of Credit, and the release of collateral underlying

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them ***.” OGT alleges MPNB returned the entire \$1 million in collateral on the MPNB Letters of Credit and sought a constructive trust over “the funds they pledged for the MPNB Letters of Credit which were improperly refunded to them ***.”

¶ 57 Both complaints contain a litany of allegations regarding devious and collusive acts of the CVC investors and their bank, all calculated to breach their obligations to OGT and avoid liability to OGT. For instance, the eighth amended complaint alleged that: (1) MPNB voided the MPNB Letters of Credit, and released collateral to Roth, Ippolito, Camino, and Foersterling without any notice of such actions to OGT; (2) Roth and Baines engaged in promissory fraud by failing to report CVC’s, Roth’s, and Baines’s successful efforts, in concert with MPNB, to undermine OGT’s rights to the MPNB Letters of Credit and improperly refund to Roth, Ippolito, Camino, and Foersterling collateral pledged to underwrite the MPNB Letters of Credit; (3) CVC, Roth, and Baines used threats against MPNB to secure the purported nullification of the Letters of Credit and return of collateral; and (4) Midwest Bank knew at the time of the OGT sight draft that MPNB had improperly cancelled the MPNB Letters of Credit in April 2005. OGT also alleged that, had it known of the actual material facts, it would have taken immediate steps to draw on and otherwise enforce its rights.

¶ 58 The complaint sought relief against CVC, Roth, and Baines for “fraudulent omissions regarding their successful efforts to undermine OGT’s rights to the MPNB Letters of Credit and the \$1,000,000 in collateral which was improperly refunded to Roth, Ippolito, Camino and Foersterling.” The complaint alleged that “Roth, Ippolito, Camino and Foersterling should not retain the funds they pledged for the MPNB Letters of Credit which were improperly refunded to

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them.” OGT alleged it did not have an adequate remedy at law regarding the improper transfer of the collateral underlying the MPNB Letters of Credit to Ippolito, Camino, and Foersterling.

¶ 59 OGT’s claim for a constructive trust over the assets that secured the MPNB Letters of Credit is wholly inconsistent with its assertion that FirstMerit purchased assets securing the MPNB Letters of Credit from Midwest. We recognize that “Illinois law unquestionably allows litigants to plead alternative grounds for recovery, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true.” *Heastie v. Roberts*, 226 Ill. 2d 515, 557-58 (2007). “When a party is in doubt as to which of two or more statements of fact is true, he or she may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts or defenses.” 735 ILCS 5/2-613(b) (West 2008). But in this case, OGT has not attempted to plead any facts in the alternative. OGT has made no statement that it does not know whether the disposition of the collateral that secured MPNB against its liability on the Letters of Credit occurred. OGT has made clear MPNB returned the collateral to the MPNB investors. This dooms OGT’s claim against FirstMerit.

¶ 60 We find no merit to OGT’s argument that how “Assets” are defined in the Purchase and Assumption Agreement changes this outcome. OGT alleges the CVC investors entered the business loan agreements, promissory notes, and other credit documents to repay MPNB. OGT argues that the credit and security documents executed by CVC and the other CVC investors in conjunction with issuance of the MPNB Letters of Credit secure FirstMerit’s liability on the Letters of Credit because they are “Assets” under the purchase agreement. Moreover, these

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credit documents remained enforceable after MPNB cancelled the Letters of Credit and returned the collateral securing the promissory notes as evidenced by a demand on the CVC investors to pay Midwest's legal fees in defending against OGT pursuant to the business loan agreements. OGT argues Roth "acknowledged the continuing effectiveness of the business loan agreements *** by beginning to make [these] payments to Midwest Bank ***."

¶ 61 OGT seems to contend that the "Assets" need only relate to any of MPNB's obligations on the Letters of Credit, specifically including litigation expenses, rather than actually secure reimbursement to the bank on the Letters of Credit. That construction is inconsistent with the clear and unambiguous meaning of "Assets securing" in section 2.1(g). To hold otherwise would ignore the plain meaning of the term "securing."

¶ 62 The collateral MPNB could claim in case the CVC investors failed to reimburse MPNB for honoring the Letters of Credit may have been an "Asset" as defined in the purchase agreement. However, the allegations in the complaint are that MPNB returned that collateral to the CVC investors. OGT is wrong to assert that the trial court conflated the "Assets" defined in the Purchase and Assumption agreement with "collateral." Several types of assets can (and were) pledged as collateral to secure the investors' obligation to repay MPNB if MPNB made disbursements under the Letters of Credit. OGT alleged MPNB, albeit wrongfully, cancelled the Letters of Credit and returned the collateral. The CVC investors may have been required to reimburse a subsequent disbursement on the Letters of Credit, but that obligation was not secured by any assets because MPNB returned the assets that were the collateral underlying the promissory notes issued to secure the CVC investors' obligation to MPNB. The bank's

independent obligation on any letter of credit is not secured simply because the bank has an asset that arose from a related transaction.

¶ 63 We agree with the trial court that (1) the fact that the security was released necessarily follows from the allegations in the complaint; (2) section 2.1(g) of the Purchase and Assumption Agreement applies only to collateralized letters of credit; and (3) the collateral securing MPNB's obligations on the Letters of Credit was released, and, therefore, the Letters of Credit were uncollateralized at the time FirstMerit assumed Midwest Bank's liabilities.

¶ 64 IV. Did FirstMerit Assume Liability Under any Other Provision?

¶ 65 OGT argues that, even if FirstMerit is not responsible under section 2.1(g) of the Purchase and Assumption Agreement, section 2.1(m) "makes FirstMerit responsible for 'all asset-related defensive litigation liabilities, *** to the extent such liabilities relate to assets *subject to a shared-loss agreement.*'" (Emphasis in original.) This allegation is contained in the complaint in the statement of facts common to all counts.

¶ 66 The purchase agreement reads, in pertinent part, as follows:

"2.1 Liabilities Assumed by Assuming Institution. [FirstMerit] expressly assumes at Book Value (subject to adjustment pursuant to Article VIII) and agrees to pay, perform, and discharge all of the following liabilities of [Midwest] as of Bank Closing, except as otherwise provided in this Agreement (such liabilities referred to as 'Liabilities Assumed'):

* * *

(m) all asset-related offensive litigation liabilities and all asset-related defensive litigation liabilities, but only to the extent such liabilities relate to assets subject to a

shared-loss agreement, and provided that all other defensive litigation and any class actions with respect to credit card business are retained by the Receiver.”

¶ 67 OGT seems to argue that liability on the MPNB Letters of Credit is an “asset-related defensive litigation liability” because it “relates” to the business loan agreements and other documents, which are, allegedly, “shared-loss loans.” OGT argues “the loans of Roth, Ippolito, Camino, and Foersterling under the Business Loan Agreement and other documents they executed in connection with the MPNB Letters of credit are ‘Shared Loss Loans’ which FirstMerit acquired under the Purchase and Assumption Agreement.” In the absence of specific allegations or evidence that the loans are shared-loss loans, the record provides no support for this characterization, and we find it unavailing.

¶ 68 V. Remaining Issues.

¶ 69 Having determined that the sole basis of any claim against FirstMerit is section 2.1(g) of the purchase agreement, and that section 2.1(g) applies only to collateralized letters of credit and standby letters of credit as defined in that agreement, there is no set of facts under which OGT has a right to relief against FirstMerit on the MPNB Letters of Credit. The MPNB Letters of Credit were not collateralized when FirstMerit entered into the purchase agreement. OGT has failed to plead that the business loan agreements, promissory notes, or any other credit documents “secured” the bank’s obligation to pay the MPNB Letters of Credit within the meaning of the purchase agreement. Therefore, the MPNB Letters of Credit were not secured when FirstMerit entered into the Purchase and Assumption Agreement. Accordingly, FirstMerit assumed no liability on the MPNB Letters of Credit. Given this holding, we have no need to

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reach the parties' remaining arguments that (1) OGT lacks standing to enforce the Purchase and Assumption Agreement as a third party beneficiary; (2) OGT's claims are barred by the *D'Oench* doctrine; or (3) the trial court erred by accepting OGT's allegation that disputed facts existed as to how the MPNB Letters of Credit were reflected on Midwest Bank's records.

¶ 70

CONCLUSION

¶ 71 OGT forfeited review of the July 28, 2010 order by failing to present any argument that the trial court improperly substituted the FDIC as a defendant. We affirm the February 9, 2012 order dismissing counts IV, V, and VI of OGT's seventh amended complaint with prejudice; the April 4, 2012, order denying OGT's motion to reconsider; and the April 24, 2012 order dismissing OGT's claims against FirstMerit in the eighth amended complaint.

¶ 72 Affirmed.