2014 IL App (1st) 140963-U
No. 1-14-0963
Order filed December 30, 2014

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FIRST MIDWEST BANK, Plaintiff and Counterdefendant-Appellee, v. ROBERT J. TRAINOR, JR., Defendant, Counterplaintiff, and Third-Party Plaintiff-Appellant, v. FORT DEARBORN PARTNERS. INC., Third-Party Defendant-Appellee.	Appeal from the Circuit Court of Cook County. 12 L 12483 The Honorable Margaret Brennan, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal of defendant's claims affirmed because claims were either derivative of Trainor Glass Company's claims, or waived by defendant.

¶ 2 Robert J. Trainor, majority shareholder and CEO of Trainor Glass Company (TGC), personally guarantied over $12 million in loans that TGC held with First Midwest Bank. As a

condition to taking those loans, the Bank required TGC to bring on a consultant to assist in cash flow management and TGC hired Fort Dearborn Partners. Thereafter, TGC defaulted on the loans and filed for Chapter 11 bankruptcy. The Bank sued Trainor to recover the guarantied debt and Trainor filed a multi-count countersuit against both the Bank and Fort Dearborn. The trial court dismissed Trainor's counterclaims, holding they were derivative of TGC's claims or personally waived. Further, the court found Fort Dearborn was not liable under a valid exculpatory clause and Trainor waived his right to a jury trial. The court ordered Trainor to pay the Bank almost $13 million.

¶ 3 Trainor contends on appeal that the trial court erred: (i) in dismissing several of Trainor's counterclaims as derivative claims of TGC, (ii) in dismissing Trainor's personal claims as waived in the guaranties, (iii) by enforcing the Fort Dearborn exculpatory clause, and (iv) in granting the Bank's motion to strike Trainor's jury demand.

¶ 4 We affirm the trial court's well-reasoned decision. First, Trainor's claims for fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, conspiracy, and reckless infliction of emotional distress are all derivative claims of TGC. Second, Trainor waived all claims and defenses against the Bank in the 2008 and 2010 guaranties. Third, the exculpatory provision unambiguously stated the parties' intentions that Fort Dearborn not be held liable in connection with the performance of its services. Lastly, the Bank's motion to strike the jury demand is moot in light of the dismissal of Trainor's counterclaim with prejudice.

¶ 5 BACKGROUND

¶ 6 TGC was an Illinois designer, manufacturer, and installer of exterior glass facades, building fronts, and related glass work. In addition to the glass business, TGC expanded its

operations by purchasing and leasing commercial properties in 10 states. Defendant Robert J. Trainor Jr. was the chief executive officer and majority shareholder of TGC.

¶ 7 In August 2004, the Bank made several commercial loans to TGC. On June 27, 2008, Trainor executed a Commercial Guaranty (2008 guaranty), personally guarantying $7.5 million of TGC's debt. Starting about 2010, the recession negatively impacted TGC's profitability as a glazing contractor. Additionally, the value of TGC's commercial properties substantially diminished, as did its ability to lease the properties. In November 2010, Trainor executed another commercial guaranty (2010 guaranty), personally guarantying the repayment of a $5 million line of credit from the Bank to TGC.

¶ 8 In both guaranties, Trainor agreed that he "has established adequate means of obtaining from [TGC] on a continuing basis information regarding [TGC]'s financial condition" and that "absent a request for information, [the Bank] shall have no obligation to disclose to [Trainor] any information or documents acquired by [the Bank] in the course of its relationship with [TGC]." Additionally, Trainor waived his right to "assert a claim at any time any deductions to the amount guarantied under the 2008 and 2010 guaranties for any claim setoff, counterclaim, counter demand, recoupment or similar rights, whether such claim, demand or right may be asserted by [TGC], [Trainor] or both." Trainor further waived any defense based on "any disability or other defense of [TGC], of any other guarantor, or of any other person *** other than payment in full in legal tender, of the Indebtedness," and "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness."

¶ 9 Also alongside the 2010 guaranty, Trainor executed a Commercial Pledge Agreement in which he pledged his shares of Doralco, Inc. to the Bank as collateral for TGC's debt. In the pledge, Trainor agreed that "this agreement is executed at Borrower's request and not at the

request of Lender" and that he "established adequate means of obtaining from [TGC] on a continuing basis information about [TGC's] financial condition."

¶ 10 In September 2011, Trainor executed a Continuing Security Agreement, in which he pledged his shares in Lake Ventures, Inc. to the Bank as collateral for TGC's debt. In the agreement, Trainor expressly waived "any defense arising by reason of disability or other defense of Borrower or by reason of the cessation from any cause whatsoever (other than payment in full) of the obligation of Borrower for the Liabilities" and "any defense based on, or arising out of any defense that Borrower may have to the payment or performance of the Liabilities or any potion thereof."

¶ 11 In late February or early March 2011, TGC experienced another cash flow shortfall and sought an additional $5 million loan from the Bank. The Bank agreed to extend $4 million of credit on the condition that TGC retain a financial consultant. The consultant would assist in, among other things, the management of its cash flow.

¶ 12 Within this agreement, TGC agreed:

> "[TGC], for itself, its successors and assigns ("Releasors") does hereby remise, release and forever discharge the Bank, its *** agents, and each of their respective successors and assigns (collectively the "Releasees"), from and against any and all claims, counterclaims *** suits *** liabilities *** rights, actions and causes of action of any nature whatsoever, including without limitation, all claims, demands, and causes of action for contribution and indemnity, whether arising at law or in equity, whether presently possessed or possessed in the future, whether known or unknown, whether liability be direct or indirect, liquidated or unliquidated, whether presently accrued or to accrue hereafter, whether absolute or contingent, foreseen or

> unforeseen, and whether or not heretofore asserted, which Releasors may have or claim to have against any Releasees (the "Released Claims"), including without limitation, any Released Claims arising under or relating to the Loan Documents *** which the Releasors, or any of them, now have or ever had, or can or may have against the Releasee, upon or by reason of any manner, cause or thing whatsoever ***."

¶ 13 The Bank provided TGC a list of three acceptable consultants, only two of which TGC chose to interview. Of those two, TGC selected Fort Dearborn Partners to serve as its financial consultant in accordance with the loan agreement. On March 10, 2011, Fort Dearborn provided TGC with a letter confirming the conditions of their engagement, and outlining its general terms. The President of TGC signed the agreement, which included an indemnification clause:

> "[N]o Indemnified Party shall have any liability to the Company [TGC] or any person asserting claims through or on behalf of the Company, including the Company's owners, parents, affiliates, security holders, agents and creditors, in connection with or as a result of services rendered pursuant to the engagement under this letter except to the extent that it is finally judicially determined by a court of competent jurisdiction that any claims, losses, liabilities, damages, costs, judgments or expenses incurred by the Company resulted directly from the gross negligence of an Indemnified Party in performing the services that are the subject of this letter."

¶ 14 In March 2011, the Bank increased TGC's borrowing base under the 2010 loan agreement from $14 million to $24 million. Within the Change in Terms Agreement, TGC agreed to retain a financial consultant acceptable to the Bank, and granted "irrevocable

authorization to [the Bank] to communicate with representatives of the consultant with the financial performance of [TGC]. Fort Dearborn began consulting with TGC in April 2011.

¶ 15 In July 2011, Trainor informed Fort Dearborn and the Bank that TGC was facing another cash flow shortfall, unless the Bank agreed to modify the terms of the loan agreement to allow TGC to make reduced loan payments. The Bank did not agree to a reduced loan payment plan. In August 2011, Fort Dearborn completed its consulting services for TGC.

¶ 16 In October 2011, TGC experienced difficulty paying its vendors due to its obligations to make the loan payments to the Bank, and the Bank required TGC to re-retain Fort Dearborn as a financial consultant. Trainor again requested the Bank restructure TGC's debt and temporarily postpone loan payments. The Bank did not modify TGC's loan payments.

¶ 17 On November 1, 2011, the Bank sent a letter to TGC and a third party vendor, stating TGC's accounts were in good standing and it anticipated extending TGC's lines of credit to July 1, 2012. Shortly after, the Bank requested Trainor make additional investments in TGC and post additional loan collateral. Trainor gathered funds in excess of $1.8 million and invested the funds in TGC.

¶ 18 In December 2011, Fort Dearborn conducted a cash flow analysis that revealed a significant loss from operations for 2011, a situation that constituted a default under TGC's loan agreements with the Bank. TGC continued to make loan payments to the Bank, instead of paying its vendors. Between December 2011 and January 2012, TGC overadvanced its lines of credit with the Bank.

¶ 19 On January 27, 2012, the Bank notified TGC that a new loan for $2.6 million had been approved, with the condition that TGC execute a forbearance agreement and install Fort Dearborn as chief restructuring officer of TGC. The forbearance agreement was not completed.

¶ 20 On February 10, 2012, TGC's checks to vendors and drawn on TGC's accounts at the Bank bounced. Vendors and suppliers ceased providing goods and services to TGC, disrupting TGC's business. Days later, the Bank, Fort Dearborn, and TGC held a meeting at which the Bank and Fort Dearborn urged TGC file a Chapter 11 bankruptcy petition. The Bank offered to provide debtor-in-possession financing on the condition that Fort Dearborn serve as chief restructuring officer.

¶ 21 On February 14, 2012, the Bank requested Trainor sign a release and waiver concerning Fort Dearborn's services, but Trainor refused. Despite this, the Bank loaned TGC an additional $2.6 million under a demand promissory note dated February 16, 2012. On February 20, 2012, TGC bounced its payroll checks. Two days later, TGC ceased all business operations.

¶ 22 On March 9, 2012, TGC filed a petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois. At the time, TGC owed the Bank $34,059,905.29.

¶ 23 On March 22, 2012, the Bankruptcy Court entered an order authorizing TGC to use the Bank's cash collateral on an interim basis and to incur post-petition debt. In exchange, TGC stipulated to the validity of the Bank's prepetition debt and that "no portion of the Prepetition Debt is subject to contest, objection, recoupment, defense, counterclaim, offset, avoidance, recharacterization, subordination or other claim, cause of action or challenge of any nature under the Code, under applicable non-bankruptcy law or otherwise." Additionally, TGC agreed that "[TGC] and its estate shall be deemed to have waived, released and discharged the Prepetition Lender and its officers, directors, principals, attorneys, consultants, predecessors in interest, and successors and assigns of and from any and all claims and causes of actions, indebtedness, and obligation, of every type, which occurred on or prior to the date of entry of this Order with

respect to or in connection with the Prepetition Debt, the Prepetition Liens, the Prepetition Documents or otherwise ***."

¶ 24 On April 12, 2012, the bankruptcy court entered a final order authorizing TGC to use the Bank's cash collateral and incur post-petition debt. TGC then reiterated all the admissions and stipulations set forth in the interim order. Additionally, the final order indicated the stipulations and admissions would be binding on TGC and all other interested parties.

¶ 25 By November, TGC had defaulted on over $34 million due to the Bank under several promissory notes. The Bank sued Trainor to recover $7.5 million under the 2008 Guaranty and $11 million under the 2010 Guaranty. Trainor filed his answer, affirmative defenses, counterclaims, and third party complaint against Fort Dearborn in January 2013.

¶ 26 Trainor alleged that at all times after its engagement with TGC, Fort Dearborn was the agent of the Bank. He further alleged that the actions of the Bank and Fort Dearborn led to (i) a complete loss of his investment in TGC; (ii) loss of other collateral pledged for TGC loans; (iii) personal liability for his guaranties of TGC operations; (iv) loss of income and benefits from his employment with TGC; (v) defense of other lawsuits related to TGC's closure; (vi) diminution of his reputation in the industry; and (vii) physical, mental, and emotional injury.

¶ 27 To recover for these harms, Trainor asserted the following causes of action: (i) breach of implied covenant of good faith and fair dealing; (ii) negligent misrepresentation causing financial loss in a business transaction; (iii) fraudulent misrepresentation causing financial loss in a business transaction; (iv) breach of fiduciary duty; (v) breach of duty in course of dealings; (vi) civil conspiracy; (vii) rescission of the Doralco and Lake Ventures, LLC collateral agreements; and (viii) reckless infliction of emotional distress.

¶ 28 The Bank and Fort Dearborn moved to dismiss Trainor's counterclaims and third-party complaint, and the Bank filed a Motion to Strike Defendant's Demand for Jury Trial. After oral arguments, the trial court granted the Bank's and Fort Dearborn's motions, and dismissed Trainor's claims with prejudice. The court held that Trainor's claims were "derivative of claims that TGC waived in the bankruptcy court and *** in loan documents." The court also enforced the exculpatory clause in Fort Dearborn's engagement letter. Moreover, the court granted the motion to strike, finding "the guaranty clearly supports that [the right to jury trial] has been waived."

¶ 29 The Bank moved for summary judgment on its suit to recover for the 2008 and 2010 guaranties. The court granted the Bank's motion, entering judgment against Trainor in the amount of $12,923,088.86. Trainor's timely appeal followed.

¶ 30 ANALYSIS

¶ 31 Standard of Review

¶ 32 Generally, dismissals under sections 2-615 and 2-619 of the Civil Code of Procedure are subject to *de novo* review. *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ 16. We review the trial court's decision to dismiss with prejudice for abuse of discretion. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 109.

¶ 33 Orders striking jury demands are subject to *de novo* review. *Prodromos v. Everen Secs., Inc.*, 389 Ill. App. 3d 157, 174 (2009). This court is free to affirm the trial court's ruling on any grounds appearing in the record. *Dratewska-Zator*, ¶ 16.

¶ 34 Trainor's Brief

¶ 35 Trainor's brief fails to comply with several Supreme Court mandated rules on appellate briefing. His initial brief lacks a certificate of compliance required by Rule 341(c) and certificate

of service required by rule 341(e). Ill. S. Ct. R. 341(c), (e) (eff. Feb. 6, 2013). Trainor's "Points and Authorities" section does not comply with rule 341(h)(1), as it does not contain most of the cases cited in the brief. Ill. S. Ct. R. 341(h)(1) (eff. Feb. 6, 2013). Additionally, Trainor is impermissibly argumentative in the "Introduction" and "Statement of Facts" sections, while a number of essential facts that undercut his argument are absent from the brief entirely. See *Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 12 ("although an appellant may present evidence favorable to his position in the statement of facts, he [or she] cannot do so at the cost of this court's understanding of the case.").

¶ 36 The Supreme Court rules are "not advisory suggestions, but rules to be followed." *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. The rules place the burden of production and argument on the parties, not the court. *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36. Although this court has the authority to dismiss the appeal for noncompliance with these rules, we will consider Trainor's appeal. *Epstein v. Galiuska*, 362 Ill. App. 3d 36, 42 (2005).

¶ 37 Derivative Claims

¶ 38 Trainor asserts the trial court erred in dismissing the bulk of his claims as derivative claims of TGC and not personal claims of Trainor. We disagree.

¶ 39 In Illinois, a shareholder seeking relief for an injury to a corporation, rather than a direct injury to the shareholder himself, must bring the suit derivatively on behalf of the corporation. *Small v. Sussman*, 306 Ill. App. 3d 639, 643 (1999). To determine if an action is derivative or direct requires us to look at the nature of the alleged injury and see if it was the corporation or the individual shareholder that suffered harm. For a shareholder to have standing to bring a direct claim, he or she must allege an injury that is "separate and distinct from that suffered by other

shareholders," or an injury that involves a contractual right that exists independently of any corporate right. *Cashman v. Coopers & Lybrand*, 251 Ill. App. 3d 730, 736 (1993). The right to vote, or assert majority control, exists independently of any right of the corporation. *Caparos v. Morton*, 364 Ill. App. 3d 159, 167 (2006).

¶ 40 In his amended counterclaim, Trainor alleges fraudulent misrepresentation in which the Bank knowingly made false statements to induce Trainor to invest additional funds into TGC. As a result, Trainor alleges he lost his investment in TGC, lost collateral he pledged for TGC loans, incurred personal liability for his guaranties of TGC debt, and lost income and benefits from his employment with TGC.

¶ 41 We fail to see how these injuries are separate and distinct from those suffered by other TGC shareholders. Trainor, CEO of TGC, does not assert that he was divested of voting rights or was forced from his company. He alleges no harm or injury that is any different than that which any other shareholder or investor of TGC would have suffered, nor does he allege a contractual right existing independently of TGC. See *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1336-37 (7th Cir. 1989) (holding guarantors' injuries directly tied to fate of corporation and therefore derivative losses); *Weissman v. Weener*, 12 F.3d 84, 86 (7th Cir. 1993) (noting when third party injures corporation, forcing it into bankruptcy and triggering guarantors' obligations on loans, shareholder-guarantors' claims are generally derivative rather than direct, and therefore shareholder is not real party in interest); *Amusement Indus. v. Stern*, 2010 U.S. Dist. LEXIS 74822, 24 (S.D.N.Y. July 26, 2010) (holding diminution in value of stockholder's interest in corporation is derivative injury, as is enforcement of guaranty).

¶ 42 Trainor argues the Bank's actions were taken directly with respect to Trainor personally and not the corporation, and, accordingly, are not derivative. Trainor's argument is flawed. "[A]

court must preliminarily determine if the gravamen of the pleadings states injury to plaintiff upon an individual claim as distinguished from an injury that indirectly affects the shareholders or affects them as a whole." *Zokoych v. Spalding*, 36 Ill. App. 3d 654, 663 (1976). In *Zokoych*, the defendant wrongfully removed the plaintiff and his wife as directors of their corporation, discharged plaintiff as president, and through other actions caused the corporation to file for bankruptcy. *Id.* at 657-58. Although the amended complaint in *Zokoych* set forth a direct injury to the corporation, the gravamen, the essence of the complaint, was the specific injury to the plaintiff. *Id*. at 664.

¶ 43 The gravamen of Trainor's claims states injuries that directly affected all shareholders and not just Trainor. His allegations, assumed true, would have caused all TGC shareholders to lose their investments. Unlike in *Zokoych*, Trainor alleges no unique injury to himself apart from the injury to TGC and its shareholders. Therefore, as Trainor has shown no individual injury, the trial court properly dismissed the fraudulent misrepresentation claim.

¶ 44 Next, Trainor alleged a claim for negligent misrepresentation, which was dismissed as derivative. A claim for negligent misrepresentation has essentially the same elements as a claim for fraudulent misrepresentation, except the defendant does not need to know the statement is false. As Trainor alleges the same injuries in this count as in the count for fraudulent misrepresentation, which we determined were not individual injuries separate and distinct from TGC's injuries, we find the claim was properly dismissed as derivative.

¶ 45 In the breach of fiduciary duty claim, Trainor asserts the same injuries as in the previous counts, however, he also argues the "injection of Fort Dearborn as a consultant was a challenge and attack on Mr. Trainor’s right as the majority shareholder to manage and control TGC and was therefore a personal injury to Mr. Trainor." Trainor’s argument is without merit.

¶ 46 The rights to vote and exert majority control exist independently of any right of the corporation. *Caparos v. Morton*, 364 Ill. App. 3d 159, 167 (2006). Any control Fort Dearborn had over TGC, whether through management of information or direct communication with the Bank, was contractually assigned to Fort Dearborn by TGC. Trainor has alleged no injury.

¶ 47 Because Trainor's injuries for fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty are not separate and distinct from injuries suffered by TGC and its shareholders, they are derivative claims of TGC and were properly dismissed.

¶ 48 Trainor also alleged conspiracy and reckless infliction of emotion distress against the Bank and Fort Dearborn. In his conspiracy claim, Trainor alleges the Bank and Fort Dearborn conspired to interject an alternative and covert management system in TGC to achieve the Bank's objectives and undermine Trainor's control of TGC. The injuries, however, are identical to those already alleged in the previous claims, and are injuries derivative of the injury to TGC. See *Sarno v. Thermen*, 239 Ill. App. 3d 1034, 1048 (1992) (Conspiracy is alleged to have injured the corporation and plaintiff's interests therein. Any injury to plaintiff in her capacity as a shareholder is derivative of the injury to the corporation).

¶ 49 As for his claim of reckless infliction of emotion distress, Trainor alleges personal anguish and suffering caused by the Bank and Fort Dearborn's "unique collection strategy." Assuming Trainor suffered any anguish, the other TGC shareholders and guarantors likely shared Trainor's anguish and suffering, as they too their investments. Thus, these claims present no unique injury to Trainor, are derivative of TGC's, and were properly dismissed. See Stone Flood & Fire Restoration, Inc. v. Safeco Ins. Co. of Am., 268 P.3d 170, 179 (Utah 2011) (Shareholder alleging intentional infliction of emotional distress must allege a distinct injury that

is not derivative of the harm to the corporation. This rule has no exception for shareholders of a closely held corporation, even though they may bear the brunt of the harm to the corporation more heavily). Even if Trainor's anguish and suffering were unique, his claims are waived as discussed below.

¶ 50 Wavier of Claims and Defenses

¶ 51 Trainor argues the trial court erred in dismissing certain claims as waived under the terms of loan documents. We disagree, and find Trainor waived all personal claims, counter claims and defenses.

¶ 52 Contracts are strictly enforced according to their terms and guaranties are contracts to be interpreted in accordance with their clear and unambiguous meaning. *Chrysler Credit Corp. v. Marino*, 63 F.3d 574, 577 (1995). Additionally, courts are bound to enforce a guarantor's waiver of all defenses to liability. *Jacobson v. Devon Bank*, 39 Ill. App. 3d 1053, 1056 (1976).

¶ 53 Trainor expressly and unambiguously waived all defenses, claims, counterclaims, counter demands, recoupments, or similar rights. In the 2008 and 2010 guaranties, Trainor waived his right to "assert a claim at any time any deductions to the amount guarantied under this Guaranty for any claim setoff, counterclaim, counter demand, recoupment or similar rights, whether such claim, demand or right may be asserted by [TGC], [Trainor] or both." Trainor further waived any defense based on "any disability or other defense of [TGC], of any other guarantor, or of any other person *** other than payment in full in legal tender, of the Indebtedness," and "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness."

¶ 54 If that were not enough, in the Continuing Security Agreement in which Trainor pledged his shares in Lake Ventures, Inc. to the Bank, Trainor waived "any defense arising by reason of

disability or other defense of Borrower or by reason of the cessation from any cause whatsoever (other than payment in full) of the obligation of Borrower for the Liabilities" and "any defense based on, or arising out of any defense that Borrower may have to the payment or performance of the Liabilities or any portion thereof."

¶ 55 We are not dealing with ambiguous terms. The guaranties state Trainor waived "any claim of setoff, counterclaim, counter demand, recoupment or similar rights." This exact language has been found to successfully waive all guarantor claims against a lender. See, e.g., *Ross Adver., Inc. v. Heartland Bank & Trust Co.*, 2012 IL App (3d) 110200, ¶ 40 n. 2.

¶ 56 In *Ross*, a bank issued a borrower a revolving line of credit secured by a promissory note, guarantied by several individuals. *Id.* ¶ 1. The guaranty agreements all contained similar language as the waivers here. See *id.* ¶ 40 n. 2. After the borrower defaulted, the bank obtained judgments to collect from the guarantors. *Id.* ¶ 15. The guarantors filed suit against the bank alleging claims arising from the loans, however, the court granted summary judgment for the bank. Id. ¶ 20. Although collateral estoppel barred the suit, the court noted the guarantor's waived the right to assert those claims. *Id.* ¶ 40 n.2.

¶ 57 Additionally, the record reveals that the guaranty was a condition for the Bank to extend funds to TGC. The parties negotiated for these releases of the Bank and its agents, and the waivers are clear and unambiguous, and therefore enforceable.

¶ 58 Trainor argues that the contract should be void due to his being under extreme duress from the Bank when he signed the Continuing Security Agreement. But, "where consent to an agreement is secured merely through a demand that is lawful or upon doing or threatening to do that which a party has a legal right to do, economic duress does not exist." *Bank of America, N.A. v. 108 N. State Retail, LLC,* 401 Ill. App. 3d 158, 174 (2010). Trainor alleges he was under

duress because the Bank required Trainor to post his Lake Ventures shares as collateral for the Bank to continue to assist in the restructuring of TGC's finances. Trainor alleges nothing more than bargaining between the parties. See *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill. App. 3d 84, 92 (1999). We find the trial court did not err in dismissing Trainor's claims as waived.

¶ 59 Because TGC waived all claims against Fort Dearborn and the Bank, the trial court did not abuse its discretion when it dismissed Trainor's claims. Moreover, since TGC no longer has any claims against the Bank or Fort Dearborn, Trainor has no derivative rights to assert. See *Chrysler Credit Corp. v. Marino*, 63 F.3d 574, 577 (7th Cir. 1995) (affirming dismissal of defenses where guaranty contained express waiver of all defenses). Trainor's claims were properly dismissed with prejudice.

¶ 60 The Fort Dearborn Exculpatory Clause

¶ 61 Next, Trainor contends the trial court erred in enforcing the Fort Dearborn exculpatory clause, and argues the clause was essentially an indemnification clause. The only authority Trainor cites to further his argument is to *Black's Law Dictionary* definitions of exculpatory clause and indemnification clause. Relying on *Black's* alone is not much of an argument and usually indicates an absence of case or statutory authority. This argument has no footing and is easily cast off.

¶ 62 An exculpatory clause excuses one party from liability for otherwise valid claims that may be made against him by the other. Indemnification, on the other hand, merely shifts the liability from one party to another. *McMinn v. Cavanaugh*, 177 Ill. App. 3d 353, 357 (1988). The provision in the engagement letter with Fort Dearborn unambiguously stated the parties'

intention that Fort Dearborn not be held liable in connection with the performance of its services to TGC. Thus, the clause is exculpatory.

¶ 63 Generally, an exculpatory clause will be enforced if: (i) it clearly spells out the parties' intention; (ii) nothing in the social relationship between the parties militates against enforcement; and (iii) it is not against public policy. *Chicago Steel Rule & Die Fabricators Co. v. ADT Security Systems*, 327 Ill. App. 3d 642, 655 (2002). There is no public policy against exculpatory clauses when the parties are commercial entities with equal bargaining power. See *Reuben H. Donnelley Corp. v. Krasny Supply Co.*, 227 Ill. App. 3d 414, 420 (1991). Further, Fort Dearborn was being asked to render services to a borrower experiencing severe financial distress. It was reasonable, therefore, for Fort Dearborn to insist that, with the exception of losses due to its own gross negligence, it would not be liable to TGC for claims arising out of those services.

¶ 64 For these reasons, the court correctly enforced the exculpatory clause and properly dismissed all claims against Fort Dearborn.

¶ 65 Motion to Strike Jury Demand

¶ 66 Finally, Trainor argues the trial court erred in granting the Bank's Motion to Strike Jury Demand. Having concluded that the trial court correctly dismissed all his claims with prejudice, this issue has become moot. In any event, a written waiver of the right to a jury trial is enforceable in Illinois, and Trainor agreed in writing to waive a jury. See *Carter v. SSC Odin Operating Co.*, LLC, 237 Ill. 2d 30, 49-50 (2010).

¶ 67 CONCLUSION

¶ 68 We affirm the orders of the trial court dismissing Trainor's claims against the Bank and Fort Dearborn with prejudice, and striking Trainor's jury demand.

¶ 69 Affirmed.