IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE ESTATE OF DOROTHEA C. BRANSON,	:	
VINCENT J. BRANSON,	:	
Plaintiff/Petitioner,	:	
v.	:	**C.A. No. 681-VCN**
DAVID J. BRANSON, individually, and as Executor of the Estate, ALBERT E. BRANSON, JR. and ROBERT BRANSON,	:	
Defendants/Respondents,	:	

MEMORANDUM OPINION

Date Submitted: May 20, 2010
Date Decided: September 1, 2010

Constantine F. Malmberg, III, Esquire of Young, Malmberg & Howard, P.A., Dover, Delaware, Attorney for Plaintiff/Petitioner.

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NOBLE, Vice Chancellor

I. INTRODUCTION

This post-trial memorandum opinion addresses a family dispute. A woman died, leaving her estate to her five children—four sons and one daughter. The estate consisted of a cottage and cash-equivalents. The daughter disclaimed her interest in the estate. The sons divided the assets with the plaintiff-son taking his share entirely in cash (or stock). The plaintiff, however, wanted to purchase the cottage from his brothers, the defendants. Discussions ensued and the plaintiff now seeks specific performance of an alleged oral contract with his brothers for the sale of the cottage. Alternatively, he seeks damages. The Court finds that there was no enforceable oral agreement for sale of the cottage.

The plaintiff also contends that the cash (or stock) he received did not represent his full and final share of the estate, and, accordingly, he claims to have inherited an interest in the cottage. He seeks a declaratory judgment recognizing this interest; he then seeks the cottage's partition and sale. His claim to an interest in the cottage is not supported by the record. Because he owns no interest in the cottage, he may not seek its partition.

Both the claims for specific performance and for partition are attempts by the plaintiff to trigger payment of an obligation owed him by one of his brothers. He has been willing to contort the facts and contradict his own representations to

pursue this result. He has also demonstrated a willingness to throw his other brothers, and even his sister, under the proverbial bus, even though they have all been innocent bystanders to the real dispute. None of the plaintiff's claims was proven at trial.

II. BACKGROUND

A. *The Parties*

The Plaintiff is Vincent J. Branson ("Vincent").[1] He is an attorney who resides in Maryland.

The Defendants are David J. Branson ("David"), Albert E. Branson, Jr. ("Albert"), and Robert Branson ("Robert") (collectively, the "Defendants"). David is an attorney who resides in Paris, France. Vincent, David, Albert, and Robert are brothers. Their sister, Theresa McVearry ("Theresa"), was dismissed as a defendant on May 24, 2010.[2] Collectively, the Plaintiff, the Defendants, and Theresa will be referred to as the "Siblings."

B. *The Cottage*

The Siblings' parents divorced in 1969. Their father, Albert E. Branson, Sr., acquired a home (the "Cottage") in South Bethany Beach, Delaware, on April 15,

[1] For matters of convenience, most parties will be referred to by first name.
[2] Order of Dismissal as to Theresa McVearry Only (May 24, 2010).

1974.[3] He transferred the Cottage to the Siblings, as tenants in common, on January 21, 1977.[4] The Cottage was subject to a mortgage which the Siblings assumed; the mortgage was paid and satisfied in or around 1990.[5]

In 1979, Vincent, Albert, Robert, and Theresa bought David's share of the Cottage,[6] which increased each of their respective shares from 20% to 25%. This transaction was not evidenced by recorded deed or otherwise. In the mid-1980's, Robert and Theresa gave their interests in the Cottage to their mother, Dorothea Branson ("Dorothea").[7] These transfers, too, were not accomplished by deed. Several years later, Vincent gave Dorothea his interest in the Cottage in exchange for forgiveness of a debt.[8] Again, a deed was not executed. By 1990, Dorothea owned 75% of the Cottage, and Albert, who had never transferred any of his interest in the Cottage, held the remaining 25%.

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[3] Joint Ex. ("JX") 3. The Parties filed 40 trial exhibits. Exhibits numbered 1-18 are joint exhibits. Exhibits numbered 9, 11, and 15, however, were withdrawn before trial. Exhibits numbered 19-32 are Plaintiff's exhibits ("PX"). Exhibits numbered 33-40 are Defendants' exhibits ("DX").

[4] JX 3.

[5] Jt. Pretrial Stip. & Order, Part 2 ¶¶ 11-12.

[6] Tr. (Vincent) 30. According to Vincent, David was paid $6,000 for his share of the Cottage.

[7] Tr. (Robert) 174.

[8] Tr. (Vincent) 35 ("[W]hen I couldn't pay that back a few years later, I knew my mother wanted the [Cottage], and I said, 'Why don't you take my share of the [Cottage] because I can't pay you this [$]25,000 back.'").

C. *Vincent's Falling Out with David*

In March of 1998, Vincent received a substantial fee from a medical malpractice settlement.[9] Not long thereafter, David and Vincent agreed that Vincent would purchase stock that David owned in a start-up technology company, Novazen, Inc. ("Novazen").[10] David agreed to guarantee Vincent's investment or to indemnify him against any losses.[11] The guaranty would be tied in some form or another to David's share of the Cottage that he expected to inherit from Dorothea.[12] It was not put in writing.

Vincent purchased 53,125 shares of Novazen stock for $85,000.[13] The stock would prove worthless. This Court previously determined that David "has a valid and enforceable obligation to pay [Vincent] $85,000 due upon the sale of the [Cottage]" (the "Guaranty").[14] After Dorothea's death, David was unwilling to acknowledge any obligation to Vincent.[15] Vincent was outraged;[16] his anger was

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[9] Tr. (Vincent) 64.
[10] *See id.* at 64-68.
[11] *Id.* at 70.
[12] *Id.*
[13] JX 6.
[14] Order dated Mar. 12, 2009; *see also* Bench Ruling on Pl.'s Mot. for Partial Summ. J. 7.
[15] Tr. (Vincent) 76 (explaining that, during a family meeting held after Dorothea's death, David, who had "always acknowledged that he owned me the money and the interest . . . just blurts out of the blue he doesn't owe me anything because all I did was buy stock."). JX 16 (Aff. of David Branson ("David Aff.")) ¶ 32 ("Plaintiff admits that Defendants said to him, in the presence of his siblings, on September 14, 2001, that Defendant owed him nothing as he had purchased stock. That is true. Defendant did say that."). David instead promised that he would return the purchase price of the stock to Vincent upon the sale of the Cottage. *Id.* at ¶ 19.
[16] Tr. (Vincent) 77 ("When he denied that he owed money, I left the meeting hot . . . I was livid that he had denied that he owed me this money for the first time. I told [Robert] after the fact to

perhaps exacerbated by the fact that he and David had, for some time, been on poor terms.[17] As will be explained in greater detail, Vincent's efforts to obtain payment on the Guaranty have been a driving force in this litigation.[18]

D. *Dorothea's Death and the Distribution of her Estate*

Dorothea died on September 7, 2001.[19] She had executed a Last Will and Testament on September 22, 1974 (the "Will").[20] In the Will, Dorothea named David as her executor; she left all of her estate (the "Estate"), in equal shares, to the Siblings.[21] The Will was admitted to probate before the Register of Wills of

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tell David that if he persisted, I'd get his sorry ass disbarred, and I meant it . . . ."); *id.* at 400 ("Every time I think about what David did, I get mad.").

[17] Tr. (David) 322 (explaining that he and Vincent had frequently communicated during March and April 1998 for reasons unrelated to the Novazen purchase, and that by the "end of April, beginning of May, Vincent stopped talking to me, and we haven't talked since for those issues that did not involve this case"). David represented Vincent's son in a criminal matter from March 1998 to May 1998; for whatever reason, the representation did not go well. *Id.* ("[Vincent] didn't like what I was doing. He didn't like the way I did it. He tore the phone out of the wall one night, and in May of 1998, he stopped talking to me . . . . He hasn't talked to me since except [for] two occasions."); Tr. (Vincent) 402 ("David wasn't the attorney of record. He's incompetent in what he tried to do. He's not a criminal lawyer, just like here, he's incompetent."). Vincent denied tearing the phone out of the wall, and he downplayed being upset with David. *Id.* ("I was not mad at my brother."). According to Vincent, he spoke with David "on at least two and maybe three or four occasions" between June 1998 and Dorothea's death. *Id.* at 403.

[18] *See* Pl.'s Post-Trial Opening Br. 26 ("With specific performance the beach home is now being sold to Vincent and David's debt is due.").

[19] Jt. Pretrial Stip. & Order, Part 2 ¶ 1. She was 85 years old.

[20] JX 1.

[21] *Id.* ("All the rest and residue of my estate, both real, personal and mixed, I give, devise, and bequeath to my children, Albert, David, Theresa, Robert and Vincent and if any of them should predecease me then their share to their children then living as tenants in common.").

Sussex County, Delaware, and David was issued Letters Testamentary on November 9, 2001.[22]

The Estate held two categories of assets: stock and cash in an account with UBS PaineWebber and Dorothea's 75% interest in the Cottage.[23] Before David distributed these assets, he first sought acknowledgment from Vincent regarding the Cottage's ownership and assurances that he would not sue the Estate.[24] On November 21, 2001, Vincent executed a covenant not to sue (the "Covenant").[25] In the Covenant, Vincent agreed that he would not "bring a claim or litigate in any way against the Estate, the executor, or the heirs over any claim that has come into existence prior to today or exists today, that I am aware of or could or should be aware of . . . ." He acknowledged that David, Robert, Theresa, and he did not own any interest in the Cottage as of the time of Dorothea's death, despite the fact that record title to the Cottage was still in their names. In return for that agreement, Vincent would receive $65,000, "payable as an early distribution from the

[22] JX 7.
[23] JX 12. Dorothea and Theresa also owned, as a joint tenants with right of survivorship, a home in Washington, D.C. As the surviving joint tenant, Theresa took full title to that property upon Dorothea's death. The Washington, D.C. property therefore did not pass as part of the Estate. *See* Tr. (Opening Statement of Counsel for Pl.) 12.
[24] Tr. (Robert) 182 (explaining that he told David, "If you do give Vincent a nickel, then you better get a release and covenant not to sue, because Vincent is a litigious person who I really didn't have any confidence in.").
[25] JX 10. The Covenant was prepared by David. Jt. Pretrial Stip. & Order, Part 2 ¶ 19.

Estate."[26] Shortly after executing the Covenant, Vincent received $65,000 from the PaineWebber account as an early distribution.[27]

Meanwhile, David had been doing the work of an executor. On December 4, 2001, the Cottage was appraised at $345,000.[28] On April 20, 2002, Theresa and her children disclaimed any interest in the Estate.[29] Around May of 2002, Robert determined that $181,000 in cash could be distributed from the Estate to Vincent, Robert, Albert, and David.[30] This $181,000 figure represented the assets in the PaineWebber account after subtracting funeral and other expenses of the Estate; however, it included the $65,000 already distributed to Vincent.[31] The brothers could then take what each wanted in cash.[32] On May 2, 2002, Vincent

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[26] *Id.* According Vincent, he wanted an early distribution in return for agreeing that David could serve as personal representative of the Estate. Tr. (Vincent) 235-36. Evidently, Vincent was prepared to sue to preclude the issuance of Letters Testamentary to David. *Id.*

[27] Jt. Pretrial Stip. & Order, Part 2 ¶ 21. Both Vincent and David testified that the $65,000 distribution made to Vincent in December 2001 was preliminary and that additional funds would be distributed to Vincent after a final accounting of the Estate. Tr. (Vincent) 269; Tr. (David) 312. It appears as though Vincent took these distributions in stock. Tr. (Robert) 186 (". . . [Vincent] had his own stock account, so he took shares and transferred them."). Vincent, however, suggested that the distributions were in cash. *See, e.g.,* Tr. (Vincent) 84. Whether the PaineWebber distributions were all cash, or some combination of cash and stock, is irrelevant; as a matter of convenience, the Court simply refers to the distributions as cash.

[28] Jt. Pretrial Stip. & Order, Part 2 ¶ 22. For estate tax purposes, the appraisal was as of the date of Dorothea's death. That appraiser was hired by David. *Id.* At Vincent's request, and as of September 17, 2009, the Cottage was appraised at $700,000. PX 32.

[29] JX 2.

[30] Tr. (Robert) 194-95.

[31] JX 8; Tr. (Robert) 197-99. There was, therefore, approximately $116,000 available in the PaineWebber account to be distributed to Vincent, David, Robert, and Albert as of May 2002. Tr. (Robert) 198.

[32] Tr. (Robert) 183 ("The brothers were all asked how much cash they wanted, and everybody took what they wanted in cash. I took no cash to honor my mother's wishes of Albert keeping [the Cottage].").

received $45,000 as a second distribution.[33] That same day, David distributed $35,000 to himself as a beneficiary of the Estate.[34] On August 19, 2002, David filed an inventory that listed a total of $450,935.56 in Estate assets.[35]

In late June and early July of 2004, David, Albert, Robert, and Theresa each signed quitclaim deeds transferring their title in the Cottage to David as the executor of the Estate.[36] These deeds were recorded on October 27, 2005.[37] David sent a quitclaim deed to Vincent in June 2004 that would have also transferred Vincent's legal title in the Cottage to David as executor of the Estate.[38] Vincent, however, did not sign the quitclaim deed.[39] According to David, the purpose of these quitclaim deeds was to clear title in the Cottage so it could later be sold.[40] He insinuated that the Estate might have brought a quiet title action had Vincent not first filed this lawsuit.[41]

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[33] Jt. Pretrial Stip. & Order, Part 2 ¶ 24.
[34] *Id.* at ¶ 23. Albert took some cash as well. Tr. (Robert) 185-86.
[35] JX 12. The inventory included Dorothea's 75% share of the Cottage, valued at $258,750 (75% of the $345,000 appraised value), and the PaineWebber account, valued at $192,185.56. The $192,000 figure reflected the value of the PaineWebber account at the time of Dorothea's death, before any distribution or payment of Estate expenses. Tr. (Robert) 197.
[36] JX 14.
[37] Jt. Pretrial Stip. & Order, Part 2 ¶ 31.
[38] PX 29.
[39] Tr. (Vincent) 94.
[40] Tr. (David) 361-62.
[41] *Id.* at 363.

E. *Discussions to Sell the Cottage to Vincent*

Albert has resided in the Cottage since 1993 or 1994 and is the only one of the Siblings who regularly uses it.[42] Vincent used to vacation at the Cottage, but his visits have been rare since Dorothea's death.[43] After Dorothea died, Albert considered selling the Cottage and moving to a condominium, perhaps in Florida.[44] David and Robert were willing to support virtually any decision Albert made regarding the Cottage.[45] Theresa, however, believed that, if Albert were to sell the Cottage, he should offer it to Vincent.[46]

Around Christmas 2001,[47] Theresa met with Robert and Albert.[48] She asked Albert if he was willing to sell the Cottage to Vincent at the appraised value. Albert said he was, but not until after the next summer;[49] Robert agreed to go along with Albert and let Vincent purchase the Cottage.[50] David was not involved in this

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[42] Tr. (Albert) 372.
[43] Tr. (Vincent) 37. Vincent's children and grandchildren still visit Albert at the Cottage. *Id.* Albert promised Dorothea that he would maintain the Cottage as a family beach house "for as long as I could, and it's still a family beach house to this day." Tr. (Albert) 397.
[44] Tr. (Theresa) 130; Tr. (Vincent) 50.
[45] Tr. (Robert) 188 ("I just agree to whatever Albert wants. I'm only here to support Albert, and that was my objective in the whole process."). David explained that he wanted to quiet title in the Cottage so that Albert would have "the ability to use the only asset that [he] has . . . ." Tr. (David) 362.
[46] According to Theresa, "the only people who ever cared about the [Cottage] were Albert and Vincent." Tr. (Theresa) 130. She was distraught about the animosity between Vincent and his brothers and believed that Dorothea would have wanted Vincent to have the Cottage. She also thought that a sale to Vincent could help to bring their family together. *Id.* at 129-30.
[47] The holiday season was a catalyst for Theresa's attempt at family reconciliation. *Id.*
[48] *Id.* at 130.
[49] Tr. (Albert) 388-89; PX 24.
[50] Tr. (Robert) 208.

meeting, although Albert represented that David would go along with whatever he wanted.[51] Immediately thereafter, Theresa met with Vincent and told him that Robert and Albert would sell him the Cottage at the appraised value, but only after Albert had lived there for one more summer.[52] Vincent was pleased with the news; however, Vincent did not want the Cottage with only Albert and Robert's shares—he wanted to "own all of the Cottage," and thus needed David's consent as well.[53] Vincent and Theresa met again a week or two later; Vincent was less enthusiastic at this time about purchasing the Cottage and merely told Theresa that a sale to him would be "fine."[54]

In the fall of 2002, Albert approached Vincent at a family gathering held at Robert's home. In what Albert testified were his "exact words," he asked, "'[Vincent], if you're going to buy the [Cottage], will you let me stay until September. I'm losing my home here. I've got to find a place to live.'"[55] Vincent found this extension acceptable, so long as he could still purchase the Cottage for

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[51] *Id.*; Tr. (Theresa) 131; Tr. (Albert) 383. Albert believed that he may have spoken out of turn when he represented that David would do whatever he wanted. *Id.*

[52] PX 34; Tr. (Theresa) 131. Theresa could not remember Vincent's reaction at that specific time.

[53] Tr. (Vincent) 105.

[54] Tr. (Theresa) 131. Theresa seemed perplexed, and perhaps aggravated with Vincent's nonchalance: "[a]nd I just went, '[j]ust fine, Vincent?' I thought it was a very generous offer on Albert's part." *Id.*

[55] Tr. (Albert) 385-86. According to Vincent, Albert wanted to wait to sell the home until after he started receiving Social Security payments. Tr. (Vincent) 108. Albert explained that he may have brought up Social Security, and that this too could have factored into his request for an extension. Tr. (Albert) 386-87.

the $345,000 appraised value.[56] Around Christmas 2002, Albert approached Vincent at another family gathering at Robert's house to tell him that he wanted to stay in the Cottage until 2006.[57] Again, this was acceptable to Vincent so long as he could still purchase the Cottage in 2006 for the $345,000 appraised value.[58]

On January 2, 2003, Vincent sent a letter to David, Albert, Theresa, and Robert in which he sought to "confirm [his] understanding concerning the [Cottage]."[59] He stated that he would purchase the Cottage on January 1, 2007, for $268,000, which represented the $345,000 appraised value minus a credit in the amount of $77,000 for the Guaranty owed him from David. He claimed that a "new deed and the stock exchange with David should occur now," while the remaining interest in the Cottage would remain in Albert and Robert's names until the January 1, 2007, purchase date. He asked his siblings to let him know by January 31, 2003, if the letter did not comport with their understanding of what he believed was an agreement to sell the Cottage.[60]

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[56] Tr. (Vincent) 108. Robert reaffirmed that whatever was acceptable to Albert, was acceptable to him. According to Vincent, Robert "looked [him] in the eye and shook my hand and agreed to sell me the cottage, his share of the cottage in another year." *Id.* at 109. He testified that Albert did the same. *Id.*

[57] *Id.* at 109. Vincent believed that Albert wanted to further extend the sale until he received full Social Security benefits. *Id.*

[58] *Id.* at 110. Once again, Vincent testified that he said to both Robert and Albert: "You agree to sell me your share at the appraised value in 2006?" According to Vincent, they both "shook my hand, looked me in the eye and said yes."). *Id.*

[59] PX 22.

[60] *Id.* Vincent requested that any disagreement be put in writing.

Albert responded to Vincent by letter on January 13, 2003.[61] He asked Vincent to "hold off on contacting a Delaware lawyer," as they needed "to discuss several issues." Albert wrote that it "would be premature to change the deed on the [Cottage] until those are resolved"; instead, he wanted to have a discussion in the spring, after he spoke with Robert "to see what he wants to do."[62]

On September 30, 2003, Eric C. Howard, Esquire ("Howard"), an attorney hired by Vincent, sent a letter to Albert, David, Theresa, and Robert.[63] From a "review of previous correspondence," and "discussions with Vincent," Howard was of the opinion that the Siblings had "reached agreement on the terms of [the Cottage's] purchase." He forwarded a proposed contract,[64] which confirmed the $268,000 purchase price and $77,000 set-off discussed in Vincent's letter from January 2, 2003.

David responded to Howard on October 20, 2003, to explain that only after the "deed on the [Cottage] is corrected and the estate closed," would Vincent be paid the Guaranty.[65] He also wrote that the Estate had never contracted to sell to Vincent its interest in the Cottage. He enclosed a copy of the Covenant and

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[61] PX 25. Neither David nor Robert responded. Tr. (David) 319; Tr. (Robert) 218 (". . . I didn't even bother. It was a joke, another fantasy of Vincent's . . . I don't have to pay attention to silly drivel.").
[62] PX 25.
[63] PX 26.
[64] Albert testified that he did not receive a contract with Howard's September 30, 2003 letter. Tr. (Albert) 392.
[65] PX 27.

informed Howard that the Estate's attorney, David W. Baker, Esquire ("Baker"), would be forwarding Vincent a quitclaim deed, the execution of which would reflect "the actual interest of ownership at this time."[66] Albert also wrote to Howard on October 20, 2003, to state that that he had never signed a contract to sell his interest in the Cottage, nor did he intend to sell his interest at that time.[67]

A sale by Robert and Albert to Vincent has not occurred. As of trial, Albert, Robert, and David understood that Albert owned approximately 46% of the Cottage, Robert owned 32%, and David owned the remaining 22%.[68] These numbers reflect Albert's historical 25% ownership stake in the Cottage, and adjustments made based on distributions of varying sizes from the PaineWebber account to Albert and David.

III. CONTENTIONS

Vincent contends that Robert, Albert, and David agreed to sell him the Cottage at the $345,000 appraised value. He seeks specific performance of this agreement: an order requiring Robert, Albert, and David sell to him their interests

[66] *See infra* note 68.
[67] PX 27.
[68] Tr. (Albert) 373. The Parties have submitted an unexecuted deed, prepared by Baker, by which the Estate would transfer the Cottage to Albert, Robert, and David in 46.5%, 31.8%, 21.7% shares, respectively. JX 8.

in the Cottage at the $345,000 appraised value.[69] Alternatively, he seeks damages for breach of contract.[70]

In addition, Vincent seeks a declaration of his rights as a record title owner of the Cottage. He contends that he never transferred his original 25% interest in the Cottage to his mother. Vincent also maintains that the early distribution he received from the PaineWebber account was not a final distribution from the Estate, and that he retained an inherited interest in the Cottage. He seeks recognition of this interest, and upon such acknowledgment, demands a partition

[69] According to Vincent, he would pay Albert $160,425, which represents Albert's 46.5% share of the Cottage; Vincent would pay Robert $109,710, which represents Robert's 31.8% share of the cottage; and he would pay David $74,865, which represents David's 21.7% share of the Cottage. Pl.'s Opening Post-Trial Br. 24. Vincent, however, maintains that he would be credited $74,865 towards his payment to David as a set-off from the $85,000 Guaranty. *Id.*

[70] Under this alternate claim, Vincent seeks $355,000 in damages. This figure represents the difference between the $700,000 appraisal from September 2009, *see supra* note 28, and the $345,000 value appraised in December 2001. Vincent had also sought damages against, and removal of, David as executor of the Estate for allegedly breaching his fiduciary duties of loyalty and care. He more or less cited any and all of David's actions as executor as grounds for this relief. *See* Pl.'s Second Am. Compl. ¶¶ 38-40. For example, Vincent claimed that David wrongfully paid himself $35,000 from the Estate instead of paying the Guaranty, and failed to file the estate accounting on time. *Id.* at ¶ 39. He informed the Court at trial that he was no longer seeking David's removal as executor. Tr. (Vincent) 116-17 ("I don't want David removed. That doesn't help me. The Court has control of it now. They can order him."). He stated that he was not seeking any relief for David's alleged breaches of his fiduciary duties, except for attorney's fees. *Id.* at 117 ("He never filed an accounting until this Court ordered him to do so. He's only filed one accounting. He hasn't filed since. So he's grossly negligent in that. And he was just totally inexplicably negligent, and breached his fiduciary duty by engaging in this self dealing with himself . . . I'm not asking for any of relief for any of those things. It just justifies attorney's fees."). No mention was made of David's alleged breaches of fiduciary duty, or the request for attorney's fees, in Vincent's post-trial briefing. Given Vincent's lack of interest in pursuing these claims, they will not be addressed by the Court.

and sale. Vincent also requests immediate payment by David of prejudgment interest on the $85,000 Guaranty, with interest.[71]

The Defendants' position is simple: they all never agreed to a sale of the Cottage to Vincent and Vincent has no interest in the Cottage because he took payment of his share of the Estate in cash (or stock).

IV. DISCUSSION

Vincent's primary claims for specific performance and partition are simply not supported by the record. There is no agreement upon which the Court can order Albert, Robert, and David to sell to Vincent their interests in the Cottage. Although Albert and Robert agreed that they would sell their shares to Vincent at some point in time, David's agreement was never forthcoming; he was a necessary party to the contract (because Vincent wanted full ownership) and without his consent, there could be no agreement for the Cottage's sale. Regarding his claim for partition, Vincent distorts the record in an attempt to succeed. Simply put, any interest he may have had in the Cottage was waived when he took his full distribution from the Estate in cash. Without any ownership interest in the Cottage, partition is not available. Vincent also mischaracterizes the Guaranty as a loan in an attempt to secure interest on the obligation; this characterization also is not supported by the record.

[71] He had also requested, but has not pursued, an equitable lien over David's share of the Cottage as security for payment of the $85,000 Guaranty.

A. *Specific Performance*

To merit an award of specific performance, a party must prove that 1) he has a valid contract to purchase real property; and 2) he is ready, willing, and able to perform his obligations under the contract.[72] The Court must also determine whether a balance of the equities tips in favor of specific performance.[73] The Court's analysis begins and ends with the first factor. Under the Delaware Statute of Frauds, no action may be brought to charge any person upon a contract for the sale of land unless the contract has been reduced to writing, and signed by the party or parties being charged.[74]

There are, however, several exceptions to the Statute of Frauds.[75] One such exception exists where the party or parties to be charged acknowledges the contract.[76] Vincent asserts that both Albert and Robert admitted the existence of a contract at trial. He further maintains that David admitted agreement by virtue of being part of a common scheme or plan to sell the Cottage and also by failing to object to Vincent's confirmation letter of January 2003.[77] Finally, Vincent argues that Theresa confirmed the existence of an agreement on three separate occasions,

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[72] *Peden v. Gray*, 886 A.2d 1278, 2005 WL 2622746, at *3 (Del. Oct. 14, 2005) (TABLE).
[73] *Sargent v. Schneller*, 2005 WL 1863382, at *4 n.20 (Del. Ch. Aug. 2, 2005).
[74] 6 *Del. C.* § 2714.
[75] *See, e.g.*, *Deene v. Peterman*, 2007 WL 2162570, at *5 (Del. Ch. July 12, 2007).
[76] *See, e.g.*, *Ueltzhoffer v. Fox Fire Dev. Co.*, 1991 WL 271584, at *9 (Del. Ch. Dec. 19, 1991); *Wolf v. Crosby*, 377 A.2d 22, 26 (Del. Ch. 1977).
[77] *See supra* note 61.

once in a phone conversation with Vincent's counsel in November 2003, again in a signed letter to Vincent's counsel from October 2007, and also at trial.

The testimony at trial paints an unclear and disjointed picture. Both Albert and Robert admitted that they had agreed to sell their interests in the Cottage to Vincent; however, neither believed that they and Vincent had entered into a valid contract. David stated that he would have been delighted if they could have sold the Cottage to Vincent, but he too testified that he and his brothers had never actually entered into a contract. The Court must determine whether the Defendants' affirmations of what they had actually agreed upon with Vincent constitute, or amount to, an admission of an enforceable contract, even if the individuals making the admissions are of an opinion otherwise. Put another way, Vincent asks the Court to take the Defendants' admissions and draw a conclusion different from the one drawn by the Defendants themselves.

The analysis should begin with Albert. He confirmed that Theresa approached him around Christmas 2001. According to Albert, Vincent had applied considerable pressure on Theresa to get her to convince him, as well as David and Robert, to sell Vincent the Cottage at the appraised value.[78] Although Albert did

[78] Tr. (Albert) 382 ("[T]imes were very, very difficult. Vincent was harassing Theresa to the point that she was on the verge of a nervous breakdown."). Theresa's narrative did not go nearly so far as Albert's, but she did indicate that Vincent had been giving her a hard time about the Estate. Tr. (Theresa) 130 (explaining that Vincent was "totally obsessing, in an unhealthy way, on my mother's estate").

not wish to sell the Cottage, he nonetheless was willing to go along with his sister in the interests of family peace.[79] He also testified that in the fall of 2002, he and Vincent had agreed that Vincent could purchase the Cottage at the appraised value the following year.[80] When asked why he never sold Vincent the Cottage, he responded that Vincent never sent an offer to buy—specifically "a contract offer."[81] He explained that he was no longer willing to sell after discovering that Vincent had been showing the Cottage to potential third-party investors.[82]

Robert's testimony corroborated that presented by Albert. He could not recall ever discussing the Cottage with Vincent, but stated that it was "entirely possible" that he told Vincent he would go along with whatever Albert wanted.[83] Regardless of what he admitted to telling Vincent, Robert, like Albert, did not believe their discussions had given rise to a formal agreement.[84] He explained that sometime after he and Albert told Vincent they would sell the Cottage to him at the

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[79] Tr. (Albert) 388.
[80] *Id.* at 389.
[81] *Id.* at 389-90.
[82] *Id.* at 390. Vincent was initially unsure whether he would qualify for a mortgage to purchase the Cottage. He brought a potential partner to see the Cottage in the spring of 2002. Tr. (Vincent) 107. In September of that year, Vincent learned that he qualified for a mortgage on his own. *Id.*
[83] Tr. (Robert) 209-10. *See also supra* note 45.
[84] Tr. (Robert) 209-10. ("Again, it would have been some kind of oral talk, and I didn't think in real estate those things worked.").

appraised value, Albert informed him that the deal was off because Vincent was attempting to purchase the Cottage with an outside party.[85]

Finally, David testified that he would have been "delighted" if he, Robert, and Albert had sold the Cottage to Vincent in 2001, as "it would have resolved this [whole] problem."[86] He suggested, however, that at the time of Theresa, Robert, and Albert's Christmas 2001 meeting, Vincent could not afford to purchase the Cottage, nor was Albert able to find another place to live.[87] David, of course, "really had no involvement in any of [his brothers'] discussions between November of 2001 and January of 2003,"[88] a fact conceded by Vincent.[89] When

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[85] *Id.* at 211. Robert reaffirmed that he would simply go along with Albert. *Id.* ("[A]nd I said, 'whatever you want Albert. You all work it out.'").

[86] Tr. (David) 318. The problem to which David referred was the fact that Vincent's name has remained on the title of the Cottage; a sale to Vincent would have enabled the Estate to dispose of the Cottage without first having to clear title. *Id.*

[87] *Id.*

[88] *Id.*

[89] At trial, Vincent explained that he was "not asking for the Court to enforce the contract with David because [he] never talked to David about it." Tr. (Vincent) 110-11. And while Vincent claimed in his Second Amended Complaint that "all the respondents orally agreed to sell the property to [him]" at the $345,000 appraised value, Second Am. Compl. ¶ 26, he requested specific performance only of "Albert and Robert's oral agreement to sell the [Cottage] to [him] at the 2001 appraised value." *Id.* at 11. Despite Vincent's apparent concession, he nonetheless argued at trial, and in his post-trial briefing, that David too should be ordered to sell his interest in the Cottage. The basis for his request, however, is a mirage. For example, at trial he argued that Albert had told him that David had in fact agreed to sell his share of the Cottage. Tr. (Vincent) 110. While Vincent confessed that no agreement existed between him and David, he asks the Court to "enforce the sales agreement between [Robert] and David." *Id.* at 111. Although unclear, it appears that Vincent views David's statement to Robert about his willingness to sell the Cottage as a separate agreement (or as a subject of a broader agreement) that may be enforced by Vincent for Vincent's ultimate benefit. Vincent perhaps recognized that this line of reasoning presented a host of problems on its own—proof and standing to name a few. In his post-trial briefing, Vincent did an about face, and insisted that David had in fact agreed to sell him his interest in the Cottage. He argued that there existed an agreement

David read Vincent's January 2003 letter attempting to confirm a supposed agreement among the four brothers, a sale was out of the question. He found Vincent's proposal to purchase the Cottage in 2007 at the 2001 appraised value to be unacceptable.[90]

The Court agrees with the Defendants that they did not enter into a binding contract with Vincent. Albert told Vincent he would sell to him at the appraised value, and Robert informed Vincent he would go along with Albert, but there was never a commitment from David. Without David, there was no deal—he was a necessary party to the agreement. Indeed, Vincent explained at trial that his understanding of the oral agreement was one in which he would have the right to the Cottage in its entirety.[91] He expressed dismay when he first heard from Theresa that Albert and Robert, but not David, had agreed to sell him their interests

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negotiated by Theresa, and that "all parties were aware of the agreement and gave their consent." Pl.'s Opening Post-Trial Br. at 5. In support of his argument that David consented to the sale, he cites to Albert's representations that could get David to agree to a sale, *id.* at 4, 7; he also cites to David's statement at trial that he would have been delighted if he, Robert, and Albert could have sold the Cottage to Vincent in 2002, Pl.'s Post-Trial Reply Br. at 2, and to the fact that David did not respond to Vincent's attempt to confirm a contract in January 2003. *Id.* at 3; Opening Post-Trial Br. at 8. Vincent offers the Court a moving target, and a specious one at that. The record is clear: David did not admit that he agreed to sell his interest in the Cottage, nor is there any evidence that he and Vincent came to that understanding.

[90] Tr. (David) 318-19.

[91] Tr. (Vincent) 90 ("If, in fact, they honored their agreement which happened after the appraisal came in, we would have a meeting of the minds. I would have accepted 110,000, my share of the estate, and would have bought the cottage at the low appraised value of 345 with the $75,000 credit from David."). The importance of David's agreement was twofold: sale of his interest would have given Vincent complete control over the Cottage, but more importantly, it would have triggered David's $85,000 obligation under the Guaranty—Vincent would finally get his money back. *See* text accompanying note 14, *supra*.

in the Cottage.[92] This concern lingered even after Vincent agreed with Albert and Robert on two separate occasions to extend the date of sale.[93]

The Court does not mean to downplay the significance of Albert's willingness, at one point in time, to sell his interest in the Cottage to Vincent. Presumably, Albert could bring Robert and David to the table.[94] The fact that Albert told Vincent that he would sell him his interest in the Cottage, and could get Robert and David to agree as well, was a critical first step that needed to be taken in order for Vincent to purchase the Cottage. Robert went along. Vincent's problem is that David, who might have agreed at Albert's urging, was never actually brought into the fold.

Vincent in fact recognized that he did not have an enforceable agreement, and that what he did have—Albert's willingness at some point in time to sell—could slip through his fingers.[95] He was hesitant to offer a written agreement out

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[92] *See* text accompanying note 53, *supra*.

[93] *See* text accompanying notes 55-56, *supra*. After agreeing with Albert and Robert in September 2002 to extend the sale date until after the next summer, Vincent explained his position as such: ". . . I still had Theresa and David. Theresa was now planning to take Constitution Avenue. She says, 'I'm out of the beach cottage,' so I didn't have to worry about her. I asked her to call David, and I never got a word from David back that first time." Tr. (Vincent) 109. And after agreeing to a second, significantly longer extension several months later, Vincent was ". . . concerned that [he] didn't have David." *Id.* at 110.

[94] As may be obvious by now, Robert went along with all of Albert's decisions regarding the Cottage, and the Court has little reason to believe that David would not have as well.

[95] Theresa too understood that her brothers had not entered into what they all considered to be a legally binding agreement for the sale of the Cottage. In a letter addressed to them dated January 5, 2003, she "trust[ed they would] all come to an agreement re[garding] the beach cottage." PX 23.

of concern that his brothers would be unwilling to sign.[96] He surmised that Albert and Robert's overtures were part of "a stall tactic."[97] Vincent's analysis appears accurate. Albert never actually wanted to sell him the Cottage; he only offered to do so to appease Theresa.[98] He twice pushed back the date at which the Branson brothers were supposed to enter into a contract, and when one was finally offered by Vincent in January 2003, Albert balked.[99]

Albert's agreement to sell was a representation to Vincent that he was willing to sell and could get Robert and David to sell their interests as well. Vincent knew he had no enforceable understanding between his brothers without agreement from each of them. As promising as Albert's assurances must have seemed, they did not come to fruition. There was no enforceable agreement among Albert, Robert, and David, on the one hand, and Vincent on the other; therefore, there is no basis for the Court to order specific performance. Without an enforceable agreement, there, likewise, is no basis for an award of damages.[100]

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[96] Tr. (Vincent) 105 (explaining that after Theresa told him of Albert and Robert's willingness to sell their interests in the Cottage, he had "a real dilemma; do I ask for a contract, which obviously a lawyer would think you'd get a contract to purchase the property . . . it would have been a no-brainer here, you know, put it in writing . . . [b]ut if I ask for a written contract and they won't sign it . . .").

[97] *Id.*

[98] Albert also may have been under pressure from his father. *See* Tr. (David) 318.

[99] *See supra* note 61.

[100] The Court finds that, for Vincent, any "agreement" for the purchase of the cottage had to be for all of it, but, without David's agreement which was never obtained, there would be no contract. It now makes tactical sense for Vincent to seek to acquire Albert and Roberts' interests. With that acquisition (at the appraisal price, well below current market value), he would have a basis for a partition and, with a partition sale, for collection from David on the

B. *Vincent's Request for "Alternative Relief"*

Vincent also argues that, even if he is not permitted to purchase David, Robert, and Albert's interests in the Cottage at the 2001 appraised value or is not awarded damages for breach of contract, he nevertheless owns an interest in the Cottage. Accordingly, he seeks partition and sale.

Vincent presents two reasons for why he believes he currently owns an interest in the Cottage. First, he contends that he never disposed of the original interest deeded to him by his father in 1977,[101] which was enhanced in 1979 by his partial acquisition of David's original share.[102] Vincent admitted at trial, however, that he gave his original interest in the Cottage to his mother in satisfaction of a $25,000 debt.[103] He explained that he "intended to buy [his share] back when he could afford to."[104] Nevertheless, at trial, Vincent asked the Court to declare that he retained his original interest, and instead to impose an equitable lien over the interest in the amount of $25,000, which he "acknowledge[ed] that he got from [his] mother."[105]

Guaranty. Although understandable, as a matter of tactics, the strategy fails for lack of a necessary agreement.

[101] *See* text accompanying note 4, *supra*.

[102] *See* text accompanying note 6, *supra*. In his Opening Post-Trial Brief, Vincent argued that, "[b]y deed, [he] has held title to a twenty percent interest in the cottage continuously since 1977." Pl.'s Opening Post-Trial Br. at 42.

[103] *See* text accompanying note 8, *supra*.

[104] Tr. (Vincent) 36.

[105] *Id.* at 91-92. Vincent's counsel, in his opening statement summarized Vincent's position as follows: "Vincent contends he owns at least a 20 percent legal interest in the [Cottage]. That's

Vincent's argument concerning his original interest in the Cottage is baffling. It perhaps proves an observation provided by Robert at trial: "Vincent always made it clear what he wanted, which was everything for him."[106] The record is clear that Vincent transferred his original interest in the Cottage to his mother. In the Covenant, Vincent acknowledged that the Cottage is the property of the Estate; he "expressly admit[ted] that while the title . . . lists my name as well as the name of my other siblings, neither I, nor David, Robert, Theresa, owned an interest in that house at the time of my mother's death, each of us having transferred our interest to her during her lifetime for good and valuable consideration."[107] He cited to the Covenant in his opening post-trial brief, and wrote "it is now undisputed that Dorothea's share of the beach home was 75% on the date of her death and Albert's share was 25%."[108]

Vincent has given the Court no basis for why it should ignore his previous representations and instead recognize that he retained his original interest in the Cottage subject to a $25,000 lien. Vincent's argument founders: while conceding that he transferred his original interest to Dorothea, he contends that he in fact retained that interest simply by virtue of record title remaining in his name. The

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based on the legal title to the property, which, at the time of [Dorothea's] death, was in the names of the five children. He will say that the covenant doesn't transfer that interest." Tr. 17.

[106] Tr. (Robert) 181.

[107] JX 10.

[108] Pl.'s Opening Post-Trial Br. 3.

Defendants have not raised a counterclaim in quiet title, and thus whether Vincent's name may remain among the land records regarding the Cottage is beyond the scope of this memorandum opinion. For purposes of Vincent's request for recognition of an ownership interest and partition, however, the Court confirms that, at the time of Dorothea's death, Vincent had no interest in the Cottage.

Vincent presents a second argument, as unfounded as the first, for why he has an interest in the Cottage. He contends that he is entitled to a one-fourth share "of either Dorothea's 75% or 80%" interest in the Cottage, which "vested in [him] automatically by operation of law as a devisee under [Dorothea's] will."[109] Vincent can only make this argument because he refused to sign a release to the effect that he had taken his full inheritance in cash. Nevertheless, the record demonstrates that Vincent has already taken his fair share of the Estate, and has once again asserted "alternative requests" for relief as a means of getting more of the Estate than that to which he is entitled.

As a brief recap, Vincent received a $65,000 distribution in November 2001, which under the terms of the Covenant, constituted an early distribution from the Estate.[110] After the Cottage had been appraised, and the total value of the PaineWebber account determined, Vincent received a second distribution of

[109] Pl.'s Opening Post-Trial Br. 41. Vincent's supposed "one-fourth" entitlement reflects Theresa's disclaimer, which left four beneficiaries to the Estate: Vincent, David, Robert, and Albert.

[110] *See* text accompanying note 27, *supra*.

$45,000.[111] The two distributions combined, which totaled $110,000, represented exactly one-quarter of the Estate at the time David filed the inventory. Vincent, however, contends that the $110,000 he received in cash was not a full and final Estate distribution. He points to the fact the initial $65,000 was only an early distribution and seemingly suggests that, in the absence of a release, any subsequent distributions could not have been final either. Then, instead of explaining why he did not receive his full share of the Estate upon acceptance of the second $45,000 distribution, he merely concludes that David distributed to him the $110,000 "at his own risk."[112]

A signed release from Vincent proving that he had taken his full share of the Estate would have been helpful.[113] Even without a release, however, the record demonstrates that the $110,000 Vincent received in cash was a full and final distribution. The inventory filed on August 19, 2002 listed a total of $450,935.56 in Estate assets. This figure did not account for the approximately $10,000 the

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[111] *See* text accompanying note 33, *supra*.
[112] Tr. (Vincent) 235.
[113] Robert believed that the Covenant accomplished this objective. Tr. (Robert) 203 ("I don't practice law, and I am not a lawyer, so I don't have any idea of that language. [The Covenant], to me, seemed like an adequate release, and I would have felt very comfortable with that document myself."). Of course, in the Covenant, Vincent did not agree that he had taken a full and final distribution; in fact, at the time he signed the Covenant, he had taken only $65,000 out of his total $110,000 distribution.

Estate had incurred in funeral and administrative expenses.[114] When those expenses are accounted for, and the discounted figure is divided into four equal shares,[115] each share equals approximately $110,000. Robert put it best: "[i]t's obvious. This is just such a basic accounting, and so simple, that it all adds up to exactly what was in the estate, and everybody agreed to the value. All five of us in the room knew that this was the agreed upon values, and we accepted."[116] When Vincent took the second $45,000 distribution, he had received one-quarter of the value of the Estate.

This fact was corroborated by David and Robert at trial. David testified that when he and Robert determined the full value of the Estate to be distributed in the spring of 2002, they did so "with the full understanding that Vincent had agreed to accept his full share of the estate in cash, and he was paid that cash."[117] Likewise, Robert explained that, after completing the accounting, he offered Vincent the right to take his share of the Estate as either a combination of cash and stock from the

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[114] The inventory listed the value of the PaineWebber account at $192,185.56. Robert valued the PaineWebber account in May of 2002 at approximately $181,000 after subtracting Estate expenses. Both figures include the funds distributed to Vincent.

[115] Once again, Theresa disclaimed any interest in the Estate. *See* text accompanying note 29, *supra*.

[116] Tr. (Robert) 186.

[117] Tr. (David) 316; *see also id.* at 369 ("[W]hat he was doing to the estate was a personal matter between he and I. But amongst everyone in the family, there was an absolute agreement that he was getting—not only getting 25 percent of the estate, but that he demanded and wanted 25 percent of the estate in cash, and that he wouldn't, in the future, ask for a share of the estate.").

PaineWebber account or an interest in the Cottage.[118] According to Robert, Vincent took his share entirely in cash from the PaineWebber account; it is his position that Vincent had no need to take an interest in the Cottage, which he would be allowed to use anyway.[119] Although Robert wanted Vincent to sign a quitclaim deed,[120] he concluded that, even in its absence of a formal agreement, "[Vincent] was [nevertheless] supposed to honor what he was supposed to have agreed to, and he was refusing. It was simple."[121]

Finally, Vincent himself, in his initial pleadings, admitted that the $110,000 received in the two distributions constituted his full and final share of the Estate. In his original petition, Vincent averred that he had "agreed to accept cash as his share of the estate while keeping his name on the title of the cottage as security for the debt owed by David."[122] At trial, Vincent attempted to downplay his admission by claiming that he never conceded that the cash distribution was full and final and that he "had reserved the right later to say when the appraisals come in, and if it's different, then I get whatever . . . ."[123] When pressed that this was not the

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[118] Tr. (Robert) 180-81.
[119] *Id.* at 181-82. ("[E]ven when he took cash, he was kind of convinced in his mind he'd be able to use the beach house. Why should he bother to pay for it when Albert was going to still own it and he'd use it and then work on [purchasing it] later.").
[120] *See supra* note 39.
[121] Tr. (Robert) 204-05.
[122] Petition to Remove Personal Representative for Cause, to Partition Real Estate and to Show Cause, Negligence and Inter Alia Breach of Contract ¶ 68. "The debt owed by David," of course, refers to the Guaranty.
[123] Tr. (Vincent) 238.

representation made in his first complaint, Vincent simply replied: "I've given you the best answer I can. As far as I'm concerned, it speaks for itself."[124]

Vincent's initial pleading does speak for itself, as do the record and the figures reflecting the worth of the Estate's assets at the time Vincent took his second ($45,000) distribution which, not surprisingly, brought the total amount he received to one quarter of the Estate. Vincent has no interest in the Cottage—he relinquished any right he may have in the Cottage when he instead elected to take his share of the Estate in cash.[125] For these reasons, the Court will not grant Vincent the declaratory relief he seeks, and it will not order partition and sale at his request.

C. *Payment of the Guaranty and Interest*

In its order on Vincent's motion for partial summary judgment, and in an accompanying letter, the Court left the Guaranty's due date, and interest owed on

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[124] *Id.* at 239.

[125] Indeed, Vincent could be said to have waived any right he may have in the Cottage. A waiver arises when one, with full knowledge of all material facts, intentionally and unequivocally relinquishes a known right. *See e.g.*, *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2010 WL 2368637, at *4 n.17 (Del. Ch. June 14, 2010). By electing to take an all-cash distribution, Vincent waived any potential interest he otherwise had to the Cottage. Vincent could also be considered equitably estopped from taking an interest in the Cottage. "To make out a claim of equitable estoppel, plaintiff must show that he was induced to rely detrimentally on defendant's conduct." *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 87 (Del. 1998). By taking a one-quarter share of the Estate at the time of the final distribution, Vincent's conduct allowed the Defendants to assume reasonably that Vincent had taken his full share of the Estate.

the Guaranty, as issues to be resolved after trial.[126] Vincent argues that he is entitled to immediate payment of the $85,000 Guaranty plus interest from June 24, 1998, the date he purchased the Novazen stock from David. His argument is difficult to follow. Vincent claims that the Novazen stock purchase was really a loan from him to David and that David had agreed in 1998 to pay him interest on this presumed debt. Vincent contends that David has falsely rejected this characterization of the Guaranty as a loan and his alleged commitment to pay interest; according to Vincent, "[b]ecause David has denied falsely that there was any agreement to pay interest, and the ten year [loan] was not contemplated by the parties, petitioner requests prejudgment interest as provided by law since June 24, 1998, until paid in full."[127] As will be seen, Vincent has once again stretched the truth to try to take something to which he is not entitled.

Vincent's argument is entirely predicated upon a mischaracterization of the Guaranty. This Court has already determined that the Guaranty is a contractual obligation in the amount of $85,000 that David owes Vincent upon sale of the Cottage. The Court recognizes that at one point it imprecisely referred to the

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[126] Order dated Mar. 12, 2009 ("The question of interest on such obligation has not been decided."); *see also* Bench Ruling on Pl.'s Mot. for Partial Summ. J. at 8; Letter from Court, dated March 12, 2009 ("I note, in passing, that among the issues that have not been resolved are the due date of the debt and the question of choice of law [regarding the interest].").

[127] Second Am. Compl. ¶ 51. Vincent also framed this argument as a request for alternative relief to his claims for specific performance and partition. He contends that if he is unable to purchase David's interest subject to an $85,000 offset, then he should be entitled to a "judgment against David personally, in the amount of $85,000 plus prejudgment interest as a matter of law." *Id.*

Guaranty as a debt in its pretrial correspondence with the parties.[128] At that time, the Court was anticipating that Vincent would eventually craft an argument that was responsive to the Court's order on Vincent's motion for partial summary judgment: an argument to the effect that the obligation created by the Guaranty is currently due and payable.

Instead of presenting an argument of that nature, Vincent has insisted upon characterizing the Guaranty as an interest-bearing loan and argued that prejudgment interest should be awarded if only as a substitute for the interest David supposedly owed on this alleged debt obligation. Not only is this characterization inconsistent with the Court's decision and order, it is also at odds with Vincent's own testimony. In fact, Vincent explained that he had originally offered the amount used to purchase the Novazen stock as a loan, but David rejected this proposal.[129] David told him he could not "list any more loans on his financial statement;" he instead wanted to structure the transaction as a sale of stock.[130] David then agreed to indemnify Vincent against any risk related to the

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[128] Letter from the Court to Counsel, dated March 12, 2009. The letter recited that the "due date" was among a number of unresolved issues.

[129] Tr. (Vincent) 69-70 (". . . I told him I'd loan him the money. He eventually replied that it couldn't be a loan; that he had too much debt . . .").

[130] *Id.* at 70. David disagrees with Vincent's account. *See* David Aff. ¶ 28. He contends that Vincent was originally interested in purchasing preferred shares of Novazen stock being offered through a private placement. Both Theresa and Robert participated in that offering; Vincent, however, was not eligible to participate because, at the time, he was not an accredited investor. According to David, Vincent then asked him if he could purchase a portion of David's shares of Novazen common stock. David claims that Vincent told him he wanted to purchase $85,000

stock.[131] Even though Vincent and David structured the transaction as a sale of stock, Vincent maintains that David agreed to pay interest on the amount tendered by Vincent in apparent payment for the stock.[132]

Vincent also claims that the $85,000 figure was not, in fact, the original amount extended in the transaction. Instead, he contends that he purchased the stock for $75,000; according to Vincent, the $85,000 represents the purchase price plus accumulated interest from the time of the purchase in June 1998 to Dorothea's death in September 2001.[133] If the Court accepts Vincent's account, because David has acknowledged an $85,000 obligation, it would therefore follow that he has also acknowledged the obligation as a loan, and acknowledged a concurrent interest obligation as well.[134]

Vincent's portrayal of the obligation as a current debt, however, is not supported by the record, and his version regarding the original amount of the purchase price and interest accumulated, and allegedly paid, has damaged his

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worth of stock; David, believing that was too much money for Vincent, who was not regularly employed, told him that if Novazen failed, he would return the purchase money to him "when mother's beach house is sold." David claims that Vincent never offered the $85,000 as a loan and that he did not tell Vincent that the transaction had to be structured as a sale of stock. *Id.* ("There was no discussion or agreement concerning a loan, a guarantee, an indemnification or interest."). Regardless of whether Vincent's account matches David's, Vincent conceded at trial that the $85,000 was not given as a loan.

[131] Tr. (Vincent) 70.

[132] *Id.* Vincent claimed that he and David agreed upon a 4% rate of interest. David again has denied this allegation. David Aff. ¶ 26 ("I never agreed to pay interest.").

[133] Tr. (Vincent) 69-71.

[134] Vincent ostensibly restates the purchase price at $75,000 to demonstrate something akin to partial performance by payment or acknowledging interest.

credibility. The evidence shows that the original purchase price for the Novazen stock was $85,000. Indeed, Vincent's June 24, 1998, letter to David confirming the terms of the stock purchase memorializes an "aggregate purchase price" of $85,000.[135] The fact that Vincent would seek interest from June 24, 1998, further undermines his narrative, if as he says, the $85,000 in part represents capitalized interest.[136]

Once again, Vincent's argument that interest should be payable from June 24, 1998, is indicative of his failure to address whether and when the Guaranty became due and payable.[137] In other words, he presents no argument that the Cottage was ever sold for purposes of triggering the Guaranty.[138] In his efforts to frame the Guaranty as he would like to see it, as opposed to what it really is, and in his attempts to take more than that to which he may be entitled, Vincent may have missed the opportunity to present a more substantial argument. In other words, Vincent has not presented a cogent reason for why the Guaranty should be considered due and payable, or for why he should be entitled to interest as of that date. Without that argument, the Court has no choice but to conclude that the

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[135] JX 6.

[136] Jt. Pretrial Stip. & Order at 5 ("Whether plaintiff is entitled to pre- and post-judgment interest under New York law from June 24, 1998, until paid on the $85,000 acknowledged debt . . .").

[137] The Guaranty was certainly not due and payable on June 24, 1998, the date it was made.

[138] The Court doubts that (but need not decide whether) such an argument would be convincing. The record is replete with references to a family cottage; there was a perception that Dorothea wanted the Cottage to remain with her children and to be available for use by her extended family. The Cottage, of course, continues to be held by members of her family. It would be at least a plausible argument that "sale of the Cottage" implies sale to a non-family third-party.

Cottage has not been sold for purposes of triggering the Guaranty, which is therefore not yet due and payable; consequently there is no corresponding current accumulated interest.[139]

V. CONCLUSION

For the foregoing reasons, Vincent's claims for relief are denied. Counsel are requested to confer and to submit an implementing form of order.

[139] Vincent also requested that an equitable lien be placed over David's share of the Estate as security for the Guaranty. *See supra* note 71. This claim was not pursued with any effort in his post-trial brief and he has argued no basis for which the Court should award him a security interest when one was not agreed upon at the time of the Guaranty's execution.