

NO. 09-0093

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

SONDRA L. GROHMAN,
formerly known as SONDRA GROHMAN-KAHLIG,
Petitioner/Cross-Respondent,
vs.
CLARENCE J. KAHLIG, ET AL.,
Respondents/Cross-Petitioners.

*On Petition for Review from the
Fourth Court of Appeals at San Antonio, Texas*

RESPONDENTS/CROSS-PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

<i>Nature of the case:</i>	The underlying suit primarily involves breach-of-contract and declaratory-judgment claims concerning the interpretation of a Security Agreement signed in 2001 pursuant to Sondra Grohman’s and Clarence Kahlig’s agreed divorce settlement.
<i>Trial court:</i>	The Honorable John Gabriel, Judge of the 131st Judicial District Court, Presiding in the 166th Judicial District Court, Bexar County, Texas.
<i>Trial court’s disposition:</i>	Sondra’s breach-of-contract claim was tried to a jury in March 2007. The trial court refused to submit Sondra’s tort claims based on a lack of evidence to support them. After the jury failed to find that Clarence breached the parties’ agreement, the trial court rendered judgment for Clarence on the verdict. The court also rendered a declaratory judgment favorable to Clarence and various Companies owned by him and awarded attorneys’ fees to both.
<i>Parties in the court of appeals:</i>	The appellant was Sondra Grohman. The appellees were Clarence Kahlig and the Companies listed as Respondents/Cross-Petitioners on page i, <i>supra</i> .
<i>Court of appeals:</i>	The Fourth Court of Appeals rendered its decision on October 29, 2008. The panel was comprised of former Chief Justice Lopez (author) and Justices Speedlin and Simmons. <i>See Grohman-Kahlig v. Kahlig</i> , No. 04-07-00468-CV, 2008 WL 4735591 (Tex. App.—San Antonio Oct. 29, 2008, pet. filed) (mem. op.). On December 17, 2008, the court issued an additional opinion on appellees’ motion for rehearing clarifying its judgment with respect to the trial court’s attorneys’-fees awards. <i>See Grohman-Kahlig v. Kahlig</i> , No. 04-07-00468-CV, 2008 WL 537704 (Tex. App.—San Antonio Dec. 17, 2008, pet. filed) (mem. op.).
<i>Court of appeals’ disposition:</i>	The court of appeals affirmed the trial court’s judgment as to Sondra’s tort claims but reversed and rendered judgment for Sondra on her breach-of-contract claim and Clarence’s declaratory judgment action. The court then remanded for consideration of damages and reconsideration of Clarence’s and the Companies’ attorneys’-fees awards.
<i>Requested disposition from this Court:</i>	Respondents/Cross-Petitioners ask this Court (i) to reverse the court of appeals’ judgment with respect to its holdings that Clarence breached the parties’ Security Agreement as a matter of law and that the trial court erred in making

	declarations favorable to Clarence and the Companies; and (ii) render judgment for Respondents that Sondra take nothing.
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STATEMENT OF JURISDICTION

The Court has appellate jurisdiction over this case under Section 22.001(a)(3) of the Texas Government Code because this case involves the construction of a statute necessary to a determination of the case. *See* TEX. GOV'T CODE ANN. § 22.001(a)(3) (Vernon 2004). In holding that Clarence committed an “event of default” under the parties’ standard security agreement by changing North Park Lincoln Mercury and Kahlig Enterprises (the “Companies”) from corporations to limited partnerships, the court of appeals essentially ignored the plain text of the Texas Business Corporations Act, which provides that “all rights of creditors . . . with respect to or against the prior interest holders . . . in their capacities as such in existence as of the effective time of [a] conversion will continue in existence . . . as if the conversion had not occurred.” TEX. BUS. CORP. ACT ANN. art. 5.20, § A(4) (Vernon 2003).

The Court also has appellate jurisdiction under Government Code Section 22.001(a)(6) because the court’s strained interpretation of the common term “dispose”—which is used in countless security agreements throughout Texas and the United States—gives creditors unprecedented control over businesses used as collateral, injecting uncertainty into numerous commercial transactions. *See* TEX. GOV'T CODE § 22.001(a)(6) (“error . . . of such importance to the jurisprudence of the state that . . . it requires correction”).

ISSUES PRESENTED

Issue One

Whether the court of appeals erred in holding that, as a matter of law, Clarence “dispose[d]” of the Collateral by converting the Companies from corporations to limited partnerships when (a) the Security Agreement gives Clarence “full power and authority” over the Companies and broadly defines “Collateral” to include the pledged stock’s “replacements,” “substitutions,” and “proceeds”; and (b) Article 5.20 of the Texas Business Corporations Act protects both a business owner’s ability to convert an entity’s business form and a secured creditor’s interest in the entity.

Issue Two

Whether, alternatively, the court of appeals erred in disregarding the jury’s failure to find breach because the Security Agreement is ambiguous with respect to Clarence’s right to convert the Companies.

STATEMENT OF FACTS

This is the third time that Sondra Grohman's and Clarence Kahlig's divorce dispute has been before the court of appeals and this Court. *See In re C.A.K.*, 155 S.W.3d 554, 557-58 (Tex. App.—San Antonio 2004, pet. denied) (explaining the litigation history between Sondra and Clarence); *In re C.A.K.*, No. 04-05-00487-CV, 2006 WL 12698 (Tex. App.—San Antonio Jan. 4, 2006, pet. denied) (mem. op.). Sondra and Clarence were divorced in April 2001. As part of their marital property settlement, Clarence agreed to pay Sondra more than \$22 million, starting with a cash payment of approximately \$12 million at the time of the divorce. 5 RR 156. Clarence signed a Promissory Note at 7.5% interest for the remainder, requiring nine annual installment payments of \$1,076,255.00 and a final balloon payment of approximately \$4 million. 5 RR 77; Px 1 at 1.¹

As security for this debt, Clarence signed a Security Agreement granting Sondra “a continuing security interest” in 70% of the outstanding stock shares of the Companies, as well as “all *replacements*, additions and *substitutions* therefor now owned or hereafter acquired by [Clarence], plus all cash and non-cash *proceeds* and all proceeds of proceeds arising from those shares,” which the Agreement collectively termed the “Collateral.” Px 2 at 1 (emphasis added). Clarence and Sondra also agreed:

- that the “Collateral [would be] acquired, owned, and used by” Clarence “primarily for business use” (¶ 1);
- that the “Collateral [would be] delivered to and . . . kept at the offices of Frost National Bank of San Antonio, Texas” (¶ 2);

¹ All of plaintiff's exhibits are located in volume 8 of the reporter's record.

- that “[f]rom time to time, at the request of” Sondra, Clarence would “execute one or more Financing Statements and such other documents and do such other acts and things” as Sondra “reasonably request[ed] to establish and maintain a valid security interest in the Collateral” (¶ 4);
- that *Clarence would “not sell, transfer, lease, or otherwise dispose of the Collateral or any interest therein”* (¶ 5);
- that Clarence would “keep the Collateral free from any adverse lien, security interest, or encumbrance and in good order and repair and [would] not allow the Collateral to become wasted or destroyed” (¶ 6);
- that *Clarence would “have all rights and all responsibilities in respect to the Collateral and [could] use it in any lawful manner not inconsistent with [the] Security Agreement, and . . . [would] have full power and authority in all matters concerning the Companies and their assets and businesses”* (¶ 8); and
- that “[u]pon the occurrence of any . . . default,” Sondra could “declare all Obligations secured . . . immediately due and payable” (¶ 10).

Px 2 at 1-3 (emphases added). Finally, Clarence and Sondra executed an Escrow Agreement requiring Frost Bank to hold the Collateral until the Note was paid off or it received other written instructions from Clarence and Sondra. Px 3 ¶ 4.

In September 2003, Clarence exercised his “full power and authority” over the Companies and converted them from corporations to limited partnerships in order to reduce their tax burden. Px 10-15.² Under each company’s plan of conversion, “[e]ach share of common stock . . . [was] by virtue of the conversion and without any further action . . . converted into a unit of interest in” the limited partnership. Px 11 ¶ 4; Px 14 ¶ 4. Neither Clarence’s ownership interest nor Sondra’s security interest was affected by the conversion. 5 RR 199. The Collateral remained “in good order and repair,” Px 2 ¶ 6,

² Under Texas law at this time, corporations, but not limited partnerships, were required to pay a franchise tax of 4.5% of the corporation’s net income. 4 RR 46, 64.

throughout the conversion and, indeed, even increased in value. 5 RR 199. Clarence also continued to make timely annual payments to Sondra under the Promissory Note. 5 RR 78-79.

Sondra learned of the conversion in 2005 and asked Clarence to sign a UCC financing statement describing the Collateral under paragraph 4 of the Security Agreement. Px 6-7. Although Clarence complied with her request, Sondra never filed the statement with the secretary of state. Px 8-9; 1 CR 1-4.

Instead, Sondra sued Clarence for breach of contract in August 2005, alleging that the conversion of the Companies had “destroyed” and effected a “dispos[ition]” of the Collateral under paragraphs 5 and 6 of the Security Agreement, entitling her to accelerate the then-remaining \$7.5 million balance on the Note and recover interest on the balance from the date that she gave notice of default. 1 CR 1-4; 4 RR 32-33. She later added the Companies as defendants and fraud and negligence claims against Clarence. 1 CR 264-74. She also sought various declarations regarding the effect of the conversion and construction of the Security Agreement. 1 CR 264-74. Clarence counterclaimed, seeking his own declaratory judgment regarding his rights under the Agreement. 1 CR 46-50.

In January 2007, after the tax benefits of organizing as a limited partnership had been removed,³ Clarence converted the Companies back to corporations. 6 RR 164.

³ In 2006, the Texas Legislature replaced the franchise tax with a margin tax that applied to both corporations and partnerships. See ROBERT W. HAMILTON ET AL., TEXAS PRACTICE: BUSINESS ORGANIZATIONS § 4.2.5 (2d ed. 2008); House Comm. on Ways and Means, Bill Analysis, Tex. H.B. 3, 79th Leg., 3d C.S. (2006); TEX. TAX CODE ANN. § 171.0002 (Vernon 2008).

Nonetheless, Sondra insisted on pursuing her claims against Clarence and the Companies all the way to trial. At this point, Sondra had exactly the same Collateral as she had originally, except that it was worth more, in part because of the tax savings achieved by the organizational changes and general increases in the Companies' value. 5 RR 199. Although the court refused to submit Sondra's tort claims to the jury, 7 RR 8-12; 2 CR 540-51, the court did ask the jury whether Clarence had breached the parties' Agreement. 2 CR 597. The jury failed to find breach. 2 CR 597.

The trial court rendered judgment on the jury's verdict and declared that the Promissory Note, Security Agreement, and Escrow Agreement "contemplate and allow [Clarence] to unilaterally determine the business form under which North Park Lincoln Mercury and Kahlig Enterprises operate" and "do not require [Clarence] to notify [Sondra] or seek her permission in order to change the business form under which North Park Lincoln Mercury and Kahlig Enterprises operate." 2 CR 622-24. It also granted the defendants' requests for attorneys' fees, awarding Clarence \$135,737 and the Companies \$82,637. 2 CR 623-24.⁴ The trial court denied Sondra's motions for judgment notwithstanding the verdict and for a new trial. 2 CR 553, 625; 3 CR 904; 10 RR 50; 12 RR 82.

The court of appeals affirmed in part and reversed in part. *See Grohman-Kahlig v. Kahlig*, No. 04-07-00468-CV, 2008 WL 4735591 (Tex. App.—San Antonio Oct. 29, 2008, pet. filed) (mem. op.). It affirmed the trial court's refusal to submit

⁴ The court also awarded Clarence and the Companies additional attorneys' fees contingent on the outcome of any appeal. 2 CR 623-24.

Sondra's tort claims to the jury, both on no-evidence and inadequate-briefing grounds. *See id.* at *6-7. However, the court also held that as a matter of law, Clarence had effected a "dispos[ition]" of the Collateral by converting the Companies from corporations to limited partnerships. *Id.* at *3-5. Based on this perceived violation of paragraph 5 of the Security Agreement, the court reversed the trial court's judgment with respect to the claims for breach-of-contract, declaratory relief, and attorneys' fees. *Id.* at *5, 7. The court then remanded for consideration of "[a]ll legal or equitable issues relating to damages," including Clarence's affirmative defenses (1) that Sondra's attempt to accelerate payment of the Note was not made in good faith, and (2) that Sondra was not harmed by the conversion. *See id.*; 2 CR 421-22. All parties' motions for rehearing were denied. *Grohman-Kahlig v. Kahlig*, No. 04-07-00468-CV, 2008 WL 5377704, at *1 (Tex. App.—San Antonio Dec. 17, 2008, no pet.) (mem. op.).⁵ Both parties filed petitions for review in this Court.

Although Clarence paid off the remainder of the Note in December 2008, satisfying his obligations thereunder and releasing Sondra's security interest in the Collateral,⁶ Sondra continues to seek millions of dollars in interest on the amount still owing when she gave notice of default in August 2005, 4 RR 32-33, as well as attorneys' fees for Clarence's alleged breach of the Security Agreement.

⁵ The court of appeals' December 17, 2009, opinion only addresses Clarence's and the Companies' motion for rehearing. The court appears to have denied Sondra's motion without opinion.

⁶ In addition to the regularly scheduled payment of \$1,076,255.00, Clarence made a lump sum payment of \$5,292,022.41 to Sondra in December 2008 in satisfaction of the Note.

SUMMARY OF THE ARGUMENT

In holding that Clarence breached the Security Agreement as a matter of law by changing the business form of the Companies, the court of appeals did not merely err, but erred in a way that may severely harm the ability of individuals and businesses to make commercially reasonable business decisions in this State. The root of the court's error is its misinterpretation of paragraph 5's prohibition against "dispos[ing]" of the Collateral. The court's conclusion that the conversion effected a disposition ignores the plain language of the Agreement and Article 5.20 of the Texas Business Corporations Act, and would render Clarence's "full power and authority" over the Companies meaningless. Furthermore, although Clarence's right to convert the Companies is evident from the Agreement itself, the court of appeals' reliance on extrinsic evidence to support its contrary holding proves, at the very least, that the Agreement is ambiguous such that the court of appeals should have been bound by the jury's failure to find breach.

Security agreements routinely prohibit the debtor from "selling, leasing, or otherwise disposing of" collateral,⁷ yet the court of appeals' opinion is apparently the only decision addressing the meaning of "dispose" in this context. And at a time when clarity about debtors' and creditors' rights is needed more than ever, the court's opinion sows needless confusion. It allows a business owner's secured creditor to sue when the business changes form, notwithstanding a statutory provision protecting both the owner's

⁷ See 2 JOHN E. KRAHMER, VERNON'S TEX. CODE FORMS ANN., UCC FORMS § 9.205 FORM 1 (3d ed. 2008) ("Debtor shall not have the right to sell, exchange, collect, or otherwise dispose of the collateral described."); *see also* 17 TEXAS FORMS LEGAL & BUS. § 42:58 (2008); 3 S. LEE STEVENSON, JR., TEXAS LEGAL PRACTICE FORMS § 14:20 (2d ed. 2008); 6 ROSLYN K. MYERS, WEST'S MCKINNEY'S FORMS UCC § 9:1015 (2009); 6A ROSLYN K. MYERS, WEST'S MCKINNEY'S FORMS UCC § 9:1935 (2009) (all substantially the same).

right to convert the entity and the creditor's continuing security interest in it. This Court should correct this obvious error, by either per curiam or signed opinion, before the court's rationale spawns further misguided litigation.

ARGUMENT

I. The court of appeals erroneously held that as a matter of law, Clarence “dispose[d]” of the Collateral by converting the Companies to limited partnerships.

A. The court of appeals’ circular analysis renders key provisions of the Security Agreement meaningless.

The court of appeals’ erroneous determination that by converting the Companies from corporations to limited partnerships, Clarence effected a “dispos[ition]” of the Collateral within the meaning of paragraph 5 of the Security Agreement is irreconcilable with the Agreement’s plain language. This strained construction renders key provisions of the parties’ carefully crafted contract meaningless. *See, e.g., Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (“In construing a written contract, the primary concern of the court is to ascertain the intentions of the parties as expressed in the instrument. To achieve this objective, courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless.”).

First, paragraph 8 of the Agreement gives Clarence “full power and authority in all matters concerning the Companies and their assets and businesses.” Px 2 ¶ 8. Rather than use this important provision to aid its construction of “dispose,” however, the court of appeals dismissed it as irrelevant, based on its circular reasoning

that “[i]f . . . the conversion is a disposition, [then it] would be a use of the Collateral ‘inconsistent with [paragraph 5 of] [the] security agreement.’” *Grohman-Kahlig*, 2008 WL 4735591, at *5.

Second, the Security Agreement only prohibits Clarence from disposing of “Collateral.” Px 2 ¶ 5. But “Collateral” itself is broadly defined in the Agreement to include “replacements,” “substitutions,” and “proceeds” of the pledged shares. Px 2 at 1. Since the partnership units undoubtedly fall within the ambit of this definition, conversion of the Companies could not result in a disposition of *Collateral*, even if it somehow resulted in a disposition of *stock*. The court of appeals’ curt rejection of this argument is again based on circular reasoning that cannot be squared with the plain language of the Agreement: “Although the term ‘Collateral’ was broadly defined to provide continued security for [Sondra] in the event of a disposition, paragraph 5 prohibits [Clarence] from disposing of the Collateral.” *Grohman-Kahlig*, 2008 WL 4735591, at *4.

B. The court of appeals also ignored Article 5.20 of the Texas Business Corporations Act.

The court of appeals’ erroneous construction of the Security Agreement is further compounded by its blatant disregard of a Texas statute protecting a business owner’s right to convert business forms without prejudicing the rights of secured creditors. Article 5.20 of the Texas Business Corporations Act provides that “[w]hen the conversion of a converting entity takes effect:”

all rights of creditors or other parties with respect to or against the prior interest holders or other owners of the converting entity in their capacities as such in existence as of the effective time of the conversion will continue in existence as to those liabilities and obligations and may be pursued by such creditors and obligees as if the conversion had not occurred.

TEX. BUS. CORP. ACT ANN. art. 5.20, § A(4) (Vernon 2003) (emphasis added). This statute—which the court of appeals barely mentions—thus protects both Clarence’s right to convert the Companies and Sondra’s security interest in them. Although the parties could have overridden this default rule in their Agreement, the plain language thereof shows that they did not. *See* Px 2 at 1 (defining “Collateral” to include “replacements,” “substitutions,” and “proceeds”); *id.* ¶ 8 (giving Clarence “full power and authority” with respect to the Companies).⁸

None of the arguments Sondra has raised against the applicability of Article 5.20 has merit. *See* Sondra’s Resp. to Pet. Rev. 6-8. First, she has argued that “Article 5.20 applies to indebtedness and obligations of the entity only,” as opposed to the liabilities of the converting entity’s owners, *see id.* at 6, ignoring the unequivocal language in section A(4) protecting “the rights of creditors . . . with respect to or against

⁸ Sondra’s argument below and in her response to Respondents’ petition that the conversion left her unsecured is contrary to both Texas law and the evidence presented at trial and was correctly rejected by the court of appeals. *See Grohman-Kahlig*, 2008 WL 4735591, at *3 (“A security interest continues in collateral notwithstanding the . . . disposition of collateral.”); *id.* at *4 (stating that the broad definition of Collateral “ensures that Grohman’s security interest [would] attach to whatever might be received as a result of a disposition”); *id.* at *6 (“Many witnesses testified that the collateral was protected because the security interest in the stock became a security interest in the partnership units.”); *see also* TEX. BUS. & COMM. CODE ANN. § 9.315(a)(2) (Vernon 2002) (“[A] security interest attaches to any identifiable proceeds of collateral.”); *id.* § 9.102(65)(A) (Vernon Supp. 2008) (defining “proceeds” to include “whatever is acquired upon the . . . exchange . . . of collateral”); 5 RR 199 (testimony of Bob Gilliam, independent auditor of the Companies) (“[T]he unit partnerships became the collateral for any outstanding debt.”); 6 RR 102 (testimony of Jamie Smith, expert witness for Clarence) (“[H]er security interest continues in her partnership interests under the language of the security agreement.”).

the prior interest holders” and providing that these rights “will continue in existence . . . and may be pursued . . . as if the conversion had not occurred.” TEX. BUS. CORP. ACT art. 5.20, § A(4).

Next, she has contended that even if Article 5.20 could apply to the creditors of a converting entity’s owners, it is nonetheless inapplicable here because Clarence’s “liability under the Promissory Note has nothing to do with his capacity as a stockholder but rather as a personal obligation in connection with the division of his marital estate.” Sondra’s Resp. to Pet. Rev. 6 (emphasis omitted). But the only reasonable interpretation of section A(4)’s “in their capacities as such” language is that the rights of all secured creditors *with respect to a shareholder’s ownership interest* in the converting entity are protected. Sondra’s proposed distinction between personal and business creditors would be both unworkable and absurd—in many cases, the line would be unclear, and there is simply no rational reason why the Legislature would have intended for a shareholder’s business creditors to be treated differently than similarly situated personal creditors.

Finally, Sondra has argued that allowing “a debtor to unilaterally convert securities held by a creditor” would be bad public policy. *See* Sondra’s Resp. to Pet. Rev. 7. Maybe or maybe not, but the Legislature has already declared that to be the preferred policy in Article 5.20. *See, e.g., Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653, 665 (Tex. 2008) (“The Legislature determines public policy through the statutes it passes.”). Moreover, the rule suggested by Sondra and adopted by the court of appeals would handcuff owners’ ability to make business decisions, give creditors

unprecedented control over businesses used as collateral, and foster recurrent litigation. For example, it is anyone's guess whose rights would prevail under Sondra's and the court of appeals' veto rule if the creditor of shareholder A was against a conversion, but shareholders B and C (or their creditors) cast majority votes in favor of the conversion. Likewise, what if different creditors of a single shareholder disagreed about whether a conversion was desirable? To avoid these inevitable problems, the Security Agreement and Texas law protect Clarence's "full power and authority," Px 2 ¶ 8, to convert the business form of the Companies.

II. At a minimum, the Security Agreement is ambiguous, and the jury's failure to find breach is amply supported by the evidence.

If the plain language of the Security Agreement does not unambiguously allow Clarence to change the business form of the Companies, then at the very least, the Agreement is ambiguous. If so, the jury has already resolved the issue in Clarence's favor by its answer to Question 1:

Did Clarence J. Kahlig, II, fail to comply with the terms of the parties' Promissory Note, Security Agreement or Escrow Agreement by converting the corporations to partnerships?

...

Answer: No

2 CR 597.⁹

⁹ Sondra's past assertions that there "was no finding of ambiguity by the trial court" and "no submission of a jury question requiring the jury to determine on the basis of extrinsic evidence the interpretation of the Security Agreement," Sondra's Resp. to Pet. Rev. 13, are clearly wrong. Since the parties' actions relating to the Promissory Note, Security Agreement, and Escrow Agreement are undisputed, the trial court's submission of Question 1 necessarily represents an implicit determination that the agreements are ambiguous. See *Exxon Corp. v. W. Tex. Gathering Co.*, 868 S.W.2d 299, 302

The court of appeals erred by disregarding this response, since the change in business form cannot be a disposition as a matter of law. Apart from the circular reasoning described above, the court offers only two justifications for its contrary holding. First, the court explains that the “parties’ intent that the Collateral would consist [exclusively] of the stock is . . . evidenced by the execution of an escrow agreement and by paragraph 2 of the Security Agreement which states: ‘The Collateral is herewith delivered to and will be kept in the offices of Frost National Bank of San Antonio, Texas.’” *See Grohman-Kahlig*, 2008 WL 4735591, at *4. Second, the court reasons that because the “Plan of Reorganization setting forth the terms of the conversion provides that” when the “shares of stock are converted into units of limited partnership interest” they “shall be canceled and retired and shall cease to exist,” then “the cancellation of the shares was a disposition of the Collateral.” *Id.* at *5.

As an initial matter, the court of appeals’ interpretation of paragraph 2 as requiring the Collateral *always* to be stock lacks any basis in the Agreement’s plain language. But even if paragraph 2 did say this, it would conflict with the provision defining Collateral as including instruments other than stock (e.g., stock “replacements” and “substitutions”) and with paragraph 8’s “full power and authority” clause. *See* Px 2 ¶ 8. If such a conflict existed, it would merely render the contract ambiguous. *See Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983) (reversing summary judgment and holding

(Tex. 1993) (“While the trial court here never made an express finding that the contract was ambiguous, such a determination was necessary to its submission of a jury question . . . which required the jury to determine on the basis of extrinsic evidence which of the interpretations of the take-or-pay provision the parties intended.” (emphasis omitted)).

that a conflict between provisions in a contract created “an ambiguity as to the intent of the parties as expressed in the written agreement”); *Ferris v. S. Underwriters*, 109 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1937, writ ref’d) (“[T]here is an apparent conflict between the two provisions, which renders the bond or contract ambiguous and uncertain.”); *see also J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2004) (holding that contract was ambiguous because it was “unclear whether Davidson’s unrestricted right to ‘unilaterally abolish or modify any personnel policies’ [gave it] the right to terminate [an] arbitration agreement without notice” (emphases omitted)). This ambiguity has already been resolved by the jury by its “no” answer to Question 1.

The court’s holding that the Security Agreement unambiguously prohibits Clarence from converting the business form of the Companies is further undermined by its reliance on extrinsic evidence—the Companies’ plan of reorganization—to support its construction of the Agreement. *See Grohman-Kahlig*, 2008 WL 4735591, at *5. “Only where a contract is first determined to be ambiguous may the courts consider . . . extraneous evidence to determine the true meaning of the instrument.” *Nat’l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *see New Concept Constr. Co. v. Kirbyville Consol. Indep. Sch. Dist.*, 119 S.W.3d 468, 470 (Tex. App.—Beaumont 2003, pet. denied) (“Only when the court finds [a] contract ambiguous may [it] consider parol evidence of the parties’ intentions.”). The court’s reading of the reorganization plan is also selective; while the plan does provide that the Companies’ stock shares would cease to exist upon conversion, it further provides that each share would be “converted into a unit of interest in” the limited partnership “without any

further action.” Px 11 ¶ 4; Px 14 ¶ 4.¹⁰ Thus, even if the court’s consideration of extraneous evidence were permissible, the very evidence pointed out by the court here cuts both ways. In such circumstances, the jury’s determination must control.

Even if the Court determines that the Security Agreement is ambiguous regarding the meaning of “dispose,” it still need not remand. Sondra failed to challenge the factual sufficiency of the evidence to support the jury’s failure to find breach in the court of appeals, instead arguing only that she had established breach as a matter of law. *See* Appellant’s Br. 29-34. Thus, the Court should reverse the court of appeals and affirm the trial court’s judgment on the verdict that Sondra take nothing.

CONCLUSION

The court of appeals’ circular rationale was a “circular saw” that “sawed away,” *Commonwealth v. Dell Publ’ns, Inc.*, 233 A.2d 840, 865 (Pa. 1967) (Musmanno, J., dissenting), Clarence’s “full power and authority” under the Security Agreement to manage the Companies. That error in and of itself would justify correction by this Court.

But the court of appeals’ decision could have much wider consequences. Its opinion—which ignores applicable statutory law and rules of contract construction and improperly disregards a jury’s considered verdict—is the *only* authority on the meaning of a term almost invariably found in security agreements across the state. Respondents therefore respectfully urge the Court to grant both petitions for review;

¹⁰ *See also* 6 RR 109 (testimony of Jamie Smith, expert witness for Clarence) (“[T]he share certificates, when the conversion takes place, in effect represent and become representative of ownership interests in the partnership. Although, you know, really, the share certificates are pieces of paper, you know. They, in and of themselves, have no value. They represent ownership interests in the business.”).

reverse the judgment of the court of appeals, either by a per curiam opinion or signed opinion after argument; and render judgment on the verdict that Sondra take nothing.

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