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Transaction ID 55988383
Case No. 3932-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEONARD GRUNSTEIN, JACK DWYER, and CAPITAL FUNDING GROUP, INC.,	
Plaintiffs,	
v.	**C.A. No. 3932-VCN**
RONALD E. SILVA, PEARL SENIOR CARE, LLC, PSC SUB, LLC, GEARY PROPERTY HOLDINGS, LLC, FILLMORE CAPITAL PARTNERS, LLC, FILLMORE STRATEGIC INVESTORS, LLC, DRUMM INVESTORS, LLC, and FILLMORE STRATEGIC MANAGEMENT, LLC,	
Defendants.	

MEMORANDUM OPINION

Date Submitted: March 14, 2014
Date Decided: September 5, 2014

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NOBLE, Vice Chancellor

In early 2005, two sophisticated businessmen teamed up to acquire a $2 billion nursing home company. By trade, one was a lawyer; the other arranges loans insured by the United States Department of Housing and Urban Development ("HUD"). Each had substantial business experience in acquiring or financing healthcare companies. They pitched their business plan to the nursing home company's CEO, obtained commitments for debt financing, and submitted several proposals to acquire the company. However, they lacked a committed equity source willing to fund $350 million.

Based on a recommendation, they asked an investor relatively new to the nursing home industry if he would be capable of raising $350 million in equity from his investment sources—two pension funds. The investor agreed to do so. They allegedly had some understanding that the lawyer and the investor would be fifty-fifty partners, while the financier (or loan broker) would have the right to do the HUD refinancing of the commercial mortgage backed securities ("CMBS") issued as part of the debt financing for the transaction. They also enlisted another person (and his company) to do the financing of the CMBS loans. Although the four participants attempted to document certain aspects of their relationship, they proceeded to acquire the nursing home company without a written agreement defining their relationship.

Having made the highest bid, the lawyer and his affiliated entities entered into a merger agreement to acquire the nursing home company. The financier put up the required $7 million deposit after the investor was unable to do so. A few days later, a third party made a topping bid. Although the acquiring entities were entitled to receive a breakup fee if the nursing home company accepted the superior offer, the foursome agreed to submit a higher bid, which was accepted and memorialized in an amendment to the merger agreement.

As a condition to the revised merger agreement, the acquiring entities were required to provide a $53 million deposit or letter of credit and an equity commitment letter by late September 2005. Because the investor and the lawyer were unable to do so by the deadline, they renegotiated the terms of the merger agreement to give them more time to obtain a firm equity source. As part of the second amendment to the merger agreement, the financier put up an additional $3 million deposit. Nonetheless, the four participants agreed to share equally in the $10 million deposit and several million dollars in expenses that had already been incurred.

Over the course of the next several months, the foursome worked together in their respective roles to acquire the nursing home company. The financier underwrote nearly 275 facilities to support the CMBS financing and in preparation for the HUD refinancing that the participants anticipated would occur post-closing.

The investor continued to solicit his institutional equity sources and work on completing the transaction. The lawyer negotiated the merger agreement and the subsequent revisions to it, and assisted in ensuring that the transaction was consummated. Finally, the investor obtained the $350 million equity commitment from one of his equity sources.

Because of some negative publicity arising from the lawyer's prior business dealings, the lawyer and the investor chose to change the acquiring entities, which were associated with the lawyer, to three shell companies controlled by the investor. This modification transferred legal control of the transaction from the lawyer to the investor, but it did not alter their relationship. As the acquisition proceeded to closing, the four participants continued to work together toward their common endeavor. However, when the transaction closed, the investor refused to recognize the lawyer as a fifty-fifty partner in the transaction and the financier's right to refinance the CMBS debt. Despite the substantial time and effort expended by the financier, he obtained from the transaction only reimbursement for the deposit. The investor paid for some of the lawyer's legal fees and separately paid fees to an investment banking firm in which the lawyer held a significant stake, but the lawyer asserts that he received no compensation for his business time expended in acquiring the nursing home company. Having little, if anything, to show for their efforts, the financier and the lawyer filed suit against

the investor claiming, among other things, that he breached both an oral partnership agreement and an oral contract to do the HUD financing.

This case presents a number of perplexing factual questions. Why would sophisticated businessmen proceed jointly to acquire a billion dollar company without a written agreement defining their relationship? Why did the participants attempt to document certain aspects of their relationship and not others? How much weight should be accorded to the fact that they attempted to document their rights and obligations based upon their collaboration but ultimately never completed this task? Why did the lawyer transfer legal control of the transaction to the investor if they did not have a partnership agreement? And why did the financier spend months underwriting 275 facilities if he did not have an oral (or written) agreement with the investor to do the HUD financing?

This case also highlights the tension that may arise between conventional business practices employed to manifest assent and the equitable doctrines that may be implicated in their absence. If these parties worked together based on a broad understanding, is the willingness of certain persons to collaborate without a firm commitment a voluntary act taken in self-interest or an unjust enrichment benefiting their collaborators who ultimately stopped working with them? Who should be responsible for making clear that the parties did or did not agree that they were contractually obligated to one another?

In resolving the plaintiffs' claims, the Court ultimately must rely on an assessment of the credibility of the parties to determine what, if anything, the parties agreed were the terms of their relationship. This is so because the parties did not memorialize their relationship, as one might expect in the context of a transaction worth more than one billion dollars. Although the parties present some evidence from contemporaneous documents and third parties, successfully contextualizing this evidence depends on the explanations provided by the litigants themselves. As might be imagined, each party-witness in a transaction of this magnitude has a sizeable financial interest in the outcome of the litigation. The plaintiffs could even gain some amount of control over a billion dollar enterprise. The Court's assessment of the litigants' testimony was that it was somewhat lacking in reliability: the parties generally appeared to say what needed to be said to support their position.

However, certain post-trial events have also been brought to the Court's attention and further weigh on the Court's assessment of credibility. Specifically, the lawyer in this case pled guilty to a charge of perjury in another civil proceeding in New York. A perjury conviction arising from a civil suit is an unusual occurrence. It is an event which must be stated at the outset of the opinion because the conclusion which flows from this conviction colors all of the lawyer's testimony, although chronologically it is one of the most recent relevant factual

developments in this proceeding. As explained in the reasoning which follows, because the Court must rely on the lawyer's testimony to find in his favor, it concludes that he has not met his burden of proof in demonstrating his entitlement to relief. Based on the totality of circumstances and for the reasons that follow, the financier is also not entitled to relief.

I. INTRODUCTION

Plaintiffs Leonard Grunstein ("Grunstein"), Jack Dwyer ("Dwyer"), and Capital Funding Group, Inc. ("CFG") (collectively, the "Plaintiffs") bring various causes of action against Defendants Ronald E. Silva ("Silva"), Fillmore Capital Partners, LLC ("Fillmore" or "FCP"), Fillmore Strategic Investors, LLC ("FSI"), and their affiliated entities[1] (collectively, the "Defendants"), relating to the acquisition and taking private of Beverly Enterprises, Inc. ("Beverly"). In March 2006, certain entities associated with Fillmore—Pearl Senior Care, Inc. ("Pearl"), PSC Sub, Inc., and Geary Property Holdings, LLC ("Geary")—acquired Beverly for $12.50 per share (the "merger").

The Plaintiffs have asserted claims for breach of an oral partnership agreement, promissory estoppel, breach of contract, unjust enrichment, and fraud. The Plaintiffs' primary claim is that Grunstein, Dwyer, Silva, and Richard M. Lerner ("Lerner"), then an employee of Credit Suisse First Boston ("Credit Suisse"

[1] These entities are: Pearl Senior Care, LLC; PSC Sub, LLC; Geary Property Holdings, LLC; Drumm Investors, LLC ("Drumm"); and Fillmore Strategic Management, LLC.

or "CSFB"), banded together to form a partnership for the purpose of acquiring Beverly. The four parties allegedly agreed to share expenses equally and to contribute their respective talents toward acquiring Beverly. Over the course of several months, Grunstein and Dwyer performed a substantial amount of work in furtherance of acquiring Beverly. Silva also fulfilled his role in the alleged partnership by securing the equity necessary for the deal. However, once the merger closed, Silva disclaimed the existence of a partnership. The remaining causes of action are based on the same underlying facts.

The Court sets forth its post-trial findings of facts and conclusions of law in this Memorandum Opinion.

II. BACKGROUND

A. *The Parties Involved & the Mariner Transaction*

During the relevant period Grunstein was an attorney at Troutman Sanders LLP ("Troutman") with significant business experience in the healthcare industry. He participated, as a principal, in the acquisitions of two nursing home enterprises: Integrated Health Services ("IHS")[2] and Mariner Healthcare ("Mariner"). The Mariner deal involved the acquisition of 220 nursing homes for approximately

[2] The IHS transaction involved the acquisition of 100 nursing homes for approximately $100 million. Credit Suisse provided the financing for the transaction. In exchange for providing the equity, Rubin Schron received majority ownership of the real estate assets owned by IHS. For his role in the transaction, which included structuring the deal, Grunstein received a minority interest (8 percent) in the real estate company. Grunstein Tr. 531-33.

$1 billion. As with IHS, Grunstein structured the deal so that Mariner was divided into three newly formed entities: the legacy company ("OldCo"), the real estate company ("PropCo"), and the operating company ("OpCo"). OldCo acquired the legacy obligations, but retained only enough assets to satisfy existing liabilities. In exchange for fair consideration, PropCo received Mariner's real estate assets. OpCo was formed to lease and operate those properties.[3] This structure is referred to as the "Mariner model." The Plaintiffs contend that the four alleged partners adopted the Mariner model for the Beverly transaction.

As he was in the IHS acquisition, Rubin Schron ("Schron") was the equity investor in the Mariner transaction and received a majority interest in PropCo.[4] For his work, Grunstein received a minority interest in PropCo[5] and a majority interest in OpCo, or SavaSenior Care, which he also managed.[6] The Mariner transaction was financed principally by Credit Suisse through $900 million in CMBS. Lerner represented CSFB in the Mariner effort.[7]

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[3] Grunstein testified that this structure offered numerous advantages. For example, OpCo, no longer burdened by the liabilities of the legacy company, was able to provide better healthcare. The real estate company was able to obtain financing more cheaply. Because the companies were separate legal entities, the bankruptcy of one would not impair the other. Grunstein Tr. 535-40.

[4] Grunstein Tr. 542.

[5] *Id*. at 542.

[6] Silva Tr. 13-14, 192.

[7] Grunstein Tr. 541-42.

Grunstein is affiliated with MetCap Securities LLC ("MetCap"). MetCap's managing member, Murray Forman ("Forman"), served as an investment banker in the Mariner acquisition, and MetCap received $14 million for his work.[8] MetCap is owned by MetCap Holding LLC ("MetCap Holding"). Grunstein has a large minority interest in MetCap Holding. Grunstein has never been an employee or manager of, received a salary from, or held check signing authority for MetCap.[9]

Dwyer owns and manages CFG.[10] Its primary business is the financing of healthcare facilities through HUD. Among other businesses, CFG provides a range of financial services to clients in the long-term health care industry.[11] CFG participated in the Mariner transaction to assure investors that the deal had a long-term financing solution.[12] In particular, CFG was retained before the Mariner deal closed to provide underwriting services on the Mariner facilities. CFG's work ensured that HUD refinancing was a viable exit strategy for the CMBS bridge financing. CFG was also employed to perform the refinancing after the Mariner transaction closed. After Mariner was acquired, CFG obtained several HUD

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[8] *See MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (Del. 2009).

[9] Grunstein Tr. 549-50. Defendants assert that Grunstein's claims are barred by the doctrine of res judicata because of his role in MetCap and its earlier, unsuccessful litigation against Silva.

[10] They are sometimes collectively referred to as "Dwyer/CFG."

[11] Dwyer Tr. 894-97.

[12] Grunstein Tr. 544.

approvals for financing to replace the CMBS bridge financing. However, no HUD refinancing has occurred with respect to Mariner.[13]

Silva and his wife are the owners of Fillmore.[14] In the Mariner transaction, Fillmore arranged for the Public Sector Pension Fund ("PSP"), a Canadian pension fund, to purchase approximately $100 million of the Mariner transaction debt from CSFB and to participate in a $50 million bridge equity investment.[15] Although Silva had extensive real estate experience, the Mariner investment was Silva's first foray into the healthcare industry.[16] In addition to PSP, Silva's other main institutional client was the Washington State Investment Board ("WSIB").[17] Brandon Ribar ("Ribar") was the only employee of Fillmore who worked with Silva on the Beverly transaction.[18] His experience included less than three years of work as a junior accountant at a well-regarded accounting firm.[19]

B. *Dwyer & Grunstein Team Up to Acquire Beverly*

In early 2005, Dwyer emailed Grunstein about teaming up to acquire Beverly after Formation Capital LLC ("Formation Capital") made a hostile offer

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[13] Dwyer Tr. 928-41, 1377.
[14] Silva Tr. 250.
[15] *Id.* at 257-58.
[16] *Id.* at 247-51. Silva had experience in real estate finance, investment, and operational management. *Id.* at 249.
[17] *Id.* at 247.
[18] Ribar Tr. 2028-30.
[19] *Id.*

for Beverly at $11.50 per share.[20] Apparently, Dwyer knew "Bill Floyd [the CEO and Chairman of Beverly] real well" and had "a lot of credibility with [him]."[21] Grunstein and Dwyer agreed to join forces.[22] Thereafter, Dwyer and Grunstein had several meetings and numerous phone conversations with Bill Floyd ("Floyd").[23] During those meetings, Floyd gained confidence that Grunstein and Dwyer could consummate the deal.[24] Around this time Dwyer met with HUD officials and did some preliminary underwriting work.[25] Grunstein worked on obtaining financing for the transaction and developed and then submitted, on behalf of SBEV Property Holdings LLC ("SBEV"), an entity affiliated with Grunstein, a preliminary proposal to acquire Beverly on May 9, 2005.[26] When Beverly's investment banker, Robert Snead of Lehman Brothers ("Lehman"), posed questions relating to the acquisition proposal, Troutman prepared and submitted detailed responses.[27]

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[20] JX 10.
[21] *Id.*
[22] Dwyer Tr. 945; Grunstein Tr. 554.
[23] Grunstein Tr. 554-55.
[24] *See id.* at 556-57.
[25] Dwyer Tr. 950-53.
[26] JX 31-33; Grunstein Tr. 563.
[27] JX 35-36; Grunstein Tr. 564 (Grunstein states that he prepared the substance of the letters although they are signed by another Troutman attorney).

As Grunstein continued to work on the financing of the transaction,[28] he developed and then submitted a second acquisition proposal on July 15, 2005.[29]

Lerner had initially declined Grunstein's and Dwyer's invitation to join in their efforts to acquire Beverly, but he later sought to be included in the CMBS financing. Although Grunstein had obtained commitments from Wachovia Bank ("Wachovia") to provide the CMBS, Grunstein was successful in securing some portion of the CMBS financing for Lerner.[30] Because Lerner suggested that it was preferable to have an institutional source of equity, as opposed to "piecemealing different equity players together,"[31] Grunstein and Dwyer were persuaded to ask Silva, whom Lerner recommended, if he would be able to raise the equity.[32] The Plaintiffs allege that sometime in late July or early August, Silva agreed to team up with Dwyer, Grunstein, and Lerner to acquire Beverly. They further allege that the foursome agreed to become partners, with Silva and Grunstein sharing equally in the promoter's interest (the "promote"), or whatever was obtained from the equity provider, Lerner having the right do the CMBS financing, and Dwyer having the right to do the HUD refinancing.

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[28] Grunstein obtained a signed commitment letter from Wachovia for real estate financing in the amount of $1.325 million. JX 83. He also appears to have obtained a signed commitment from Capital Source Finance LLC ("Capital Source"). JX 79.
[29] JX 79.
[30] Grunstein Tr. 562-63; Dwyer Tr. 957-58.
[31] Dwyer Tr. 958-59.
[32] *Id.* at 961-62; Grunstein Tr. 574.

Testimony and documentary evidence conflict as to whether Silva, on behalf of Fillmore, was considering an equity investment, in addition to a debt investment,[33] by late July 2005. On July 20, Grunstein forwarded to Lehman, as Beverly's investment bank, an executed equity commitment letter (for $300 million) from Schron.[34] Grunstein's revised acquisition proposal, dated July 29, which raised the merger consideration from $12.65 to $12.70 per share, did not mention any equity source other than SBEV.[35] Nonetheless, FCP's own presentation, dated July 15, 2005, states that it was "considering an opportunity to provide approximately $100-$150M of equity capital" to complete the transaction and that Schron was expected to fund "$50 million in hard cash equity."[36] On August 2, 2005, four days after Grunstein submitted a revised acquisition proposal, Silva sent Lerner an email that stated: "I just gave Len the green light at 12.80. God help me!!!"[37]

Silva testified that those words meant "we would still be interested in the transaction at 12.80."[38] In contrast, Grunstein insisted that Silva's approval was

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[33] *See* JX 88. On July 20, Lawrence Levinson ("Levinson"), a Troutman attorney, sent a letter to Lehman Brothers regarding the lender's due diligence in which he wrote: "[Troutman has] also been working with Fillmore as a likely source of the junior-most portion of the mortgage financing . . . ." *Id.* The letter made no mention of a potential equity investment by Fillmore.

[34] JX 89.

[35] JX 94.

[36] JX 86. The presentation was intended for PSP.

[37] JX 96.

[38] Silva Tr. 35.

required because they were partners and because "any price increase came from the equity."[39] In light of Silva's written display of emotion and his own presentations, the most reasonable interpretation of this email is that Silva had given his approval to increase the offering price. By August 2, Silva had also likely committed to use his best efforts to obtain some portion of the equity for the Beverly transaction. Silva's email also clearly refutes his testimony that he did not discuss an equity investment with Grunstein until mid-August[40] and substantially undermines his statement that he had not secured the right or obligation to provide equity until November 18, 2005.[41] Thus, by August 2, Silva and Grunstein had likely

[39] Grunstein Tr. 575-76. The Defendants attempt to refute Grunstein's testimony that any price increase would have needed to come from the equity source. Defs.' Answering Post-Trial Br. ("DAB") at 12 n.42. However, Silva's own testimony on this point is consistent with Grunstein's testimony. *See* Silva Tr. 91-92 (Silva agreeing that any increase in the bid from $12.80 to $12.95 was most likely going to come from the equity provider).

[40] Silva Tr. 26-27. In support of Silva's contention that he did not consider an equity investment until mid-August, the Defendants assert Silva was not given access to the data room for the Beverly transaction until August 4. *See* JX 104. However, Silva was receiving detailed financial information about Beverly from Wachovia through Grunstein well before that time. JX 70-72 (July 13, 2005). The Defendants' contention that Leucadia, another equity source, was still involved in the transaction by August is not supported by their references to the record. DAB at 11.

[41] Silva Tr. 21; *see* JX 235 (Fillmore's Presentation to WSIB regarding Beverly, dated September 6) ("In August 2005, FCP secured the right to provide $650MM in the form of $300MM CMBS mezzanine debt and approximately $350MM of investor equity to complete the $2.4B public to privatization of Beverly Enterprises Inc."). Silva explained his presentation was based on the fact that he had the opportunity to invest, rather than a legal right. Silva Tr. 22-23.

discussed partnering, Grunstein had asked Silva if he could come up with the equity, and Silva likely said he would use his best efforts to do so.[42]

C. *The Merger Agreement & the First Amendment*

Entities affiliated with Grunstein and other Troutman attorneys, North American Senior Care ("NASC"), NASC Acquisition Corp. ("NASC Acquisition"), and SBEV, entered into a merger agreement with Beverly on August 16.[43] The merger agreement required a $7 million deposit. Although Grunstein testified that Silva had agreed to put up the deposit,[44] Silva wrote to Grunstein, on the morning of August 16, that he was unable to do so because he had not yet obtained a commitment from PSP. Grunstein testified that after receiving this email he called Silva, who then agreed to deposit $3.5 million. Roughly two hours later, Grunstein sent an email to Silva stating that his $3.5 million deposit needed to be in the escrow account by 3:45 p.m.[45]

Once again, Silva did not come up with the money. This time Silva offered a different explanation. In an email to Grunstein, Silva wrote that he needed until morning—although he knew that it would be too late by then—because his

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[42] Grunstein Tr. 574.

[43] *See* JX 136. For convenience, NASC and SBEV are sometimes collectively referred to as "NASC/SBEV."

[44] Grunstein Tr. 583-84.

[45] JX 143. Grunstein testified that after Silva had informed him that he was unable to put up the $7 million deposit, they had a conversation in which Silva agreed to put up half of the deposit, or $3.5 million. Grunstein Tr. 584-85.

attorneys had not drafted a letter agreement or completed a review of the merger agreement.[46] At trial, Silva denied ever agreeing to fund the deposit or a portion of it.[47] However, Silva did not make that assertion in his August 16 emails to Grunstein. Interestingly, on August 14, Silva emailed Lerner with a question: "can [Grunstein] himself put up half the deposit??"[48] Lerner responded the next day: "Prob not, but he and jack Dwyer can and all jack will want is the FHA business."[49] Silva was clearly contemplating the need to fund the deposit, although his email to Lerner suggests that he had reservations about doing it. More likely than not, he had agreed to do so or at least to try.

As time was winding down, Dwyer (or CFG) ultimately funded the entire $7 million deposit. Shortly thereafter, Grunstein signed an undertaking, on behalf of himself, and a promissory note, on behalf of SBEV, payable to CFG in the amount of $3.5 million.[50] Both Grunstein and Mark Goldsmith ("Goldsmith"), a Troutman attorney, signed the merger agreement on behalf of the three acquiring entities, SBEV, NASC, and NASC Acquisition.[51] This structure reflected the parties' intention to follow the Mariner model. The merger agreement was accompanied

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[46] JX 141.
[47] Silva Tr. 43.
[48] JX 130.
[49] *Id*.
[50] JX 227.
[51] JX 136. Goldsmith, as President, signed on behalf of NASC and NASC Acquisition. Grunstein, as a manager, signed on behalf of SBEV. NASC was expected to be the owner of OldCo and SBEV was the placeholder for the equity provider and promoters. Grunstein Tr. 579-80.

by a "soft" equity commitment letter from Schron.[52] At trial, Grunstein testified that Schron was no longer interested in providing the equity, but tendered a "soft" commitment letter as an accommodation to him. Silva did not provide the equity commitment letter because he had not obtained a commitment from his investors.[53]

Following the execution of the merger agreement, Fillmore's counsel at Dechert LLP ("Dechert") sent a draft "pledge agreement" to attorneys at Troutman, who were representing SBEV, NASC, and Grunstein. The draft pledge agreement proposed that Fillmore would make a payment of $3.5 million to NASC in exchange for a 100 percent security interest in the stock or member interests of SBEV and NASC.[54] The draft agreement also stated:

> NASC and SBEV shall negotiate in good faith and execute and deliver[] prior to August 23, 2005 an agreement with Fillmore (satisfactory to Fillmore in its sole and absolute discretion) relating to the respective rights and obligations of Fillmore, NASC and SBEV with respect to the merger contemplated by the Merger Agreement.[55]

Two days later, Fillmore's counsel proposed another idea to Troutman. Instead of a pledge agreement, they suggested admitting Fillmore as a 50 percent member of SBEV and a 50 percent member of NASC. In that scenario, Fillmore would have "joint decision[-]making authority over all decisions until PSP's contributions were

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[52] JX 135.
[53] Grunstein Tr. 581-82.
[54] JX 169.
[55] *Id*.

made," and thereafter would have sole decision-making authority.[56] Neither of these drafts was ever accepted or executed, but it appears as if Grunstein and Silva continued to negotiate.

On August 21, Levinson summarized in an email the outcome of various discussions with Fillmore's counsel.[57] Among other things, the email contemplated the formation of SBEV Equity Holdings LLC, which was to be owned fifty-fifty by Fillmore and an entity controlled by Grunstein. In addition, it noted that Fillmore's 50 percent interest would be given in exchange for a capital contribution of $7 million.[58] Unlike Fillmore's previous proposals, there was no reference to its obtaining complete control over the transaction. On August 23, a Troutman attorney emailed Silva and his counsel a draft of a $7 million promissory note,[59] but this note was never signed.

In the meantime, on August 18, Formation Capital submitted an offer of $12.90 per share for Beverly, which was $0.10 per share more than what NASC/SBEV had offered and agreed to in the merger agreement.[60] Under the terms of the merger agreement, Beverly could accept the higher offer, but not

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[56] JX 182.
[57] JX 186.
[58] *Id*. The email also contemplated a loan document between SBEV Property Holdings LLC (the lender) and NASC (the borrower). The document would include certain covenants that would provide Fillmore control over what NASC did with the merger agreement. *Id*.
[59] JX 209.
[60] JX 176.

without returning the $7 million deposit and paying a $3.5 million breakup fee.[61] Grunstein and Dwyer testified that they discussed with Silva whether they should submit a counterbid.[62] Silva seemingly consented to a higher counterbid when he emailed Grunstein on August 21: "Len we have changed our bidding recommendation to PSP from $12.90 to $12.95 to suggest we are the clear favorite."[63] Thus, with Silva's tacit consent, Grunstein submitted a revised proposal of $13.00 per share,[64] which was accepted by Beverly, and memorialized in the form of a first amendment to the merger agreement on August 23 (the "First Amendment").[65]

The First Amendment required that NASC/SBEV provide a firm equity commitment letter and a $53 million deposit or letter of credit by September 22.[66] The failure to do so would forfeit the $7 million deposit. Notably, on August 23, Fillmore's counsel emailed Levinson to confirm that: "Fillmore is not able to commit to provide any equity funding for the Beverly transaction, as a result of which any decisions which your client makes to proceed would be at their own risk without any obligation on Fillmore's behalf."[67] Around this time, Grunstein also

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[61] JX 136; Dwyer Tr. 974; Grunstein Tr. 601.
[62] Grunstein Tr. 601-02; Dwyer Tr. 975.
[63] JX 189.
[64] JX 213.
[65] JX 216.
[66] *Id*. at LG 011706.
[67] JX 209.

sent emails to his contacts at Capital Source and Wachovia, as well as Lerner, indicating that he and Silva were "preparing a downside risk budget, just in case," and warned that, "until [PSP] . . . authorizes the investment, we are all proceeding on spec."[68] Interestingly, on the evening of August 23, Levinson wrote to two other Troutman attorneys: "Apparently – after all – Fillmore is now saying they can supply the entire $330 equity, 50 percent from PSP and 50 percent from the State of Washington employees retirement fund."[69]

D. *Fillmore's Presentations to PSP & WSIB*

During this time, Ribar had been preparing written presentations on the Beverly transaction for the purpose of soliciting Fillmore's two institutional investors. One presentation, sent on August 22 to Lerner, stated that the acquisition "would utilize the Mariner Model[,]" "FCP will team with the Mariner sponsorship team (Mr. Grunstein) to manage the Bev. Investment[,]" and the HUD financing would be completed by 2007.[70] On August 28 and 29, Ribar (and Silva) sent a copy of their Beverly presentation to representatives from PSP in which they

[68] JX 192, JX 195, JX 202.

[69] JX 206. Grunstein also sent an email to Brink Dickerson ("Dickerson"), a Troutman attorney, stating "I received a call from Ron Silva who reported that the Washington Pension System call went very well and that they're in. He is now working on completing the docs with them and the PPS of Montreal. He also hopes to bridge the LC with PPS or CSFB so that we have both the 60 mil deposit and firm equity commitment within the 30 day period as required." JX 207.

[70] JX 190. The Defendants claim that this draft was never circulated outside of Fillmore. DAB at 29 n.120. This claim seems unlikely as the "To:" line of JX 190 shows that the draft was sent to Lerner and its Bates stamp indicates that the document was produced by Credit Suisse.

recommended that PSP contribute $100 million of equity to Beverly.[71] The presentation also included several false statements, including that "Fillmore . . . has tendered a $7 million deposit through [NASC] and entered into a Merger Agreement to purchase and privatize Beverly Enterprises, Inc."[72] While Silva admitted to these false statements,[73] Ribar explained that these statements, drafted in the past tense, were in fact "forward looking statements as to what our best guess is going to occur if the transaction is going to close."[74]

Ribar's refusal to acknowledge these obviously false statements and his justification for making them are perhaps understandable given his allegiance to Silva, but they do nothing to enhance his credibility. Fillmore continued to make similar false statements to WSIB. These were not casual misstatements of fact; Silva paid careful attention to details. One can easily imagine Silva's embarrassment if it turned out that he was unable, after months of pitching Beverly to his investors, to include them in the deal. Thus, the false statements made to PSP and WSIB buttress the Court's finding that Silva had promised, by early August, to use his best efforts to obtain the equity for the Beverly transaction.

[71] JX 224, JX 226.
[72] JX 226 at 4.
[73] Silva Tr. 53.
[74] Ribar Tr. 1951-52.

As in the August 22 presentation, Fillmore's August 29 presentation explained that the transaction would be structured using the Mariner model and that "FCP will also employ the Mariner acquisition/asset management team to assist in the repositioning of BEV."[75] With respect to PSP's exit strategy, the presentation states that "FCP will engage Capital Funding Group . . . to complete the underwriting, application and completion of the HUD . . . refinancing of the owned assets . . . ."[76]

By late August, Silva had intensified his efforts to obtain an investment from WSIB. The Plaintiffs allege that Silva deliberately omitted any reference to Grunstein in his interactions with WSIB because he intended to "jettison" him all along, regardless of whether PSP or WSIB provided the equity.[77] Silva never mentioned Grunstein's name to WSIB in any oral or written presentation.[78] He also refused to allow Grunstein or Dwyer to participate in a conference call with

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[75] JX 226 at 5, 7, 18.

[76] *Id*. at 6. On September 11, Silva sent to Ribar a PSP Investment Proposal (JX 242) prepared by PSP representatives. This proposal was based on information and documents that Silva had provided PSP. Silva Tr. 56. The proposal also includes numerous inaccuracies. Among other things, the proposal states that the "opportunity is controlled by FCP who has tendered a US$7M deposit . . . and entered into a Merger Agreement to purchase . . . Beverly Enterprises, Inc. . . . ." JX 242. The proposal also states that "FCP has worked closely with Mr. Grunstein and his team to improve investment results of Mariner." *Id*. However, FCP's participation in the Mariner deal involved the purchase of mezzanine debt; it had not participated in the management of Mariner in any way. Silva Tr. 13, 78. The proposal also highlights the use of the Mariner model and the planned engagement of CFG, lists Grunstein as a partner along with FCP and WSIB, and credits him with being the "architect of the Mariner" acquisition. JX 242.

[77] Pls.' Opening Post-Trial Br. ("POB") at 27.

[78] Silva Tr. 70.

Barry Blake, a Lehman banker working for Beverly, and representatives of WSIB.[79] Interestingly, the August 22 presentation to Lerner includes a reference to Grunstein,[80] but his name is strangely omitted from an otherwise identical slide of the September 6 presentation that was sent to WSIB.[81] This curious omission raises a strong inference that Silva and Ribar were deliberately concealing Grunstein's participation in the deal from WSIB.[82]

E. *The Second Amendment*

Both Grunstein and Dwyer testified that Silva, on behalf of FCP, had agreed to provide a commitment letter and a $53 million deposit or letter of credit by September 22. Although Silva admitted that he knew that these items had to be produced by that date, he denied that he ever agreed to do so.[83] Nonetheless, Fillmore's August 22 presentation stated: "[c]ounter-bid would require FCP Equity

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[79] *Id.* at 462; Dwyer Tr. 987; JX 1052. In fact, when Dwyer dialed in to the call, Silva immediately told him "You're not supposed to be on this phone call. You need to get off the phone." It appears that Lehman, on behalf of Beverly, was concerned about whether WSIB was a reliable equity source.

[80] JX 190 at 6.

[81] JX 235 at 7. The presentation does refer to the Mariner sponsorship team.

[82] Silva testified in his deposition that: "Mr. Grunstein and the Mariner folks were developing a reputation that was troublesome for the long-term care sector and would not have been additive to the transaction." Silva Dep. (Mar. 18, 2008) at 300. This occurred sometime between the Second and Third Amendment. *Id*. at 301. While this may explain why Silva did not mention Grunstein's name thereafter, Silva did not offer any reason why he did not mention Grunstein's name before the Second Amendment. *Id*. at 302.

[83] Silva Tr. 96-97.

Commitment Letter for transaction . . . ."[84] Its September 6 presentation to WSIB also stated: "[o]n September 22, 2005 NASC ("FCP Partnership") is required to provide a good faith deposit of $53 million to BEV."[85]

As the deadline approached, it became apparent that Fillmore was unable to deliver the commitment letter, letter of credit, or the $53 million deposit. Although Silva continued to express confidence that the equity would be forthcoming from WSIB, he needed additional time to get formal approval from WSIB's board. As a result, NASC/SBEV was forced to renegotiate the terms of the merger agreement with Beverly (the "Second Amendment"). Both Grunstein and Silva were involved in those negotiations with Floyd and Blake.[86] Grunstein managed to negotiate a conditional equity commitment, which Fillmore provided.[87] However, Blake, on behalf of Beverly, insisted that he speak directly with WSIB to ensure that the equity commitment would be approved in November, as Silva had claimed.[88] Moreover, despite Silva's protestations, Beverly required that the

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[84] JX 190; JX 199 at 3.
[85] JX 235 at 4.
[86] In an email to Blake, Silva wrote: "Barry, I will send you a draft of our equity ltr tonight. However, I am unwilling to spend another $100k to produce an LOC with the contingencies set out in the proposed second amendment. I told you that if we had to raise the BIF deposit amount we would stop working on this transaction. We have spent millions getting to this point working diligently with all best efforts to complete this transaction in a timely manner." JX 262.
[87] JX 267 (the commitment letter was conditioned upon FCP obtaining the approval from "an investment source which has been identified by [FCP] to the Company"); Grunstein Tr. 611-12.
[88] Dwyer Tr. 987-88; Grunstein Tr. 611-13.

initial, $7 million deposit be increased by $3 million and that the subsequent deposit be increased to $50 million.[89] The Second Amendment also mandated that the acquirers obtain WSIB's approval by November 18 or else the $10 million initial deposit would be forfeited.[90] Dwyer again funded the $3 million increase in the deposit, but this time Grunstein, Lerner, Dwyer, and Silva agreed to be responsible for half of it and half of some other expenses that had been incurred.[91]

Around September 26, opposition to the NASC/SBEV acquisition of Beverly emerged in Arkansas. Grunstein testified that at Silva's request he worked to diffuse the opposition. Among other things, he hired various lobbyists, met with Arkansas senators and state legislators, and worked with Beverly's public relations personnel.[92]

Following the execution of the Second Amendment, a document entitled the "Contribution Agreement" was circulated among Silva, Grunstein, Dwyer, and Lerner.[93] The proposed Contribution Agreement acknowledged that expenses had been incurred by CFG, SBEV, Credit Suisse, and FCP and detailed how those

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[89] Grunstein Tr. 616; JX 267.
[90] Silva Tr. 113.
[91] Grunstein Tr. 616; Silva Tr. 113.
[92] Grunstein Tr. 621-23. Silva did not dispute any of this testimony at trial. Silva Tr. 462-64.
[93] The Court has described this document as providing "for the payment and division of money before completion of the Beverly Acquisition, the division of money should the Beverly transaction fail to be completed, and the guarantee of payment of certain fees for services upon the completion of the acquisition." *Grunstein v. Silva*, 2009 WL 4698541, at *8 n.53 (Del. Ch. Dec. 8, 2009) ("*Grunstein I*").

costs would be allocated if the merger agreement was terminated.[94] The document noted that CFG "had been retained to provide a HUD insured permanent mortgage refinancing of the CMBS financing."[95] It also provided a right to receive 10 percent of the promote "to be earned by Fillmore" and the "principals of MetCap Holding" for the person or persons who furnished the deposit or letter of credit required in the Second Amendment.[96] A revised draft included a statement that CFG would "earn its reasonable and customary fees" for the HUD financing.[97] The draft also included this statement: "Capital Funding may earn advisory fees at the closing under the Merger Agreement, on terms and conditions to be agreed upon by the parties."[98] One draft copy included handwritten annotations by Dwyer. Next to the paragraph referencing the retention of Capital Funding to provide HUD refinancing, Dwyer wrote: "Do contract."[99] Importantly, the Contribution Agreement was never executed.

Also in late September, CFG's attorney, Jack Fenigstein ("Fenigstein"), sought to obtain written documentation of the parties' agreement for the repayment of the deposit made by CFG and the sharing of certain expenses. On behalf of CFG, Fenigstein prepared promissory notes and an undertaking and sent copies to

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[94] JX 309.
[95] *Id*.
[96] *Id*.
[97] JX 319.
[98] JX 266.
[99] *Id*.

Grunstein's and FCP's counsel.[100] After the parties agreed that the amounts were correct, both CFG and FCP (or their counsel) attempted to confirm that all signature pages were signed. By this time, however, Grunstein had left the office for the weekend, and therefore, did not sign his copy.[101] Nonetheless, that same day or shortly thereafter, Fillmore wired CFG more than $2 million in partial repayment of the deposit loan. Although Silva claimed at trial that he believed that all of the signature pages had been obtained before he wired the money, Silva tendered the payment without having fully confirmed whether the parties had signed the documents.[102] Indeed, Grunstein apparently never signed the note and no signature page for Silva or Grunstein was ever produced in this litigation.[103] On October 3, Silva made an additional wire payment to CFG of $35,320 again without having confirmed that the signature pages were fully executed. The Plaintiffs contend that this evidence shows that Silva was acting pursuant to an oral partnership agreement.[104]

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[100] JX 330.

[101] JX 349; JX 354; JX 359; JX 362.

[102] Silva Tr. 63-66.

[103] An email from Levinson on October 2 indicates that Grunstein would sign the signature pages. JX 362.

[104] Silva testified that he was responsible for 25 percent of the $10 million deposit when it was made on September 22. Silva Tr. 113.

On October 9, 2005, Dwyer sent an email to Lerner, Silva, and Grunstein in order to reconcile the expenses being shared among the parties.[105] The email lists the contributions of each party, and the outstanding balance due to Dwyer. Thereafter, Dwyer writes:

> If the deal goes in the toilet we s[h]ould all be responsible equally? Now we just have to change the current document to reflect this if everyone agrees. Can everyone be available for a conference call at 2:30 east coast on Monday to go over this and where everyone fits financially if the deal doesn't go in the toilet???[106]

Dwyer testified at trial that his statement "we should all be responsible equally" was meant to convey the uncertainty with respect to the expenses.[107] Lerner's response appeared to be positive,[108] and Silva wrote back that there might be additional expenses at a later time that Fillmore would need to fund.[109]

On October 13, Dwyer sent a letter agreement to SBEV (addressed to Silva and Grunstein) regarding mortgage loans on the Beverly properties (the "CFG commitment letter"). The letter specifies that, in "consideration for Capital Funding loaning sums . . . to fund the Initial BIF Deposit," CFG would be repaid the entire $10 million deposit, as well as a "pre-paid fee" defined as the amount

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[105] JX 370.
[106] *Id.*
[107] Dwyer Tr. 1011.
[108] JX 371.
[109] JX 915.

equal to the principal balance of the loan.[110] The contract also called for a service charge and placement fee of 2.5 percent of each insured loan amount. The letter also stated that: "This Commitment shall become effective only upon receipt by Capital Funding on or before October 20, 2005, of a copy of this letter with your acceptance evidenced thereon."[111] Dwyer signed the proposed CFG commitment letter, but no one else did. At trial, Grunstein testified that this letter was a deliverable—not a proposal—that was required to obtain the CMBS loan.[112] Dwyer contends that the alleged partners agreed that CFG would refinance the CMBS loan with HUD financing on the terms set forth in the CFG commitment letter.

Meanwhile, Silva worked to confirm WSIB's commitment to provide the equity and also conducted due diligence on the Mariner model as it applied to the Beverly transaction. With respect to the former, FCP emailed WSIB two presentations, dated November 4 and November 17, regarding the Beverly acquisition.[113] Although these presentations did not refer to Grunstein and stated falsely that Fillmore had tendered the $10 million deposit, they continued to refer

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[110] JX 378. The agreement refers to the "principal balance of the Loan," although "Loan" does not appear to be defined there. The agreement likely was referring to the Deposit Loan. Plaintiffs appear to adopt this view as they say the pre-paid fee should have been $10 million. POB 78-79.
[111] *Id.*
[112] Grunstein Tr. 709, 781.
[113] JX 404; JX 427.

to the Mariner structure and the plan to engage HUD advisors to do the HUD refinancing. However, sometime in November or December, Silva started to have concerns about using the Mariner model for Beverly. Silva was worried that the sale of some of Beverly's ancillary businesses, as then planned, could violate federal anti-kickback statutes.[114] Silva also became concerned that the sale of real estate from old Beverly to PropCo would result in significant tax liabilities.[115]

Sometime before the third amendment to the merger agreement, Grunstein suggested that the names of the acquiring entities be changed to "break their identification with the Mariner transaction,"[116] which had been subjected to some negative publicity in the context of the proposed acquisition of Beverly. Silva agreed and Dechert formed three new entities, Pearl, PSC Sub, and Geary, to replace the original acquiring entities. With respect to this change, Silva testified that it "did not have anything to do with eliminating Mr. Grunstein from the transaction."[117]

F. *Third Amendment*

On November 17, 2005, WSIB formally approved the investment in Beverly. Silva's entity, Fillmore Strategic Management, LLC ("FSM") and WSIB

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[114] Silva Tr. 283-84.
[115] *Id.* at 377.
[116] Grunstein Tr. 624. Silva testified that someone from his side suggested the change in entities. Silva Tr. 146-47.
[117] Silva Tr. 148. Grunstein also testified that the change in entities did not result in any change in Grunstein's economic interest in the transaction.

entered into an operating agreement for a limited liability company known as FSI.[118] At the same time, an effort was made to renegotiate the purchase price with Beverly. At trial, both Silva and Grunstein claimed credit for negotiating a $0.50 per share reduction in the purchase price.[119] Grunstein explained that the reduction was obtained because Beverly had depleted its cash (and liability) reserves by overpaying settlements, which arguably constituted a material adverse change.[120] The reduced purchase price of $12.50 per share was memorialized on November 21, 2005, by the third amendment to the merger agreement (the "Third Amendment"), which transferred legal control of the transaction from NASC/SBEV to Pearl/Geary—entities set up by Silva. Through FSI, WSIB eventually contributed $350 million in equity to the transaction in exchange for a 99 percent interest in the Beverly successor entities, and Fillmore/FSM committed $3.5 million in equity and received a 1 percent interest.[121] Under FSI's operating agreement, FSM is the managing member and is entitled to receive a yearly management fee, plus a promote or carried interest equal to a percentage of

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[118] JX 421; JX 435; JX 438. The approval satisfied the condition contained in the equity commitment letter submitted with the Second Amendment. On November 18, Silva delivered to Beverly a new equity commitment letter on behalf of FSI.

[119] Grunstein Tr. 625; Silva Tr. 517-18.

[120] Grunstein Tr. 624.

[121] Post-merger, the ownership of Beverly is as follows: FSI owns Drumm, Drumm owns Pearl, and Pearl owns Beverly. JX 900 at Ex. 1.

whatever is left after repayment of all the equity and a 9 percent internal rate of return.[122]

Around this time Silva and Grunstein agreed to change Grunstein's direct interest in the transaction to an indirect one, as a result of an incorrect press release. According to Grunstein, Silva had told the "Beverly people" that Grunstein "would have no role or ownership in the Fillmore management entities," and that information was reported to the press.[123] Rather than correct the record, Silva and Grunstein agreed to replace Grunstein's direct interest with an indirect interest.[124] Grunstein's testimony reflects his apparent acceptance that he would have no role in the Fillmore management entities. At trial, Grunstein testified that Silva told him that WSIB insisted that Grunstein could not be involved in the

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[122] JX 438.

[123] Grunstein Tr. 640-41.

[124] *Id.*; Silva Tr. 154. After the Third Amendment, Fillmore and its related entities retained Troutman because of its involvement in the Beverly transaction. Troutman's proposed engagement letter referred to "some partners of Troutman . . . [that] will have a participatory interest in certain income which Fillmore may derive from the transaction." JX 491. However, FSI did not sign the draft or drafts containing that language. At trial, Silva testified that he did not sign the engagement letter because of the reference to Grunstein's participatory interest. Silva Tr. 371-74. However, in emails to other Troutman attorneys, Dickerson wrote that Silva's primary complaint was paying for Grunstein's legal time given his 50 percent stake in the carried interest. JX 558; JX 562. Ultimately, Troutman was paid millions of dollars in legal fees by FSI, including some fees for work performed by Grunstein. *See* JX 533-34; JX 584; JX 590-91.

management of Beverly.[125] Grunstein again appears to have acquiesced to this term.[126]

G. *The Closing*

On December 16, 2005, Grunstein emailed Silva a list of tasks that needed to be completed before closing. Among other things, Grunstein noted that Silva needed to "[f]inaliz[e] the Capital Funding (Jack Dwyer) arrangement in connection with (a) obtaining HUD-insured financing, and (b) reimbursement of advances."[127] Later in the email, Grunstein writes: "We should also reach out to [Lerner] and [Dwyer] to confirm agreements with them." In addition, Grunstein suggested that "we should also sign up a letter agreement between us, replacing the direct equity interest with the indirect equal share in your interest that we discussed on the phone to solve the press release issue."[128]

By late December, Silva's and Grunstein's relationship may have become strained because of Silva's unilateral decision to abandon the Mariner model. Silva made the decision to alter the structure of the transaction purportedly because of tax reasons.[129] Although Grunstein argued that it was a "mistake," and that the

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[125] Grunstein Tr. 645-46.
[126] *See id*.
[127] JX 520. Notably, Grunstein testified that "[f]inalize mean[t] there's something that wasn't agreed to." Grunstein Tr. 728-29.
[128] JX 520.
[129] Silva Tr. 377-78. Grunstein testified that the structure had to be changed because Silva told him that WSIB "insisted that they own everything." Grunstein Tr. 645.

transaction was not "going to make as much money," Grunstein testified he was "not going to stand in the way."[130] The Defendants claim that Grunstein, around the time of the closing, withdrew because he thought the Beverly transaction would lose money.[131]

Silva also testified that Grunstein, by January, was paying less attention to the transaction.[132] However, the evidence in the record does not fully support that assertion. Communications between Grunstein and Silva during the latter half of December and in January reveal that Grunstein was working actively on the transaction.[133] Indeed, just before the closing of the transaction, Silva sought Grunstein's help in resolving an emergency caused by the change in the transaction's structure. Not only did Grunstein get involved, but he offered a solution to the problem which was ultimately utilized.[134]

Following the Third Amendment, FSI made arrangements to repay CFG for its deposit, which it did on December 22.[135] Dwyer signed a letter agreement—dated December 21, 2005—that contained a release relating to his payment of the

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[130] Grunstein Tr. 645, 665.
[131] DAB at 46.
[132] Silva Tr. 379.
[133] *See* JX 561 (December 29) (Silva: "I am interested in [y]our counsel . . . ."); JX 571 (Grunstein sent a lengthy email to Silva on January 5 to help him prepare for a meeting); JX 578.
[134] Grunstein Tr. 660-63.
[135] JX 527; JX 552.

$10 million deposit (the "Release").[136] The Release is expansively phrased and contemplates a release of all claims concerning the $10 million advanced by CFG. Meanwhile, CFG continued to underwrite the Beverly properties through closing. The Defendants contend that Dwyer's underwriting was performed at the request of Credit Suisse. Although the Plaintiffs concede that Credit Suisse requested the information, Dwyer insists that the work was also done because Silva requested it.[137] The record contains certain emails (dated March 2006) in which CFG sent to Fillmore the HUD release prices.[138] In one email, Ribar specifically requests "what is our timing looking like on the HUD release prices?"[139] After several months of work, CFG completed the underwriting of the 275 skilled nursing facilities owned by Beverly.[140] The results showed what the maximum HUD loans could be for each nursing facility and were provided to Ribar and Lerner's associate on March 8 and 9. Ribar acknowledged that the estimated HUD loan amounts and monthly mortgage payments were necessary to secure the CMBS financing.[141]

Eight days before the closing, which occurred on March 14, 2006, Grunstein wrote a letter to Silva, in which he expressed frustration over Silva's having not

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[136] JX 538.
[137] JX 620; JX 621; JX 624; POB at 41.
[138] JX 627; JX 629.
[139] JX 621; JX 624.
[140] *See* POB at 41.
[141] Ribar Tr. 2115-16.

paid Wachovia, Capital Source, and MetCap.[142] At the time, Grunstein was feeling as if he was "being squeezed out."[143] Grunstein testified that the following Saturday night, just before closing, they had a telephone conversation in which Silva assured him that his economic interest was protected and that the "papers are being done."[144] However, when the closing occurred, Grunstein received nothing.

Silva offers two reasons for why Grunstein did not receive an economic interest in the transaction. One is that Grunstein withdrew from the transaction. However, Silva testified at his deposition that he discussed Grunstein's economic interest through the closing of the transaction.[145] Moreover, in a March 6 email, Grunstein wrote:

> Ron, you correctly said that my interest was worth hundreds of millions of dollars. I am willing to go forward and work with you to make the deal the success that you and I had envisioned. However, as you promised, I expect to be a full participant in all decisions.[146]

Additionally, Grunstein had already been repaid the $1.5 million he advanced to pay Troutman's expenses and retaining his interest would not have cost him anything.[147] The second reason proffered by Silva as to why Grunstein was not entitled to 50 percent of the carried interest is that he failed to provide certain

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[142] JX 613.
[143] Grunstein Tr. 656.
[144] *Id*. at 664.
[145] Silva Tr. 449-50.
[146] JX 613.
[147] Silva Tr. 66-67.

deliverables after the transaction had closed. That assertion is discussed in more detail below.

H. *Post-Closing Events*

On May 1, 2006, Silva emailed Dwyer to inform him that Fillmore was "starting to do our research on HUD financing alternatives" and to suggest that the next time he was in California, "let's schedule some time to discuss."[148] Already in California, Dwyer responded the next day that he "was happy to come to your office tomorrow to discuss resolving our differences."[149] Silva replied: "[w]e are considering all financing and specifically HUD for a portion of the portfolio."[150] On May 3, Silva and Dwyer met and discussed HUD financing. No agreement was reached during that meeting. However, because of Dwyer's complaints about not being compensated for his underwriting work in relation to the Beverly deal, Silva asked that Dwyer send him an invoice for his expenses.[151]

On May 17, Dwyer sent a proposed letter agreement to Silva. The letter described the "original obligation"—a $3.5 million payment upon closing of the Beverly acquisition and the right to provide HUD financing at market interest rates. In satisfaction of that obligation, the letter proposed, among other things, that Fillmore sell to CFG certain trust deed notes at a discount rate, reimburse CFG

[148] JX 660.
[149] *Id.*
[150] *Id.*
[151] Silva Tr. 388.

for "services previously rendered in developing a potential HUD exit or refinancing strategy for the Beverly Portfolio[,]" and give CFG the right "to provide or arrange any HUD Financing which is used for the Beverly Portfolio."[152] The letter values CFG's services rendered in developing a potential HUD exit for the Beverly portfolio at $695,000.

In response, Silva "strongly suggest[ed] that [Dwyer] . . . rescind this email immediately."[153] Although the Defendants decided not to pursue HUD financing immediately after the acquisition, they eventually retained Credit Suisse's Column Guaranteed LLC to do the HUD financing.[154] That effort, however, failed because Silva refused to agree to onerous requirements imposed by HUD. Consequently, Silva was forced to obtain a more expensive bank loan to refinance the CMBS debt.

Since the closing, Beverly's value has increased substantially. As of December 31, 2011, FSI valued the Beverly investment at $1.084 billion, up from an estimated value of approximately $744 million at the beginning of 2007.[155]

I. *Post-Trial Developments*

A variety of claims and actions have been asserted among the various parties discussed above, in this forum and in others. Two developments from concurrent

[152] JX 664.
[153] JX 666.
[154] JX 766.
[155] JX 825.

litigation are pertinent to this opinion and have become part of the record pursuant to this Court granting Defendants' motion to re-open the trial record.[156]

First, in Maryland, CFG filed suit against Credit Suisse (the "Maryland Litigation"). Among other claims, CFG asserted that Credit Suisse breached an oral contract not to compete with CFG on the HUD financing for Beverly in exchange for CFG's help in completing the CMBS financing.[157] CFG obtained a judgment against Credit Suisse for breach of contract.[158] Defendants argue that that judgment precludes any recovery by Dwyer under a theory of unjust enrichment, because the services were therefore provided by CFG to Credit Suisse pursuant to a legal contract. Defendants therefore have not unjustly retained the benefit of these services because they paid Credit Suisse for the CMBS financing.

Second, in New York, Grunstein and Schron engaged in litigation concerning the Mariner transaction. On December 11, 2013, Grunstein signed a plea agreement in which he pled guilty to third degree perjury based upon his trial

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[156] *See* Tr. of Telephonic Oral Arg. on Defs.' Mot. to Re-Open and Supplement the Trial R., C.A. No. 3932-VCN (Del. Ch. Dec. 20, 2013).

[157] CFG also asserted an unjust enrichment claim to recover for the work it performed in the Beverly transaction and obtained a judgment on that claim as well. However, the Maryland court subsequently vacated that unjust enrichment judgment. *See* Pls.' Letter Regarding the Ct.'s Decision to Grant the Mot. to Re-Open and Suppl. the R., C.A. No. 3932-VCN (Del. Ch. Feb. 12, 2014), Ex. A. CFG filed a motion for a new trial in that litigation which was later denied. Attach. to Defs.' Letter Respecting CFG's Mot. for a New Trial in the Maryland Action, C.A. No. 3932-VCN (Del. Ch. Mar. 14, 2014).

[158] CFG also obtained a judgment for breach of contract against Column Financial, Inc. and Column Guaranteed, LLC. *See* Transmittal Certificate of Bruce E. Jameson in Supp. of Defs.' Mem. in Supp. of Their Mot. to Re-Open and Supplement the Trial R., Ex. 8 at 16-18.

testimony from that litigation.[159] Grunstein admitted that he "intentionally made a false statement that [he] did not believe to be true" during a deposition when he testified about having a conversation which never occurred.[160] According to the Plea Agreement, his testimony concerned a relevant fact in that litigation. Grunstein also agreed to not re-apply for admission to the New York State Bar.[161]

Grunstein's perjury conviction warrants discussion before further analysis because it affects the assessment of his testimony. Although Grunstein erred and lied under oath in another proceeding, not all of his testimony must automatically be discredited here. However, the conviction reinforces the Court's initial reaction to the testimony in this proceeding which prompted it to rely on documentary and third party evidence wherever possible instead of the testimony of the three self-interested parties. It also merits mention that Grunstein's perjury does not somehow transform his opponent's (or his co-plaintiff's) testimony into fact or prevent the Court from determining that their testimony was self-serving and lacked credibility as well.

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[159] Defs.' Letter Respecting Pl. Grunstein's Plea Agreement in Connection with Testimony in 2012 Trial in *Schron v. Grunstein*, C.A. No. 3932-VCN (Del. Ch. Dec. 13, 2013), Ex. A ("Plea Agreement"). Though Grunstein has not signed the copy attached, his counsel confirmed that the copy is identical to the signed version.

[160] Plea Agreement at 2.

[161] *Id.*

Thus, the analysis that follows is not so different from any credibility assessment following a trial. The Court proceeds with appropriate caution in the face of exceedingly divergent factual recitations, although also with the knowledge that one party has admitted he has lied under oath in the past.

III. ANALYSIS

The Plaintiffs have the burden to prove their claims by a preponderance of the evidence, except that they bear a higher burden for certain of their equitable claims as will be discussed. "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[162]

A. *The Oral Partnership Claim*

The Plaintiffs assert that an oral partnership was formed among Grunstein, Dwyer, Lerner, and Silva to acquire Beverly. The alleged terms of the partnership were as follows. Silva's role was to obtain the equity. As the architect, Grunstein was to structure the deal, secure financing, and negotiate with Beverly. Lerner was to provide the CMBS financing. Dwyer was responsible for both providing an assurance that HUD financing was feasible and completing the HUD refinancing once the Beverly transaction closed. All four would share expenses equally in the

[162] *Delaware Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002) (internal quotation marks omitted).

amount of $14 million.[163] Decisions relating to the merger process were to be made jointly. Silva and Grunstein were 50/50 partners in the promote, carried interest, or whatever benefit was derived from the deal. Dwyer/CFG and Credit Suisse had the option either to obtain fees from the HUD or CMBS financings or to remain equal partners. The breakup fees would be shared equally. If the Beverly deal was successful, all expenses would be reimbursed by the equity providers and Grunstein and Silva would manage Beverly together.[164] Finally, the Mariner model would be followed, which would vest control over the operating business (OpCo) between Grunstein and Silva.

Under the Delaware Revised Uniform Partnership Act, "the association of [two] or more persons . . . to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership."[165] Although "there is no singularly dispositive consideration that determines whether or not a partnership existed between two parties[,]" the hallmark of a partnership is the "common obligation to share losses as well as profits."[166] The "creation of a partnership is a question of intent[,]" that is, whether the purported partners

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[163] The amount of $14 million was based on the $10 million initial deposit plus additional fees. Silva Tr. 59-62.
[164] POB at 13-18.
[165] 6 *Del. C.* §15-202(a).
[166] *Ramone v. Lang*, 2006 WL 905347, at *12 (Del. Ch. Apr. 3, 2006).

intended to share losses and profits, control, and ownership.[167] Relevant considerations include the parties' actions, prior dealings, and admissions.[168] Where, as here, the suit is "between the parties as partners, stricter proof is required of the existence of a partnership than where the action is by a third person."[169]

As with any contract, an "intention or desire to form a general partnership cannot bring the legal relationship into being . . . [where] [t]he parties were never able to reach a final accord on the essential elements" of a binding contract.[170] The test for determining whether all material terms have been agreed upon is: "[w]hether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms *that the parties themselves regarded as essential* and thus that the agreement concluded the negotiations . . . ."[171] Consistent with this objective test, the parties' "overt manifestations of assent,

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[167] *Grunstein v. Silva*, 2011 WL 378782, at *9 (Del. Ch. Jan. 31, 2011) ("*Grunstein II*") (quoting *Hynansky v. Vietri*, 2003 WL 21976031, at *5 (Del. Ch. Aug. 7, 2003)).
[168] *Id.*
[169] *Id*. (quoting *Ramone*, 2006 WL 905347, at *12).
[170] *Cochran v. Nagle*, 1995 WL 819054, at *2 (Del. Ch. Feb. 27, 1996).
[171] *Pharmathene, Inc. v. SIGA Techs., Inc.*, 2010 WL 4813553, at *8 (Del. Ch. Nov. 23, 2010) (italics and alteration in original) (quoting *Loppert v. WindsorTech, Inc*., 865 A.2d 1282, 1285 (Del. Ch. 2004), *aff'd*, 867 A.2d 903 (Del. 2005)).

rather than their subjective desires, control" when assessing whether they intended to be bound.[172]

For better or worse, Delaware's oral partnership law does not differentiate among the dollar amount involved, the number of terms, or the complexity of the agreement. Thus, an oral partnership agreement could be formed even if the partnership were worth billions of dollars and had dozens of material and complex terms. But as a practical matter, this type of oral agreement is unlikely for obvious reasons. Indeed, a reasonable negotiator could rationally assume that a complex partnership agreement involving an acquisition worth more than a billion dollars would necessarily have to be reduced to writing for all of the essential terms to be fully agreed upon.

Of course, that does not mean that an oral partnership could not be formed, especially where the essential terms are capable of being reduced to a few simple terms or to an objective controlling standard. Here, Plaintiffs assert, the alleged partnership was formed for a simple purpose: to acquire Beverly.[173] Although the deal was for over a billion dollars, the alleged partners were collectively risking only $14 million, or $3.5 million each. Yet, given the complexities of the alleged

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[172] *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *4 (Del. Ch. Feb. 3, 2009).

[173] *See Hannigan v. Italo Petroleum Corp. of Am.*, 77 A.2d 209, 216 (Del. 1949) (noting that a partnership may be formed for a single transaction or purpose).

partnership, it comes as no surprise that they intended to document certain aspects of their relationship.[174]

As a preliminary consideration, the Defendants contend that the parties' intention to document their relationship in a written agreement around the closing of the merger precludes the formation of a binding (oral) contract.[175] The Defendants rely upon an established principle of law:

> [I]f either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a binding contract.[176]

The Plaintiffs assert that no evidence exists requiring a signed writing to document the partnership agreement. Instead, they expected that the terms of the partnership would be *implemented* around the closing of the merger as had been done in the Mariner transaction. They cite the Restatement (Second) of Contracts for the proposition that: "[m]anifestations of assent that are in themselves sufficient to

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[174] The record shows that Grunstein and Dwyer anticipated that certain aspects of the oral partnership agreement would be reduced to writing. Grunstein testified that he expected the oral partnership agreement to be implemented at closing. Grunstein Tr. 598-99. Dwyer wanted to document the $10 million loan deposit. Dwyer Tr. 1572-73. Silva similarly expected that the parties' relationship would be documented in an executed contract. Silva Tr. 62-63; *see also* JX 169. The pledge agreement contemplated that the parties would "reach an executed definitive agreement relating to their respective rights and obligations in the merger." JX 169.

[175] DAB at 64-65.

[176] *Greetham v. Sogima L-A Manager, LLC*, 2008 WL 4767722, at *16 (Del. Ch. Nov. 3, 2008) (quoting *Intellisource Gp., Inc. v. Williams*, 1999 WL 615114, at *5 (D. Del. Aug. 11, 1999)); *see also* Restatement (Second) of Contracts § 27 cmt. (b) (1981).

conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof."[177] Thus, even if the alleged partners intended eventually to document their agreement or some portion of it, that intention does not necessarily preclude the formation of a partnership absent an explicit statement that conditions an agreement on a written document.[178]

Here, the evidence does not indicate that Silva or his counsel made an unequivocal statement that a written executed contract was a condition precedent to an agreement. They perhaps came close to making such a statement, but they never did. The draft pledge agreement provided that NASC and SBEV would "negotiate in good faith and execute . . . an agreement with Fillmore . . . relating to the respective rights and obligations of Fillmore, NASC and SBEV with respect to the merger."[179] At most, this statement showed Silva's desire to execute a written

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[177] Restatement (Second) of Contracts § 27 (1981); *see also id.* § 28 cmt. c ("Among the circumstances which may be helpful in determining whether a contract has been concluded are the following: the extent to which agreement has been reduced on all the terms to be included, whether the contract is of a type usually put in writing, whether it needs a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether a standard form of contract is widely used in similar transactions, and whether either party takes any action in preparation for performance during the negotiations.").

[178] *See Transamerican S.S. Corp. v. Murphy*, 1989 WL 12181, at *1 (Del. Ch. Feb. 14, 1989) ("Where one of the contracting parties states that he will not be bound until an event-such as the signing of a memorandum that might not otherwise be required-occurs, he will not be bound before that condition is satisfied, even though an agreement on all of the material terms of the contract have been reached.").

[179] JX 169.

agreement. Dechert's "proceed at your own risk" email also does not condition an agreement on a written instrument and it was made only in the context of the $7 million deposit.

Thereafter, no similar statement was made. Because the evidence does not reveal any explicit statement conditioning an agreement on a written executed agreement, the question turns to whether Grunstein or Dwyer knew that Silva regarded the parties' "understandings" as incomplete and intended that no obligation would exist unless other terms were agreed upon or the contract had been reduced to writing. That inquiry necessarily requires an examination of what terms the parties considered essential and whether Dwyer and Grunstein knew that Silva intended for their agreement to be reduced to writing before it became effective.[180]

Grunstein and Dwyer generally testified that the partnership was formed around the first half of August 2005. However, the testimony of both Dwyer and Grunstein explaining when the partnership was formed varied between their accounts and was inconsistent at times with their deposition testimony. Moreover, Plaintiffs do not clearly identify the moment of formation of the alleged partnership. There was no meeting during which the four alleged partners came to

[180] As will be discussed briefly below, Lerner, who is not a party to this action, does not claim to be a partner, and therefore, the Court does not examine his participation in the Beverly acquisition in much detail.

a resolution on all material terms and then declared that they had formed a partnership.

Within the context of Delaware partnership law, there is substantial evidence showing that the parties had not agreed upon all the essential terms of the alleged partnership in August. If a partnership had been formed, why did the parties make several unsuccessful attempts to modify the original agreement? Why did Troutman propose inconsistent terms concerning control and funding of the initial deposit? Why did Fillmore's counsel warn Grunstein that he was proceeding at his own risk? And why did Grunstein email Lerner to warn him that they were proceeding "on spec"? The Court's inability to answer these questions satisfactorily prevents it from finding that a legally enforceable partnership agreement was formed in August.

The weight of the evidence suggests that the foursome (or any smaller grouping) had not reached an agreement on a number of material terms as of August 2005. While Silva committed to use his best efforts to secure the equity, Grunstein's email to Lerner in which he wrote that "we are all proceeding on spec" suggests that the parties had not yet agreed to share expenses.[181] Moreover, upon the signing of the merger agreement, Grunstein provided Dwyer with an

[181] JX 192; JX 195; JX 202.

undertaking and promissory note payable to CFG in the amount of $3.5 million. Notably, this was half, not a quarter, of the $7 million deposit.

The assertion that the material terms were agreed to during this period also is undermined by the evidence demonstrating active negotiation. Various draft written proposals exchanged between Dechert and Troutman show that Silva and Grunstein continued to negotiate the terms of their relationship throughout August. These proposals were not in the form of a partnership and contained terms that varied from the alleged partnership.[182] Leading up to the First Amendment, Dechert proposed a written pledge agreement whereby Fillmore would obtain a 100 percent security interest in NASC and SBEV. On August 19, Dechert also proposed admitting Silva as a 50 percent owner of NASC and SBEV and then giving him sole decision-making authority once the equity commitment was made. Two days later, Troutman, on behalf of Grunstein, sent a proposed LLC operating agreement for SBEV which would have admitted Fillmore as a 50 percent member.

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[182] The Defendants point out that the proposals were not in the form of a partnership. In *Cochran*, the plaintiff asserted the formation of a partnership to operate a health club even though the business eventually formed was structured as a corporation. The Court ruled that the "closing documents . . . put [the plaintiff] on notice the enterprise with which he claimed association would not operate as a partnership but as a corporation." *Cochran v. Nagle*, 1995 WL 819054, at *2 (Del. Ch. Feb. 27, 1996). The Defendants' similar contention that there was no partnership because the proposals were not structured as partnership is misplaced under the facts of this case. Unlike in *Cochran*, where the business was operating a health club, the business relationship here was primarily formed to acquire Beverly. Thus, any partnership terms could have been implemented at the closing depending on what was obtained from the equity source. However, although *Cochran* is not dispositive, Defendants' point that early proposals were not structured as a partnership is relevant and, at the least, does not support Plaintiffs in this analysis.

Importantly, the operating agreement called for a distribution of profits based on the capital invested, with entities affiliated with Silva and Grunstein each contributing $3.5 million.

From the perspective of a reasonable negotiator, this exchange of documents and proposals is indicative of a negotiation involving offers and counteroffers. Significantly, none of these documents was ever signed. Consistent with this evidence that Grunstein and Silva were unable to reach an agreement *inter se* by the First Amendment, Dechert warned Troutman that any actions Grunstein took with respect to tendering the $7 million deposit would be at his own risk. Thus, as of the First Amendment, the Court concludes that Silva and Grunstein had not agreed on the control and ownership of a venture to be carried on as co-owners of a business for profit.[183]

And, although Silva may not have unequivocally demanded that an agreement be reduced to a writing, the apparent desire of the litigants to formalize their relationship, at this juncture and with later unexecuted proposed documents, is relevant when considering whether a reasonable negotiator in this setting would think all of the terms that the parties themselves regarded as essential had been agreed upon. The parties circulated legal documents that sophisticated parties

[183] The alleged partnership agreement contemplated control and ownership of the partnership during the acquisition process and, depending on the equity provider, some control and ownership of Beverly.

would expect to memorialize their rights and obligations. A reasonable negotiator, all things being equal, would be less likely to conclude that a high-level oral agreement to share profits and losses, co-ownership, and control constituted all of the material terms to an agreement and had been assented to after these failed attempts to formalize more detailed agreements.

However, the events surrounding the Second Amendment present a slightly different picture in which the parties appear to have arrived at certain understandings. The record shows that the foursome had reached an agreement on the sharing of expenses. At trial, Silva testified that he agreed to be responsible for a quarter of approximately $11.9 million, which included certain fees that had been incurred and the $10 million deposit. His testimony is corroborated by documentary evidence.[184] The foursome also made efforts to document their agreement to share expenses in the form of promissory notes and an undertaking. On September 29, Fenigstein, Dwyer's counsel, sent a signed promissory note and undertaking to Troutman (for Grunstein) and Dechert (for Silva).

Although Silva's and Grunstein's executed signature pages to the promissory notes and undertaking were never located for this trial, the Court credits Silva's testimony that he believed that the notes would eventually become fully executed. In one contemporaneous email, Silva wrote to Fenigstein:

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[184] Dwyer and Grunstein also testified that the parties agreed to share expenses equally.

"I believe we have lost Len until Sunday. Let's make sure we finalize docs today so that they may be executed on Sunday."[185] In an email to Grunstein, Silva wrote: "This wire to SBEV/NASC will go out no later than Monday if we receive signature pages today."[186] Even without Grunstein's signature page, Silva transferred more than $2 million to CFG with knowledge that the undertaking and notes were not fully executed.

Plaintiffs argue that Silva's willingness to transfer this money is proof that these documents were only attempts to implement the foursome's already assented to oral partnership. However, his willingness to transfer the money also could be evidence that he agreed to participate in the funding of the deposit. His understanding may have been premised on the expectation that the parties would work together to execute the Beverly transaction, while the foursome continued to negotiate in good faith about their relative obligations to one another.

The Contribution Agreement circulated in late September was an unsuccessful attempt to document the parties' contributions and costs and further provide for the sharing of expenses. The Court agrees with Defendants that the provision giving 10 percent of Fillmore and MetCap's promote to the party who furnished the subsequent loan deposit or letter of credit is inconsistent with the terms of the alleged partnership. Thus, the Contribution Agreement supports their

[185] JX 354.
[186] JX 359.

position that material terms, such as the percentage of the promote, were still the subject of negotiation and that no partnership had been assented to at this point.

The agreement was not signed because Silva would not agree to the backup letter of credit provision.[187] The agreement contemplated that the foursome would individually be responsible for $3.5 million in expenses (for a total of $14 million) if the merger agreement was terminated.[188] This amount included additional expenses of roughly $2 million in addition to the $11.9 million that the parties had already agreed to share.

Notably, the Contribution Agreement stated that CFG had been retained to do the HUD financing for which it would "earn its reasonable and customary fees." Dwyer's annotation "do contract" on his draft of the Contribution Agreement suggests that he had not finalized the terms of the HUD financing with his alleged partners Silva and Grunstein.[189] A reasonable negotiator in Dwyer's position would not have assumed that the financing terms would have been agreed upon without the other party's having carefully considered and negotiated over the proposed terms. As with prior documents, the Contribution Agreement was never executed by any of the parties.

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[187] Dwyer Tr. 1003-04; Grunstein Tr. 620.
[188] Dwyer Tr. 998; JX 319.
[189] *See also* JX 613 (Grunstein email to Silva stating: "Neither have you signed up with Jack Dwyer at Capital Funding, as you promised.").

On October 9, Dwyer sent his "toilet" email. The email sets forth a summary of the contributions to date and what amounts had been paid. Dwyer's first question ("If the deal goes in the toilet we s[h]ould all be responsible equally?") might suggest that there was some uncertainty as to the sharing of expenses. Dwyer testified, however, that his question referred only to the uncertainty regarding the precise amount of expenses allocated to each partner. Dwyer's interpretation is supported by the evidence. By this time, both Fillmore and Credit Suisse had wired CFG over $2 million each. Moreover, the foursome had already agreed to share expenses up to $11.9 million. Both Lerner's and Silva's responses to Dwyer's email showed that they generally agreed with the numbers Dwyer posted.[190] Indeed, in his deposition, Silva testified that the foursome had all agreed to share expenses up to $14 million.[191]

Similarly, Dwyer's second question ("where [does] everyone fit[] financially if the deal doesn't go in the toilet???") might also suggest that there was still uncertainty as to how each of the alleged partners would benefit from the Beverly transaction. The evidence is not clear. In his deposition, Lerner testified concerning a phone conversation among the foursome around the time of the Second Amendment. According to Lerner, the parties agreed how each of them would be compensated for providing a quarter of the expenses. Lerner testified

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[190] *See* JX 915.
[191] Silva Dep. (Feb. 29, 2008) at 179.

that Dwyer would be compensated by either receiving money back for the loan deposit or by receiving the contract to do the HUD financing. Lerner would receive the CMBS financing and Grunstein and Silva "would be partners in the transaction going forward."[192] Dwyer's question may have been particularly

[192] Lerner Dep. (Oct. 15, 2007) at 38-40.

> A. I remember one conversation when we were all on the phone discussing posting the what I recollect to be $10 million deposit for one of the amendments. I can't remember which one. Where we discussed that each of the four parties on the phone would be responsible for one-quarter of that and discussed how we would be compensated for providing that money.
>
> Q. And what was your understanding as to the compensation?
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> A. My understanding was that Mr. Dwyer would be compensated, as I described prior, by receiving some money back or by receiving the contract to bring the properties to the Department of Housing and Urban Development for refinancing, that our firm would be allowed to continue to provide the financing for the real estate on the – or the CMBS for the real estate company in the interim, as well as provide the loan on the operating company. And that Mr. Dwyer and Mr. Silva would –
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> Q. You mean Mr. Grunstein?
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> A. I'm sorry. Mr. Grunstein and Mr. Silva would be partners in the transaction going forward.
>
> Q. And was the word partner used in connection with Mr. Grunstein?
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> A. It was.
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> Q. And was there anything more specific discussed in terms of percentage of partnership interest?
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> A. It was discussed that they would be 50/50 partners. . . .

reflective of his position. He had put up $10 million, but he was not intimately involved in the details of the acquisition. He may have had a desire to confirm his role in the transaction.

That inference is buttressed by Dwyer's subsequent actions. Four days after his email, Dwyer sent the CFG commitment letter to Silva and Grunstein. He also began to work on underwriting the Beverly facilities. Both Dwyer and Grunstein testified that the letter was a deliverable, and not a proposal.[193] However, a reasonable person would have concluded that the CFG commitment letter was an "offer" to contract because the letter proposed various terms and its effectiveness was conditioned on receipt by CFG of a signed copy.[194] Although Dwyer may have proceeded without a written contract in connection with the Mariner transaction, there is no evidence that Silva was aware of this fact at the time or had any prior dealings with Dwyer that might have informed him of Dwyer's way of doing business. Moreover, no reasonable negotiator in Dwyer's position would have concluded, based on the explicit terms of the commitment letter, that an oral

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> Q. And based on your participation in the phone call was everybody in agreement?
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> A. My recollection is that everybody left that phone call in agreement.

[193] The commitment letter may have been a deliverable, but the Court is not persuaded that it was not an offer to contract.

[194] Silva arguably could not have signed CFG's commitment letter as written because he did not have any authority to sign on behalf of SBEV, which was affiliated with Grunstein.

agreement had been established, or that the terms of the letter would become effective, without being fully executed.[195] Thus, the Court finds that the foursome did not come to a consensus on the terms of the HUD financing by mid-October.

Although the parties appeared to share certain understandings concerning the transaction, it is clear that Dwyer and Lerner had not entered into a partnership with Silva and Grunstein. Some of the critical elements of an enforceable partnership agreement include profits and losses, control, and ownership.[196] Even if at a high level certain of those elements were present, the evidence demonstrates that the parties were, over time, trying to finalize the terms of an agreement.

By late September, the foursome had agreed at some level to share losses when they agreed to share the losses if the merger agreement was terminated. And, although the terms of Dwyer's HUD financing were not finalized, the foursome had some understanding of how they might share certain financial benefits from the Beverly transaction. Perhaps in a broad sense the "*sharing*" of "*benefits*" arising from the Beverly acquisition might qualify as the sharing of profits. Yet, the purpose of the business relationship was to acquire Beverly. Dwyer and Lerner arguably were not "carrying on the business" of acquiring

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[195] If an oral agreement had already been established, there would be no logical explanation for that language.

[196] *See Hill v. Harris*, 1998 WL 960763, at *2 (Del. Super. Ct. Oct. 27, 1998) (noting that the elements of a partnership are intent to share profits and losses, co-ownership, and joint control).

Beverly for profit—they were hoping to earn fees from that business.[197] In contrast, the evidence Plaintiffs developed primarily seeks to demonstrate that Silva and Grunstein expected to share in the profits of the acquisition, minus whatever return the equity provider demanded.[198]

Two other factors—joint control and ownership—further demonstrate that Dwyer or Lerner were not partners in the legal sense. Lerner and Dwyer never had any ownership or control of the legal entities involved in the acquisition of Beverly. They lacked authority to make decisions regarding the Beverly acquisition. Grunstein also testified that he and Silva were the decision-makers in the merger process.[199]

Lerner and Dwyer may have participated in some decisions, including the significant decision to tender the $7 million deposit, but they were not major participants in the acquisition. Their efforts were mostly confined to financing the transaction through CMBS debt or supporting that financing. Learner was never a partner. His involvement in the Beverly Acquisition, recounted in an affidavit for

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[197] *See Cochran v. Nagle*, 1995 WL 819054, at *2 (Del. Ch. Feb. 27, 1996) ("To form a partnership, there must be (1) an agreement to carry on some business or occupation jointly, and (2) either an express or implied agreement to share in business losses and business profits."). Unlike in *Cochran*, where the Court found that the plaintiff had no intention to share in the losses of the business, the parties here had an intention to share losses in acquiring Beverly. Moreover, unlike in *Cochran*, where the plaintiff had limited involvement in the business, Grunstein was heavily involved in the acquisition.

[198] There was never any expectation that Dwyer or Lerner would share their fees from the HUD or CMBS financings with Grunstein and Silva. Similarly, the promote was not to be shared with Lerner or Dwyer if they elected to do their respective financings.

[199] Grunstein Tr. 598.

the Maryland Litigation, began when Grunstein "inquired whether Credit Suisse might be interested in participating in the possible acquisition of Beverly by providing some or all of the acquisition financing" and Lerner "indicated that Credit Suisse was potentially interested."[200] Dwyer is an expert on HUD financing and CFG is primarily a financing company.[201] At trial, Grunstein revealed that there was never any genuine belief that Dwyer would share in the carried interest.[202] Silva probably never even considered sharing the promote with Dwyer.

Dwyer continued to work on the underwriting until the closing of the transaction.[203] While his work was consistent with preparatory actions to obtain HUD approval and financing, it was also consistent with his role in the alleged partnership. Indeed, his efforts went beyond what one would reasonably expect

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[200] JX 826 (Aff. of Richard M. Learner in the Maryland Litigation). ¶ 4. In this affidavit, he implicitly concedes he was never a partner; he extensively reviewed his participation in the Beverly Acquisition without intimating any consideration of partner status. The Amended Verified Complaint even alleges that "[i]n July or August 2005 . . . , *Grunstein, Dwyer and Silva* agreed to share profits and losses resulting from the potential, and hopefully actual, Beverly acquisition." JX 721 ¶ 17 (emphasis added).

[201] Dwyer Tr. 895-97 (although it does operate approximately 25 nursing homes).

[202] Grunstein Tr. 637. Lerner testified that "[i]t was never discussed that Mr. Dwyer would be a partner in the deal" and that "[t]here was no discussion of Credit Suisse being a partner in the deal." Lerner Dep. (Oct. 15, 2007) at 71-72. Except for Grunstein's and Dwyer's testimony, there is no evidence that Dwyer had the right to revert to a proportionate partnership interest if the HUD financing did not occur.

[203] The foursome expected that Dwyer would be compensated through HUD financing or the receipt of a multiple of the loan deposit (*i.e.*, the pre-paid fee) for his significant contributions to the Beverly acquisition. Lerner Dep. (Oct. 15, 2007) at 70-71. Those contributions should not be understated. Dwyer may very well be correct that without his $10 million loan deposit or his introducing Grunstein to Beverly's CEO, neither Grunstein nor Silva would have acquired Beverly.

from a salesperson trying to close the deal. Nevertheless, Dwyer has not met the stricter burden of proof required to establish a partnership with Silva and Grunstein and possibly Lerner. The failure to agree on material terms relating to the HUD financing precludes a finding that Dwyer and Silva were partners. They merely had an agreement to agree.[204] Equally fatal to Dwyer's partnership claim is his lack of control and ownership in the alleged partnership's business.

Thus, if any partnership existed, it was between Grunstein and Silva. Grunstein was a more natural partner because of his experience with Mariner and only Grunstein or Silva had actual legal control over the transaction. In late August, Grunstein and Silva had been actively negotiating over their relationship in the Beverly acquisition. They were then working together toward their common goal. However, Silva seemed noncommittal. He had agreed to fund the $7 million deposit, but failed to do so when PSP appears to have backed away from investing. He later claimed that his lawyers needed more time to draft a letter agreement.

After various draft documents and proposals were exchanged in late August, the record is much more limited regarding the negotiations that took place between Grunstein and Silva, if further negotiations occurred. A Troutman email dated

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[204] *See Ramone v. Lang*, 2006 WL 905347, at *13 n.56 (Del. Ch. Apr. 3, 2006) ("In Delaware, an agreement is not enforceable if 'it is nothing but an agreement to agree in the future without any reasonably objective controlling standards.'") (quoting *Hammond & Taylor, Inc. v. Duffy Tingue Co.*, 161 A.2d 238, 239 (Del. Ch. 1960)). No objective controlling standards are present here.

October 12 addresses the documentation of the loan deposit and expense loans. Attached were promissory notes in favor of CFG, Fillmore, MetCap, and SBEV and an undertaking. The email was sent to counsel for CFG and Fillmore.[205] The promissory note from NASC in favor of SBEV and the promissory note from SBEV in favor of Fillmore each contained almost identical restrictive covenants. These covenants were included to address "Fillmore's concerns about the decision[-]making process going forward."[206] The covenants restricted SBEV's ability to take certain actions, such as modifying the merger agreement or merging with any other entity, but did not affect the ownership of SBEV or NASC. The email further acknowledged that the "parties were still in the process of finalizing the total loan number."[207] Two days before, an internal Troutman email contemplated these amendments to provide Silva the control he sought over the Beverly transaction.[208] Once again, none of these documents was ever signed.

The emails suggest that Fillmore wanted further assurances that the transaction would not be disrupted and that control over the transaction was not finalized. The attorneys may have simply been documenting the terms to which Silva and Grunstein had already assented. However, because the documents were unsigned, it is unreasonable to conclude that Silva assented to finalized terms, and

[205] JX 375.
[206] *Id.*
[207] *Id.*
[208] JX 372.

the continuing attempts to settle the terms of the deal favor an inference that all material terms to the agreement had not been concluded.

From late August to mid-November, Grunstein and Silva continued to work together toward acquiring Beverly without any substantive negotiations over ownership and control of the business. Silva secured the equity and participated with Grunstein in negotiating the Second Amendment. Among other things, Grunstein negotiated the First and Second Amendments and worked to alleviate the opposition to the merger. Their conduct in furtherance of acquiring Beverly could be evidence supporting Plaintiffs' view that the two had reached an oral agreement on the essential terms of their partnership.

An alternative theory is that the relative bargaining positions of the parties had shifted over time. If Silva earlier had an expectation that Grunstein would be responsible for locating an equity source, perhaps both men knew by this point, or earlier, that Grunstein would be unable to locate another equity source. Silva's association with WSIB may have made him the key to the deal at this point in time. Similarly, it was around this time that questions about the viability of the Mariner model began to arise. If Grunstein's participation was predicated upon his familiarity with the model, as Silva became convinced the model was a mistake, his need for Grunstein may have diminished.

The Third Amendment transferred legal control of the transaction from Grunstein to Silva. Before the Third Amendment, Grunstein and certain partners at Troutman had control over NASC/SBEV, the original acquiring entities. Following the Third Amendment, the entities controlled by Silva (*i.e.*, Pearl, PSC Sub, and Geary) became the new acquiring entities. If negotiations between Grunstein and Silva were still ongoing, this change would have dramatically shifted the balance of power. In theory at least, Grunstein could have solicited and obtained a different equity source up until the Third Amendment. However, he made no effort to do so. Grunstein's decision to transfer legal control over the transaction without fully documenting his partnership interest could have been a leap of faith that an agreement would be reached or an act consistent with an already assented to partnership agreement. Or, as the Defendants suggest, Grunstein's actions also may have been a rational and calculated gamble that he could still profit from the acquisition and avoid millions of dollars in losses.[209] Both theories are plausible.

Silva, at trial, was asked: "Now, just to be clear about it, you're not claiming that Len Grunstein gave up his interest in your carried interest in connection with

[209] While Grunstein had $3.5 million to lose before the Third Amendment, Silva had the same exposure. Moreover, Grunstein still was able to profit from the transaction in other ways, which might have hedged his risk in continuing to push the transaction along.

the third amendment, are you?" He answered: "No."[210] In other words, the transfer in control had *no effect whatsoever* on Grunstein's and Silva's relationship. However, Silva's testimony is not responsive to the question of whether all material terms had been assented to by this time.

There is evidence that Silva and Grunstein had some agreement to share equally in the carried interest. Silva admitted to an understanding to share the carried interest equally with Grunstein if he provided certain deliverables.[211] Lerner also testified that there was an agreement between Silva and Grunstein to be equal partners on a fifty-fifty basis.[212] Lerner specifically recalled that the word "partner" was used.[213] Dickerson testified that he had numerous conversations with Silva in which he acknowledged Grunstein's 50 percent interest.[214] Levinson testified that he had conversations with Fillmore's lead attorney and Silva in which they confirmed that there was a fifty-fifty partnership between Silva and Grunstein.[215] Moreover, Silva admitted that he "never denied [Grunstein's] carried interest at any point prior to the closing."[216]

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[210] Silva Tr. 441.
[211] *Id.* at 116-17.
[212] Lerner Dep. (Oct. 15, 2007) at 38-40.
[213] *Id.*
[214] Dickerson Dep. (Oct. 9, 2007) at 22-24, 60
[215] Levinson Dep. (Mar. 27, 2008) at 31-38. Silva told Levinson that Grunstein had a 50 percent interest. Silva Tr. 128.
[216] Silva Tr. 134.

The two also appeared to have had a close relationship at times during the transaction. When Silva's mother died on November 30, Grunstein called a United States Senator's office to try to arrange her burial in a military cemetery. He also wrote a condolence letter which stated: "I am most privileged to call you a partner and friend."[217] In an email to Silva on December 16, Grunstein wrote: "As an aside, we should also sign up a letter agreement between us, replacing the direct equity interest with the indirect equal share in your interest that we discussed on the phone to solve the press release issue."[218] On December 29, Silva sent Grunstein an email stating: "I am interested in [y]our counsel on all issues" that Grunstein had mentioned.[219] Silva also wrote: "We have also made fee payments to our team."[220] In an email to Grunstein on January 5, Silva wrote: "I did well for us today Len."[221] This is not the type of email that one writes to his attorney.

In late December, Dickerson sent two emails to another Troutman attorney describing telephone conversations with Silva.[222] Dickerson was trying to obtain payment from Fillmore for legal expenses incurred by Troutman in the Beverly transaction. Silva complained about paying for Grunstein's time given his

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[217] JX 504. The letter was dated December 5. Silva testified at trial that by early December his relationship with Grunstein was deteriorating. Silva Tr. 138.
[218] JX 520.
[219] JX 561.
[220] *Id.*
[221] JX 573.
[222] JX 558; JX 562.

economic interest in the deal.[223] Finally, on March 6, as Grunstein was beginning to feel squeezed out, he wrote Silva an email, which read in part: "you correctly said that my interest was worth hundreds of millions of dollars."[224] Grunstein testified that on March 11 Silva reassured him that they were partners, that he would still be involved, and that the papers were being drawn up and would be delivered at closing.[225] However, when the closing occurred on March 14, Grunstein received nothing.

Silva's mindset during this entire period is illuminating. Although he has a law degree, Silva confessed at trial that he did not believe that a contract could be formed unless it was in writing "because if it's not put in writing, you don't understand the terms and conditions in which the parties are agreeing to."[226] Silva's conduct after the Third Amendment was consistent with his incorrect understanding of the law. As Grunstein and Silva worked together to complete the Beverly acquisition, Silva all along believed that he had no agreement with Grunstein until it was documented. That explains in part why Silva, as the merger process progressed, never felt a pressing need to document their relationship.

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[223] *Id.* At trial, Silva admitted that he told Dickerson that Grunstein had a 50 percent interest in the carried interest. Silva Tr. 133.
[224] JX 613.
[225] Grunstein Tr. 663-64.
[226] Silva Tr. at 62-63.

However, Silva's admissions that Grunstein and he shared a fifty-fifty interest, that his control of the Beverly acquisition entities did not change Grunstein's interest, that Grunstein's direct participatory interest would be converted to an indirect interest, or that he "did well" for himself and Grunstein do not, by a preponderance of the evidence, prove Silva's assent to carry on a business to share profits. Although this evidence could be consistent with a partnership interest, it could also be consistent with two individuals who presented a unified front to others while they continued to negotiate a final deal. Agreement on several terms is also not the same as agreement on all the terms the parties understood to be essential. Similarly, Silva's silence for seven months and the compatible working relationship between Grunstein and Silva (which included Grunstein's taking a variety of actions to push the deal forward) do not demonstrate the existence of a partnership. Instead, they are consistent with the choice he and Grunstein made to move the merger forward while trying to finalize a partnership arrangement. Their functional working relationship may be attributed to Grunstein's multiple roles throughout the transaction. Even if Grunstein could not be sure of whether he would secure a partnership interest, he would have been incented to facilitate the transaction to continue earning fees through his associated entities, MetCap and Troutman.[227]

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[227] Plaintiffs also contend that because Grunstein and Dwyer were already partners and

Thus, the evidence is mixed and the final inquiry is whether Grunstein and Silva had agreed on all the terms that they considered essential. Although a close call, the Court concludes that Grunstein has not met the necessary burden of proof to demonstrate that they reached such an agreement.

The evidence already reviewed presents Grunstein's claim in a favorable light, but is inadequate to prove Silva's assent. The Court rejects Grunstein's claim because 1) Grunstein overstates Silva's assent to certain key terms; 2) an oral agreement, formed around or after the mid-October timeframe, is contrary to Plaintiffs' theory and would be inappropriate given the parties' earlier negotiations; and 3) Plaintiffs' dependence on Grunstein undermines their case.

First, Defendants convincingly explain that certain key terms to a partnership were not as well defined as Plaintiffs assert. On the issue of control, if the goal of the enterprise claimed by Plaintiffs was acquiring Beverly, Grunstein first had control over the shell entities and then they were conveyed to Silva. From that point forward, Silva appeared to control the decision-making process. Silva was also clear from early on that the equity would make decisions, which is consistent with his later unilateral control. And, as late as October 10, 2005,

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they invited Silva, he must be a partner as well. However, as discussed above, Dwyer never agreed to carry on a business for profit with either of Silva or Grunstein. Dwyer's testimony was also self-serving and Grunstein's credibility is diminished based upon his guilty plea to perjury. Finally, their assertions do not replace the need to show Silva's assent. An alleged agreement between Grunstein and Dwyer is not evidence that Silva assented to join them.

Troutman emails contemplated amending an earlier arrangement to give Silva control over Beverly.[228] These facts are inconsistent with the joint decision-making Plaintiffs argue was a feature of the partnership.

Although Silva conceded that Grunstein's delivery of the shell entities to him did not alter Grunstein's economic interest, his concession does not change the observation that the facts presented differ from Plaintiffs' alleged partnership. Moreover, Silva's testimony could be consistent with an understanding on that one term, subject to the parties' reaching agreement on all terms.

Plaintiffs also claim that Silva's role was to provide the equity. However, Grunstein asserted that Silva wanted him to contribute cash and to contribute equally with him as an equity source until February or March.[229] This is inconsistent with Plaintiffs' theory of each of the putative partners' roles in the partnership. It also indicates that the negotiations were more complicated and lengthier than Plaintiffs suggest or that an agreement had not been reached on this key term until much later than Plaintiffs assert. Although third parties testified that Grunstein and Silva referred to one another as partners, Grunstein's testimony that he knew Silva wanted him to provide equity may have been a basis upon which this partnership was conditioned.

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[228] JX 372.

[229] Grunstein Dep. (Feb. 26, 2008) at 381-82. Indeed, Grunstein also did not contribute to the initial deposit; Dwyer bore that $10 million expense.

It is possible that an understanding existed that Silva and Grunstein would share profits, but that such profit sharing was based on who was primarily responsible for the equity. When Schron bowed out, Grunstein failed to locate another equity source, and it became clear that Silva had secured 100 percent of the equity, the interest to which Grunstein may have been entitled may have diminished. A smaller equity interest would have been consistent with Grunstein's reduced participation in the Mariner transaction. However, Plaintiffs' position has been that the parties were equal partners. Thus, if a partnership existed, albeit one which tied profit sharing to securing equity, the Court is left without guidance and standards to enforce such an agreement.[230]

Defendants also explain that certain more specific partnership terms were left undefined. For example, no agreement was reached on how to share losses of invested capital or what might happen in the case of insolvency or bankruptcy. Plaintiffs argue that this fell outside of the partnership agreement, as the partnership was only concerned with the acquisition of Beverly. Additionally, terms were not reached determining how the upcoming transaction's fees would be

[230] As questioned in a similar context, "What terms of what partnership agreement, express or implied, would I be charged with enforcing?" *Ramone v. Lang*, 2006 WL 905347 at *12 (Del. Ch. Apr. 3, 2006). This question could also be posed in a variety of more specific circumstances given the generality of Plaintiffs' alleged partnership. If Grunstein and Silva were to share equal control, by what mechanism would deadlock be broken? Other more specific objections raised by Defendants are discussed below.

paid, such as those for legal services.[231] Silva directs the Court to no evidence that demonstrates these were terms he considered to be material. Nonetheless, his argument carries some weight as Grunstein faces challenges in demonstrating that a moment occurred when the parties had assented to the most basic of partnership terms, especially given the parties' history of attempting to formalize their agreement.[232]

These variances from Plaintiffs' theory concerning key terms such as control and the parties' roles also show that Silva had not manifested his assent to carry on a business for profit with Plaintiffs. Additionally, it confirms that Grunstein and Silva could functionally operate while they disagreed on certain key terms or while such terms were in flux.

Second, Plaintiffs fail to explain satisfactorily when a partnership was formed. They claim that the partnership was formed in the "summer of 2005" and

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[231] Grunstein did testify that the acquirer would pay for some of these fees, but in light of his diminished credibility, the Court would prefer corroborating evidence. Grunstein Tr. 607-08. Agreement existed for the sharing of losses up to the $14 million, but the lack of clarity beyond this amount is perplexing.

[232] Delaware partnership law supplies specific terms if they are not otherwise agreed upon by the partners. *See* 6 *Del. C.* § 15-401. Plaintiffs argue the terms Defendants describe are non-essential and may be supplied by gap-filling rules. They are technically correct, but there is something circular to the view that because it was not assented to, it was not material to the parties. As discussed more below, given the parties' attempts to execute more formal documentation, assent to such documents appears to supply best the standard for what a reasonable negotiator would understand Silva to have reasonably expected before establishing a partnership.

that "all of this was in place by no later than August 2005."[233] Their theory is flatly refuted by the evidence of negotiations continuing into mid-October. Thereafter, the record becomes murkier concerning the evidence of negotiations. Plaintiffs essentially ask the Court to look at that silent record over a period of months and accept that at some moment not precisely identified by Plaintiffs, they agreed to carry on a business for the purpose of making a profit. The Court has already concluded that the parties demonstrated their ability to work together to consummate a complicated transaction in the absence of a finalized partnership agreement.[234] Plaintiffs offer no compelling reason, except for Silva's sporadic acknowledgement of agreement on certain terms, to conclude that Silva made clear his assent to the package of terms they sponsor. Rather, the picture that emerges is one of incomplete negotiations.

Similarly, the dispositive legal question is whether a reasonable negotiator would conclude that the agreement reached constituted agreement on all of the terms that the parties themselves regarded as essential. The record is replete with

[233] POB at 59 & 61.

[234] Indeed, if, as Plaintiffs claim, the parties planned to finalize their agreement at the merger's closing—as with the Mariner transaction—that, in conjunction with the strong evidence of ongoing negotiations through October, supports Defendants' view that the parties understood they would engage in continuing efforts to search for mutual agreement.

failed attempts to document the specific rights and obligations of the parties.[235] A reasonable negotiator would, all things being equal, be less likely to conclude that there was assent until an agreement was negotiated and signed, which was similarly precise as the draft agreements the parties had circulated. The alleged partnership also is less credible in the context of a billion dollar acquisition and given the generality of its terms. The record suggests that Grunstein understood Silva's desire for formal documentation. Thus, it was unreasonable for Grunstein to accept Silva's consent, over time, to general terms as assent to carry on a business for profit.

Third, to enforce the alleged partnership, the Court would have to rely on Grunstein's testimony about its terms. Although Dwyer's and Grunstein's testimony was consistent, as discussed above, Dwyer's account of his partnership interest is contradicted by the record. Additionally, while certain third parties viewed Grunstein and Silva as partners, that is hardly definitive and is in tension with their ability to work together while simultaneously negotiating. Third parties might well have seen their collaboration and understood them to have worked out

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[235] Although the record also contains emails which allegedly summarize negotiations, attempts were made to circulate several agreements which contained the level of detail typically associated with sophisticated commercial investments. *See, e.g.*, JX 169 (the pledge agreement providing Fillmore 100 percent security interest in stock of NASC and SBEV); JX 196 (amended operating agreement admitting Fillmore as a member of SBEV); JX 289 (contribution agreement providing for profit sharing with CFG).

some arrangement, but that tells the Court little about how that arrangement was structured and whether it was incomplete or contingent.

Silva's admissions, as the Court interprets them, amount to an evolving understanding of certain crucial features of his and Grunstein's relationship. However, they may well have been contingent on Grunstein's satisfaction of certain conditions, such as contribution to the equity. Or, they may have been dependent on other key terms which were unresolved, such as control over Beverly or a fuller consensus on who would pay for upcoming expenses. Although Silva appeared cagey at trial, his testimony becomes more understandable if the parties only had reached an agreement on one or two terms, but fully understood that they had not yet reached complete accord.[236] Furthermore, even if Silva's testimony

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[236] Silva's general lack of credibility throughout trial does not prove Grunstein's claim. Silva testified that Grunstein was required to provide deliverables to obtain his 50 percent interest. At trial, Silva shifted gears to explain that Grunstein withdrew from the transaction. His explanation that Grunstein withdrew from the deal defies reason and is unsupported by the evidence. Even if Silva and Grunstein had a falling out, Grunstein would have no motivation to abandon his interest in the transaction after all of his efforts. Furthermore, he assisted with the transaction through the closing. With respect to the deliverables, there is no evidence that Silva ever insisted that Grunstein provide the deliverables as a condition to their agreement aside from his self-serving testimony. Silva's argument is not particularly compelling, but skepticism about in his account does not satisfy Grunstein's burden of proof.

The Court appreciates that it has diverged from Silva's theory of the case to make sense of the facts. However, Plaintiffs' theory that a partnership existed in August 2005 is also not credible. If a partnership between Grunstein and Silva existed, it would have to have been formed sometime after these October negotiations, when the record less plainly contradicts Plaintiffs' account. Thus, finding for Plaintiffs would require a divergence from their theory as well. Because neither side's position is fully believable, the Court is less inclined to attempt to create a version of events which could support a

was at times self-serving and unconvincing, he does not bear the burden of proof, which is stricter here because Grunstein seeks to demonstrate a partnership when his alleged co-partner denies it.[237]

Thus, Grunstein's testimony is critical to the case. Although it was, to an extent, self-serving, his narrative appeared to be slightly better supported by the record than Silva's. However, Grunstein undermined his credibility by perjuring himself in the Mariner litigation. The other evidence in the record does not, by a preponderance of the evidence, convince the Court that Silva assented to the terms Grunstein sponsors. The Court therefore would have to trust, more than it is able, Grunstein's testimony to force Silva to share the profits of the Beverly transaction.[238]

Plaintiffs' theory of assent in August 2005 is unconvincing and countered by evidence of continuing negotiations. Grunstein was not entitled to rely on Silva's assent to a few high level terms, agreed to over months, when the parties had

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partnership in favor of the party who bears the burden of proof and who has elsewhere lied under oath.

[237] *Grunstein II*, 2011 WL 378782, at *9 (citing *Ramone v. Lang*, 2006 WL 905347, at *12 (Del. Ch. Apr. 3, 2006)).

[238] Plaintiffs' initial account of the terms of the partnership is heavily dependent on Grunstein's testimony. *See* POB at 13-14. They contend the parties agreed to share expenses equally and a breakup fee equally (Grunstein Tr. 589, 592), share equally in whatever was derived from the deal (Grunstein Tr. 590-91), have expenses reimbursed if successful (Grunstein Tr. 597), manage Beverly together and throughout make decisions jointly (Grunstein Tr. 597, 598), and follow the Mariner model (Grunstein Tr. 597). Plaintiffs are able to support some of these terms as discussed, but the Court is left with strong reservations about whether Silva's assent to certain terms evidenced his consent to carry on with Grunstein a business for profit.

attempted to formalize their relationships in a manner more traditionally employed in billion-dollar transactions. Finally, the testimony of both Grunstein and Dwyer was not credible. Plaintiffs have not demonstrated by a preponderance of the evidence that Silva assented to carry on a business for profit.

B. *Dwyer/CFG's Breach of Contract Claim*

Dwyer/CFG assert that Silva and Dwyer formed an oral agreement based on the terms in the CFG commitment letter.[239] Those terms included the origination fee, the loan amount, the interest rate on the loan, and CFG's right to do HUD financing on the Beverly facilities. Dwyer allegedly performed by underwriting 275 Beverly facilities, enabling Credit Suisse to carry out the CMBS financing and permitting the Beverly transaction to close. Dwyer claims that Silva breached the oral agreement by refusing to proceed with HUD financing in 2006.[240] Alternatively, Dwyer contends that a contract was formed based on Fillmore's acceptance of CFG's services. For the following reasons, Dwyer has failed to prove the formation of an oral agreement.

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[239] Dwyer also seeks recovery of the pre-paid fee based on having funded the $10 million deposit.

[240] The CFG commitment letter is not clear on when the HUD application would be made. In the Plaintiffs' brief, Dwyer asserts that the "law implied a reasonable time to start the refinancing." Pls.' Post-Trial Reply Br. ("PRB") at 22.

Under Delaware law an "overt manifestation of assent—not subjective intent—controls the formation of a contract."[241] Thus, "an intention to be bound by an agreement may be evidenced by continued performance in accordance with an agreement's terms."[242] The test is "whether a reasonable man would, based upon the 'objective manifestation of assent' and all of the surrounding circumstances, conclude that the parties intended to be bound by contract."[243] In determining whether the arrangement reached constituted an agreement on all of the terms that the parties themselves regarded as essential, the Court considers the surrounding circumstances, including: "the course and substance of the negotiations, prior dealings between the parties, customary practices in the trade or business involved and the formality and completeness of the document (if there is a document) that is asserted as culminating and concluding the negotiations."[244]

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[241] *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1101 (Del. Ch. 1986). The majority of the parties' analysis relies on Delaware law, and they raise no issue that appears to turn on questions of choice of law. Although Plaintiffs briefly invoke both Maryland and Massachusetts law, the law of those jurisdictions to which they direct the Court is similar to Delaware law. *See* POB at 75; PRB at 22. Thus, the Court, like the parties, assumes that Delaware law applies, or the application of our law in this context approximates that of the appropriate jurisdiction.

[242] *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *4 (Del. Ch. Feb. 3, 2009).

[243] *Leeds*, 521 A.2d at 1101.

[244] *Id.* at 1102.

At trial, Silva testified that he reached an understanding with Dwyer that CFG would be awarded the HUD financing—all things being equal.[245] In contrast, Dwyer averred that he and Silva reached an oral agreement on the financing terms described in the CFG commitment letter before October 13, 2005, when he sent Silva a copy of the letter. More likely than not, Silva did not expressly communicate that condition to Dwyer. A reasonable person in Dwyer's position would probably not have accepted that condition and then directed his or her company to perform a substantial amount of work over the course of several months. Of course, Silva believed that a contract could not be formed without a written agreement. At best, Silva and Dwyer had a misunderstanding, but more likely than not, Silva knowingly took advantage of Dwyer's efforts. Applying the Delaware standard, however, a reasonable person in Dwyer's position would not have concluded that Silva intended to be bound by the terms of the CFG commitment letter.

To begin, there is no evidence in the record that those terms were ever seriously negotiated.[246] Especially for a deal of this size, a reasonable negotiator in

[245] Silva Tr. 115-16, 182. There is no question that Silva knew that Dwyer's participation in the Beverly deal was to obtain the HUD financing. He also knew that HUD refinancing was a part of the Mariner model, which he had anticipated following in the Beverly transaction.

[246] In fact, Silva testified that he had no discussion about fees or compensation. Silva Tr. 221. In contrast, when Silva decided to pursue HUD financing, the terms of

an equal bargaining position would have expected some haggling over the terms. CFG's expertise could conceivably have given it some bargaining leverage, but Dwyer has not proved that CFG was the only capable provider of HUD financing available. Although Dwyer and Silva likely had some preliminary discussions about HUD financing terms in late September or early October, Silva was then unfamiliar with the HUD process, and probably did not have any idea what constituted reasonable and customary fees.[247]

Equally problematic to Dwyer's claim is that the CFG commitment letter, which was never signed by Silva, contained language antithetical to the formation of an oral agreement. The letter explicitly conditioned its effectiveness upon receipt by CFG of an executed copy.[248] Dwyer's attempt to negate this highly probative fact by contending that the commitment letter was a deliverable that memorialized the oral agreement is unpersuasive. Dwyer's attorney, Fenigstein, testified that he expected that a borrower would countersign the letter to accept the terms therein.[249] A reasonable person would not have understood that the commitment letter was a deliverable, effective upon receipt, without a signature

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Fillmore's engagement with Credit Suisse's Column Guaranteed LLC were heavily negotiated.

[247] Silva testified that during the acquisition process he "was still in the learning curve of understanding the HUD requirements." Silva Tr. 228-30.

[248] The CFG commitment letter was also addressed to SBEV. Silva never had any ownership of SBEV or authority to sign on behalf of it.

[249] Fenigstein Tr. 1425, 1470.

evidencing one's acceptance. Moreover, Silva did not have a prior course of dealing with Dwyer. Nor did the parties' implicit adoption of the Mariner model supply that awareness either.[250] Finally, the Plaintiffs assert that a "commitment letter, unsigned, where the customer does not object, is binding based on the way Jack Dwyer did business."[251] But Dwyer's way of doing business would turn Delaware contract law on its head.

Dwyer may have honestly believed that Silva had agreed to do HUD financing on the terms in the commitment letter, but that belief was not reasonable under the circumstances. A reasonable person would have believed (as Silva did) that the commitment letter was an "offer" to contract and that the failure to respond to an offer as explicitly set forth in the proposal was an implicit rejection.[252] As an additional factor, the terms proposed in the CFG commitment letter did not reflect all of the terms that Dwyer asserts were agreed upon. It contained the origination

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[250] There is no evidence that Silva had any indication that Dwyer/CFG and Schron proceeded (assuming that they did) on an oral agreement and an unsigned commitment letter in the Mariner transaction until at least December 16 when Silva received a copy of that letter from Grunstein.

[251] PRB at 31 n.35.

[252] *See Eaton v. Eaton*, 2005 WL 3529110, at *6 n.38 (Del. Ch. Dec. 19, 2005) (the "offeror is the 'master of his offer' and may specify that acceptance may only occur through performance . . . the language and circumstances of the offer are to be considered in determining the manner of acceptance required."); *see also* Restatement (Second) of Contracts § 30 (1981) ("An offer may invite or require acceptance to be made by an affirmative answer in words . . . ."). Thus, that Silva never told Dwyer that the terms were not acceptable to him is of no moment. Silva Tr. 490.

fee, but it failed to include other material terms such as the servicing or premium fees associated with placing Ginnie Mae bonds in the market.[253]

Dwyer also relies on various forward-looking statements in presentations that Silva made to PSP and WSIB. However, these statements only represent that Fillmore or FSI "*will engage* [CFG] to complete the . . . HUD refinancing."[254] Expectations of future employment are not particularly persuasive evidence that a contract has been formed.

Finally, Dwyer asserts that a contract was formed because Fillmore requested and accepted its assistance with the financing work without ever objecting to the terms in the CFG commitment letter. The underwriting work that CFG performed was necessary to obtaining both the CMBS loans and the HUD financing. Silva may have encouraged Dwyer to perform the underwriting work,[255] but that encouragement was primarily for purposes of obtaining the CMBS loans provided by Credit Suisse, and less so for purposes of doing the HUD financing. Because Silva had not signed the CFG commitment letter, a reasonable person would not have construed Silva's encouragement as an implicit acceptance of the HUD financing terms when the same work was likely being requested by its lender for the more critical purpose of obtaining the financing necessary to close on the

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[253] *See* Dwyer Tr. 889-90.

[254] *See, e.g.*, JX 413 at 8 (emphasis added).

[255] Dwyer testified that Silva repeatedly asked him to "[f]inish underwriting the HUD mortgages." Dwyer Tr. 1024-25; Silva Tr. 209-11.

transaction. Silva understandably wanted what his lender wanted. Ribar's two emails to Reynolds, an employee of CFG, inquiring about the HUD release prices in early March 2006 hardly show that Fillmore had employed CFG to do the financing work for the HUD approval.[256] One would have expected more frequent and detailed communication between Silva and Dwyer (and their employees) if Fillmore had retained CFG.

Fillmore, nonetheless, indirectly accepted the benefits of CFG's work through its relationship with Credit Suisse. Dwyer, indirectly through CSFB, contends that CFG should recover on the theory that an implied-in-fact contract was formed when Fillmore accepted CFG's work:

> If a party voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred.[257]

The Court disagrees. The underwriting work served two purposes. The Court cannot reasonably conclude that Fillmore's acceptance of the underwriting work for the CMBS loans constituted a "promise" to do the HUD financing and pay the fees in the CFG commitment letter. At most, the Court might be able to infer a promise from Fillmore to pay CFG a reasonable value for the services rendered.

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[256] JX 620; JX 621.
[257] *Anisgard v. Bray*, 419 N.E.2d 315, 318 (Mass. App. Ct. 1981) (quoting *Day v. Caton*, 199 Mass. 513, 515 (1876)).

However, Dwyer has not specifically argued that an implied-in-fact contract was formed for merely the underwriting work done in support of the CMBS loans. Moreover, the Court will not infer a promise here between CFG and Fillmore where Dwyer/CFG performed that work for Credit Suisse and Fillmore benefited from the underwriting work pursuant to its separate contractual relationship with Credit Suisse.[258] Accordingly, Dwyer has not proven his contract claim by a preponderance of the evidence.

C. *Promissory Estoppel*

To prove a promissory estoppel claim, the Plaintiffs must show that: (1) Silva made a reasonably definite and certain promise; (2) Silva reasonably expected to induce action or forbearance by the promisee; (3) Grunstein and Dwyer "reasonably relied on the promise and took action to [their] detriment;" and (4) the "promise is binding because injustice can be avoided only by its enforcement."[259] Moreover, each of these elements must be established by clear

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[258] Having determined that no contract was formed between Fillmore and CFG, the Court need not analyze whether the contract would have violated the statute of frauds. *See* DAB at 127-32; PRB at 27-29.

[259] *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000); *Envo, Inc. v. Walters*, 2012 WL 2926522, at *10 (Del. Ch. July 18, 2012); *Cont'l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1233 (Del. Ch. 2000). The Court has previously observed that the Plaintiffs must prove that the "Defendants made specific promises to Plaintiffs that were outside the Merger Agreement, that Plaintiffs acted in reasonable reliance on those promises, and that a failure to enforce the promise would result in an unjust distribution of the benefits of the Beverly transaction." *Grunstein II*, 2011 WL 378782, at *11.

and convincing evidence,[260] or in other words, they must be "highly probable, reasonably certain, and free from serious doubt."[261] "[T]he principal question in Delaware promissory estoppel cases is 'whether injustice could be avoided only by enforcement of the promise.'"[262]

The first issue raised by Grunstein's promissory estoppel claim is whether Silva made a reasonably definite and certain promise to him. Although Silva admitted the two shared an understanding and other third parties explained that they believed an agreement was reached as to the fifty-fifty interest, it is a close call whether that evidence carries Grunstein's burden of proof. Again, Grunstein has not directed the Court to a specific promise made. The third parties' understandings are undermined by the negotiation history of Grunstein and Silva, which demonstrated that the two held divergent views on certain critical terms such as carried interest and control of the entities. Furthermore, an outsider could have misjudged the relationship or could have been misled by one of the parties.

Silva's admission of an understanding strengthens Grunstein's position, but the terms of that understanding have not been sufficiently proven. Even if the parties at one point agreed to a fifty-fifty split, was that split contingent upon Grunstein's also locating an equity source which could match Silva's equity

[260] *Envo, Inc.*, 2012 WL 2926522, at *10.
[261] *Utz v. Utz*, 2003 WL 22952579, at *2 n.11 (Del. Ch. Dec. 5, 2003).
[262] *Grunstein II*, 2011 WL 378782, at *11.

source? Was it contingent on the Mariner model being used in the transaction? Again, Grunstein's case would have been aided by more specific evidence concerning when a promise was made and the promise's terms. Grunstein's failure to muster it supports Silva's view that no definite and certain promise was made and Grunstein is overreaching based on a contingent or general understanding that the two parties shared.

Grunstein is again left to rely on the inferences that may be drawn because the two shared a seven-month history of collaboration to complete the transaction. Although such evidence is relevant in assessing whether the Court can infer a promise was made, in the context of this transaction and because of Grunstein's burden to prove his claim by clear and convincing evidence, the Court cannot say with confidence that it is free from serious doubt that a promise was made. Therefore, Grunstein falls short of his required burden of clear and convincing evidence.[263]

However, the issue of whether a promise was made need not be resolved. The Court also finds that it was unreasonable for Grunstein to rely on Silva's promise, if indeed one was made. Grunstein was aware the parties had, on multiple occasions, attempted to document the transaction in a manner more

[263] Silva argues that certain closing deliverables were a condition of any understanding the two shared. The record does not support his view, and, as discussed above, this is likely a litigation posture adopted in response to Grunstein's claims.

befitting the complexity of the acquisition.[264] Additionally, in his suit against Troutman, he indicated that he charged Troutman with papering his relationship with Silva.[265] The Court concludes that these acts show Grunstein's understanding of the commercial reasonableness of formalizing a partnership agreement with an equity source with whom he had no prior business relationship. Grunstein could not rely reasonably on Silva, a stranger until this transaction.[266] His background as a lawyer at a well-respected law firm and the history of their attempts to finalize documents in which they appeared to seek different ownership interests and relative control, suggest that Grunstein was aware that it was unreasonable to rely on an understanding in lieu of completing negotiations.

If the Court adopted Grunstein's position, a negotiator who realizes she is unable to secure the deal on the terms she believes she is entitled to could simply acquiesce in the transaction, avoid documenting it, gather evidence showing that in a general sense the two parties intended to work together and share in profits, and then assert a promissory estoppel claim to enforce the deal her arm's length counterparty declined to accept. This would seriously undermine the expectations

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[264] *See supra* note 235 & accompanying text.

[265] *See* JX 864 (complaint on behalf of Grunstein and his associated shell entities against Troutman alleging that Troutman attorney was "responsible for making sure the Partnership was properly documented").

[266] *See, e.g.*, *Stein v. Gelfand*, 476 F. Supp. 2d 427, 436 (S.D.N.Y. 2007) (concluding it was "manifestly unreasonable" to rely on unwritten promise of friend of thirty years where many terms were left open).

of the business world. Although Silva may have taken advantage of the incomplete negotiations and could have disaffirmed the existence of a partnership, Grunstein could have just as easily, if he succeeded in bargaining for the deal he claims he achieved, demanded that it be reduced into a writing prior to continuing to work with Silva. It was unreasonable for Grunstein to have failed to do so in this context, for the reasons discussed above.

Regarding Dwyer's promissory estoppel claim, the initial question is whether Silva's promise to Dwyer that CFG would be entitled to do the HUD financing was sufficiently definite and certain. As a preliminary factor, there is no evidence that Silva was irrevocably committed to do HUD financing. While the plan was to follow the Mariner model, Dwyer likely understood that the HUD financing was subject to market variables.[267]

Another problem for Dwyer's promissory estoppel claim is that Silva's promise lacked definite compensation terms. Under what terms would the Court enforce Silva's promise?[268] Silva's understanding with Dwyer necessarily anticipated that the parties would be able to agree on reasonable terms. This

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[267] The pre-paid fee in the CFG commitment letter arguably contemplated the possibility that the HUD financing might not occur. Dwyer was entitled under the CFG commitment letter to receive the pre-paid fee at the closing of the merger, but if HUD financing occurred, the pre-paid fee would be credited against the HUD financing fees. JX 378.

[268] *See Gallagher v. E.I. DuPont De Nemours & Co.*, 2010 WL 1854131, at *4 (Del. Super. Ct. Apr. 30, 2010) (noting that the promise to provide some compensation is too vague to enforce).

promise is perhaps more aptly characterized as a "mere expression[] of expectation."[269] Nonetheless, either Silva's promise or CFG's relationship with Credit Suisse induced Dwyer to act.

Also fatal to Dwyer's promissory estoppel claim is that Dwyer's reliance on Silva's promise was unreasonable under the circumstances. Dwyer was a sophisticated party represented by able lawyers. He had previously documented his agreement to loan the $10 million deposit. Moreover, because Dwyer's and Silva's conversations "left for future resolution so many terms" it would have been "manifestly unreasonable" for Dwyer to have relied upon such an indefinite promise.[270] Moreover, the "mere expression of future intention . . . does not constitute a sufficiently definite promise to justify reasonable reliance thereon."[271] In this case, Dwyer was taking a chance that he and Silva would not be able to reach a deal.[272]

For having performed such a significant amount of work, both Grunstein and Dwyer are understandably upset. Silva appears to have taken advantage of the efforts of Grunstein and CFG. But the amount of work Grunstein, Dwyer, and CFG invested in the Beverly transaction does not make their reliance any more

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[269] *Pharmathene, Inc. v. Siga Techs., Inc.*, 2011 WL 4390726, at *27 (Del. Ch. Sept. 22, 2011).
[270] *Stein v. Gelfand*, 476 F. Supp. 2d 427, 436 (S.D.N.Y. 2007).
[271] *Santoni v. Fed. Deposit Ins. Corp.*, 677 F.2d 174, 179 (1st Cir. 1982).
[272] *See Stein*, 476 F. Supp. 2d at 435.

reasonable. Accordingly, Plaintiffs have failed to prove their promissory estoppel claims by clear and convincing evidence.

D. *Unjust Enrichment*

The Plaintiffs claim that the Defendants have been unjustly enriched by the Plaintiffs' work in the Beverly acquisition. "Unjust enrichment is the 'unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'"[273] To prevail on their unjust enrichment claims, the Plaintiffs must prove that (1) the Defendants were enriched; (2) the Plaintiffs suffered an impoverishment; (3) there is a relationship between the enrichment and impoverishment; (4) the absence of any justification; and (5) the absence of a remedy provided by law.[274]

The Defendants contend that the Plaintiffs' efforts were performed officiously. The Court has previously noted that "where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched."[275] An officiously conferred benefit is one in which a "person

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[273] *MetCap Sec. LLC*, 2009 WL 513756, at *5 (quoting *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999)).
[274] *Id*.
[275] *Id*. at *9 (internal quotation marks omitted) (quoting Restatement (First) of Restitution § 2 cmt. a (1937)).

who without mistake, coercion or request . . . unconditionally conferred a benefit upon another."[276]

The Court concludes that Grunstein acted in his own self-interest in assisting Silva in the deal. As already described, Grunstein likely thought his best chance to participate in the deal was to continue to prove his worth and assist in the transaction.

Grunstein balanced the risk that he would lose the Beverly deal against the risk that Silva and he would be unable to agree to the final terms of an agreement, even if they shared an understanding that Grunstein had some interest in the transaction. Until that understanding was finalized and fully documented, Grunstein should have known that the interest was not a partnership interest. If he had been able to secure the 50/50 interest and shared control from Silva, he would and should have done so. However, he and Silva had not completed their negotiations and thus he gambled that he would be able to do so as the transaction progressed.[277] That Grunstein was ultimately unsuccessful, does not mean that

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[276] *Id.* (quoting Restatement (First) of Restitution §112 (1937)).

[277] This case is thus much like *Stein* and this Court reaches a conclusion similar to the decision offered there. *See Stein*, 476 F. Supp. 2d at 435-36. That opinion reasons:

> In investing his efforts in bringing the acquisition to fruition, Stein took a chance that he and Gelfand would be unable to reach a deal. There is nothing unjust in holding that he is not entitled to have Gelfand compensate him for having made a losing bet by engaging in preparatory activities against the possibility that they would prove to be of value to him. This is especially so because Stein could have protected himself by insisting that

Silva was unjustly enriched or that Grunstein did not aid Silva of his own volition with the hope that they would finalize an agreement.[278] He therefore acted officiously and with justification.

Much of Dwyer's claim may be disposed of because the work he completed to further this transaction was performed pursuant to a contract with CSFB and was compensated through that relationship. A judgment was entered in the Maryland Litigation in which the jury found that a contract existed between CFG and CSFB (among other entities) and that CSFB breached that contract.[279] Part of CFG's obligation under this agreement was to perform the underwriting work on the Beverly portfolio to prepare release prices which were part of its bargained for exchange with CSFB.[280] Said another way, "our law precludes the doctrine of unjust enrichment from being invoked to circumvent basic contract principles

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> he be compensated for his preparatory efforts in the event he and Gelfand ultimately did not come to terms on his participation in the deal. He elected not to do so.

Plaintiffs contend it is inappropriate to compare this case to *Stein*, because there, the plaintiff's activities which he claimed caused defendant's unjust enrichment were performed in preparation for the transaction, and here, Grunstein is performing as part of the transaction. *See* POB at 88-89. The Court disagrees. In both cases plaintiffs acted before a final accord was reached. The extent of their activities is only a matter of degree and does not change the Court's assessment that it is not unjust to permit Grunstein to elect to offer his services with the knowledge that he had not fully protected himself.

[278] Moreover, the Court has not found that Grunstein acted at Silva's insistence. They collaborated and, in doing so, Grunstein volunteered to push the transaction forward while trying to conclude a partnership.

[279] *See* Transmittal Certificate of Bruce E. Jameson in Supp. of Defs.' Mem. in Supp. of Their Mot. to Re-Open and Supplement the Trial Record, Ex. 8 at 16-18.

[280] *See id.*, Ex. 1. at 164.

recognizing that a person not a party to a contract cannot be held liable to it."[281] The contract between CFG and CSFB precludes Dwyer from claiming unjust enrichment for services performed pursuant to that relationship. The underwriting work was performed pursuant to a contractual obligation and the breach of that contract was in fact remedied in another jurisdiction.

Dwyer argues the enrichment asserted in this action is broader than the work CFG performed pursuant to its agreement with CSFB. He asserts that he used his credibility with Beverly and its CEO to secure the merger agreement, made it financeable, extended $10 million to cover the deposit, agreed to share losses up to $14 million, and committed to the HUD refinancing under the commitment letter in 2005 so that the CMBS could be sold to investors.[282]

However, Dwyer also acted officiously and in his own self-interest for those services he provided beyond those which CFG was contractually obligated to provide to CFSB. Grunstein and Dwyer began voluntarily working on the project before Silva became involved. Dwyer worked with CSFB on the earlier Mariner transaction, and he sought to advance his relationship with CSFB as well as to eventually earn fees from a HUD refinancing in the Beverly transaction. His work was thus a gratuity to build goodwill and position himself as a party with intimate

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[281] *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *6 (Del. Ch. May 16, 2007) (quotations and alterations omitted).

[282] Pls.' Br. in Opp'n to Defs.' Mot. to Re-Open and Supplement the Record at 29.

knowledge of the transaction in order to complete a HUD refinancing when, and if, such a need arose. As discussed in considering Dwyer's breach of contract claim above, when Silva or Ribar checked in about the progress of the underwriting, they did so for the primary purpose of obtaining the CMBS loans pursuant to their separate relationship with CSFB, rather than to obtain the HUD financing.

Silva has thus not been unjustly enriched by the actions of Grunstein and Dwyer because they acted officiously and provided their services in pursuit of their own self-interest. Either could have and indeed attempted to secure consideration for the work he provided. They elected to pursue the business relationship without adequately protecting their preparatory efforts, but by making such a choice they cannot later claim unjust enrichment for such voluntarily provided services.

E. *The Fraud Claim*

The Plaintiffs assert that Silva had no intention of keeping his promise to share in the economic benefits of the merger. They further assert that he made numerous promises with no intention to perform them.[283] Of course, the Defendants vigorously dispute these claims, arguing that Silva had no idea how the deal would transpire.

A claim for fraud generally requires that the plaintiff establish five elements:

[283] POB at 94.

> 1) a false representation, usually one of fact . . . ; 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance.[284]

There are various types of fraud. Promissory fraud is where a promise is made without the intention to perform.[285] "A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention."[286] However, an "unfulfilled promise of future performance" is insufficient.[287] The intention not to perform must exist at the time the promise was made. Where the "speaker intended when she made a promise to perform it, but

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[284] *Hauspie v. Stonington P'rs, Inc.*, 945 A.2d 584, 586 (Del. 2008) (quoting *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992)); *see also* Restatement (Second) of Torts § 525 (1977) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.")

[285] *See* Restatement (Second) of Torts §530 cmt. c (1977) ("Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such intention is fraudulent.").

[286] Restatement (Second) of Torts § 530 (1977). The Restatement further provides:

> The state of a man's mind is as much a fact as the state of his digestion. A false representation of the actor's own intention to do or not to do a particular thing is actionable if the statement is reasonably to be interpreted as expressing a firm intention and not merely as one of those "puffing" statements which are so frequent and so little regarded in the negotiations for a business transaction as to make it justifiable for the recipient to rely upon them. *Id.* at cmt. a.

[287] *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch. Dec. 23, 2008).

sometime later reneges, no action for fraud arises."[288] Another type of fraudulent misrepresentation is a "representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter."[289]

Given the state of affairs in early August 2005, when Silva initially promised to try to obtain the equity and, if and when, he later agreed to share fifty-fifty in the promote with Grunstein, one would have been hard pressed to have schemed the subsequent events that transpired. Yet, Silva, believing that a contract could not be formed absent a written agreement, was content to lead Grunstein and Dwyer along because he needed them—all the while believing that he had the option to renege or renegotiate the agreements or understandings that he had made with them. The question is whether this exploitation amounted to fraud.

The Court concludes as a factual matter that Silva likely intended to share at least some portion of the economic benefits in the beginning.[290] Throughout much of the merger process Silva and Grunstein worked together amicably to complete the transaction. Silva repeatedly mentioned Grunstein's name to PSP in various

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[288] *Id*.

[289] Restatement (Second) of Torts § 529 (1977). The Restatement further explains: "A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue." *Id*. at cmt. a; *see also Corporate Prop. Assocs. 14 Inc. v. CHR Hldg. Corp.*, 2008 WL 963048, at *6 (Del. Ch. Apr. 10, 2008).

[290] However, the sharing of benefits may well have been conditional, for example, based on Grunstein's also contributing as an equity source.

presentations. Silva's purported reason for not mentioning Grunstein to WSIB holds some water given the negative publicity involving Mariner. The WSIB presentations did refer to the Mariner team, with which Grunstein was publicly associated.[291]

Silva's decision to dump Grunstein was likely influenced by several factors that germinated in late 2005 or early 2006. Silva appears to have become dissatisfied with Grunstein's advice. They clearly had a difference of opinion over whether the Mariner model should be deployed. Silva also began to feel as if Grunstein was not carrying his weight.[292] As Silva moved away from some of Grunstein's ideas, he may have believed that he no longer needed him.

The Plaintiffs contend that Silva's fraud is highlighted on page one of the Defendants' pre-trial brief, which states: "Silva and Fillmore always insisted on getting 100 percent interest and control if they and their institutional investor provided the equity for the acquisition."[293] At trial, Silva refused to acknowledge the full import of that statement. He evasively claimed that having "100% interest" did not mean that he intended to keep everything for himself if he

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[291] In contrast to WSIB, PSP was likely familiar with Grunstein given its participation in the Mariner deal, and so mentioning his name may have been of no consequence.
[292] Dickerson Dep. (Oct. 9, 2008) at 60-61.
[293] Silva Tr. 71.

provided the equity.[294] Silva did admit that Grunstein (and Dwyer) never would have agreed to Silva's participation in the deal if he had insisted on 100 percent

[294] When asked at trial if he had always intended "to keep everything for yourself if you provided the equity[,]" Silva answered: "It's just not true. Your statement is not true." Silva Tr. 72. In an attempt to clarify Silva's testimony, the Court inquired: "I think he said it's not accurate, let's tie that down." Then the following exchanged occurred:

> Silva: Your Honor, I am not sure I know how to answer the question.
>
> Court: [After repeating the statement] . . . That's a fairly straightforward statement of fact I think. It's either true or it's not true . . . .
>
> Silva: I guess what I'm – I'm just a little confused here. It doesn't exclude other participation in the economics of the transaction. All it's saying is if they put up 100 percent of the equity, they want 100 percent of the control. That's all it says.
>
> Grunstein's counsel: The sentence refers to you, not the actual equity provider, WSIB. It says "Silva and Fillmore."
>
> Silva: Right. From the very beginning, if you look at the documents, if we were going to put up equity, we wanted control of the transaction.
>
> Grunstein's counsel: How about 100 percent ownership of the economic benefits and interest vis a vis to the exclusion of someone like Mr. Grunstein?
>
> Silva: That's not what it says.

It is difficult to believe that Silva did not understand that "100% interest" referred to 100 percent ownership, and thus, all the economic benefits from the transaction, as it applied to Grunstein's partnership interest. The more credible explanation for Silva's evasiveness is that he was purposely sidestepping the question. The Defendants, nevertheless, proffer an explanation: "It is true that Silva intended to achieve 100% interest and control and it is also true that once he received these benefits he could have then . . . shared them with Plaintiffs had there been an agreement to do so." DAB at 109 n.424.

ownership.[295] However, recognizing that others were acting out of economic motivation and taking advantage of that does not necessarily amount to fraud. Silva's behavior was far from admirable, but Grunstein also could have avoided his fate had he insisted on documenting his transaction with Silva with the same diligence and thoroughness that he applied to the acquisition of Beverly. For the reasons listed above, the Court is not persuaded that Silva intended to cut Grunstein out of the transaction completely.[296]

Grunstein has also failed to prove his assertion that Silva made a false misrepresentation to him that WSIB insisted that only Silva could manage Beverly.[297] Grunstein's statement is not corroborated by any other evidence. At trial, Steven Draper, a senior investment officer at WSIB, testified that he could not recall whether WSIB insisted that Beverly be managed only by Silva. Silva, of

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[295] Silva Tr. 74-75.

[296] Although Silva proposed a pledge agreement in which he would obtain a 100 percent interest in NASC/SBEV, he later proposed an agreement in which he would have obtained a 50 percent interest and complete control once a $53 million deposit was made. Further discussions between the parties showed that they were contemplating a fifty-fifty membership interest in a newly formed LLC. JX 186. However, Silva demonstrated unilateral control once he abandoned the Mariner model.

[297] Grunstein testified that he agreed to modify the alleged oral partnership agreement because of the Washington State issue. Grunstein Tr. 736. As Grunstein testified, Silva claimed that WSIB told him that only he could be involved in the management of Beverly. Grunstein Tr. 645-46. Moreover, it unlikely that Silva intended to induce Grunstein's acts to turn over control, given his testimony that the replacement of the original three acquisition entities with Pearl, PSC Sub, and Geary had nothing to do with eliminating Grunstein from the transaction.

course, denied ever making such a statement. Without more, the Court declines to find that Silva made this false statement.

As for Dwyer, the Court has already concluded that Silva tentatively promised to obtain HUD financing through CFG if Beverly (or FSI) decided to pursue HUD financing. Silva was still considering doing HUD financing as of May 2006, when he spoke with Dwyer about financing a portion of the Beverly portfolio through HUD. The Court also credits Silva's testimony that he developed concerns about HUD financing as the acquisition process progressed. That is consistent with the fact that Silva was inexperienced with HUD financing and could not have formed at the outset a definitive position as to whether to pursue that course. Thus, Silva never had the intention not to perform his promise when he made it. Dwyer's fraud claim also fails because, as discussed during consideration of Dwyer's promissory estoppel claim, his actions were not taken in justifiable reliance upon Silva's representations. Accordingly, Dwyer's fraud claim fails.

F. *The Release of the Pre-Paid Fee*

Dwyer also seeks to recover the "pre-paid fee" that Silva and Dwyer allegedly agreed to in consideration for Dwyer's having put up the $10 million deposit. The pre-paid fee, defined as the principal balance of the loaned initial deposit, was set forth in the CFG commitment letter, which Silva never signed.

The Court has found that Dwyer and Silva did not form an oral contract based on the terms of the CFG commitment letter. The Court did not specifically address whether an independent oral agreement had been reached as to the pre-paid fee. Even assuming that an oral contract had been formed or that Dwyer is entitled to recover the pre-paid fee on equitable grounds, the Court concludes that Dwyer released any claim to the pre-paid fee when he signed the Release on December 21, 2005.

In a prior opinion, the Court has determined that the deposit loan "is unambiguously encompassed by the language of the Release."[298] The Release provides in relevant part:

> By your signature below, you agree on behalf of yourself, [and] Capital Funding Group, Inc. . . . (the "Release Parties"), that upon Fillmore's making of the Payment, each of the Releasing Parties releases and discharges North American Senior Care, Inc., NASC Acquisition Corp., Pearl Senior Care, Inc., PSC Sub, Inc., SBEV Property Holdings LLC, Geary Property Holdings, LLC, Fillmore, [and] Fillmore Strategic Investors, L.L.C., . . . (the Released Parties) for any and all claims, demands, proceedings, causes and actions and liabilities whatsoever, whether known or unknown, which any Releasing Party has or may have against the Released Parties arising out of or relating to the [Deposit] Loan.[299]

The Court declined to dismiss the Plaintiffs' claim for the pre-paid fee because of the possibility that they might be able to challenge it based on mistake or fraud. The Plaintiffs have invoked mistake.

[298] *Grunstein II*, 2011 WL 378782, at *14.
[299] JX 538.

To establish mutual or unilateral mistake, the Court had held that Dwyer/CFG would have to prove—by clear and convincing evidence—that:

> (1) they did not believe that the Release extinguished their right to the Pre-Paid Fee;
>
> (2) either the Defendants held that same belief (mutual mistake) or the Defendants knew that Dwyer/CFG held that belief and the Defendants held a different belief which they did not disclose (unilateral mistake); and
>
> (3) the Defendants and Dwyer/CFG specifically agreed that the Release did not extinguish the right to the Pre-Paid Fee.[300]

For the following reasons, the Plaintiffs have not proved either mutual or unilateral mistake by clear and convincing evidence.

On December 19, CFG's counsel, Fenigstein, and Silva discussed paying off the $10 million loan deposit with interest.[301] During that conversation, Silva asked for a "simple acknowledgement that when he paid the loan was repaid."[302] The next day Fenigstein emailed Silva an acknowledgement: "This email will confirm that the payment of the principal and interest amounts set forth in the attached spreadsheet will comprise payment in full to Capital Funding Group, Inc. of the amounts it has advanced to NASC."[303] Despite receiving this acknowledgement, a Dechert attorney, on behalf of Silva, emailed Fenigstein a letter agreement that

[300] *Grunstein v. Silva*, 2012 WL 3870529, at *4 (Del. Ch. Aug. 24, 2012) ("*Grunstein III*").
[301] JX 527; JX 529; JX 544.
[302] Fenigstein Tr. 1428.
[303] JX 1058.

contained a general release.[304] Because the release was unacceptable, Fenigstein modified the language of the draft to include only claims related to the deposit loan. Dechert, on behalf of Silva, accepted the proposed changes, and the Release was thereafter executed.

At trial, Fenigstein testified that he understood the Release was not merely an acknowledgement of the loan repayment.[305] He also testified credibly that he had no intention to include the pre-paid fee and was not aware of its inclusion in the CFG commitment letter.[306] For his part, Dwyer understood the Release to be merely a form of acknowledgement that the loan was repaid.[307] Thus, although Fenigstein (and by extension Dwyer) understood the Release to include claims related to the loan deposit, they did not intend to release the pre-paid fee, which was not even due at the time.[308]

However, the Plaintiffs have not set forth clear and convincing evidence that Silva held the same belief or that he knew that Dwyer held a different belief. In his deposition, Silva testified: "I'm aware that Mr. Dwyer signed an acknowledgement. It was in the form of a release. It could have been for the

[304] JX 535. The general release would have released all claims "arising out of any matter whatsoever."
[305] Fenigstein Tr. 1433.
[306] *Id*. at 1434-35.
[307] Dwyer Tr. 1029-30.
[308] The pre-paid fee was due upon the closing of the merger.

repayment of the loan, which was not 10 million."[309] When asked whose idea it was to propose the release, Silva testified: "My guess would be it would be me."[310] At trial, Silva recalled instructing Dechert to obtain a general release for repayment of the loan deposit.[311] Moreover, Silva's attorney testified that he intended the Release to include the pre-paid fee, but could not recall whether he was instructed to do so by Silva.[312] Thus, the evidence tends to show that Silva intended to obtain more than a mere acknowledgement that the loan was repaid.

Nor have the Plaintiffs proved that the Defendants knew that Dwyer held the belief that the Release did not apply to the pre-paid fee. By its plain terms, the Release covered the pre-paid fee. Nor is there any evidence that Fenigstein or Dwyer ever communicated their intention to Silva (or Dechert) that the Release did not cover the pre-paid fee.[313] Without more, the Plaintiffs have failed to establish a unilateral or mutual mistake by clear and convincing evidence. Accordingly, the Release extinguishes any claim that the Plaintiffs have to the pre-paid fee.

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[309] Silva Tr. 228 (quoting Silva's deposition testimony). In his deposition, Silva also testified that he had a discussion with Dwyer about the Release, but that it concerned only the repayment of the loan.
[310] Silva Dep. (Mar. 18, 2008) at 344-45.
[311] Silva Tr. 226-27, 366-71.
[312] Escher Dep. (Apr. 2, 2012) at 17-22. This testimony is relevant to Silva's state of mind. *See Roberts v. N. Ins. Co. of N.Y.*, 2009 WL 1482231, at *4 (Del. Super. Ct. May 6, 2009) ("Generally, information received by an attorney, within the scope of counsel's employment, is imputed to the client."); *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, 2005) ("Delaware law states the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal.").
[313] Fenigstein Tr. 1487.

G. *Res Judicata*[314]

The Court has denied two separate motions for summary judgment by the Defendants asserting that Grunstein's claims are barred by res judicata.[315] The Defendants now contend that the Court, unmoored from the summary judgment standard, should find that the preponderance of the evidence shows that Grunstein was in privity with MetCap and NASC. They further assert that Grunstein could and should have joined the *MetCap* litigation to assert his partnership claims.

Res judicata operates to bar a claim if, in an earlier action:

> (1) The original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.[316]

There is no dispute that the *MetCap* court had jurisdiction, the issues in the prior action were decided adversely to MetCap, and the decree in the prior action was final. Only the second and third elements are at issue.

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[314] In light of its other conclusions, the Court need not resolve this issue. It does so, however, for completeness.

[315] *See Grunstein II*, 2011 WL 378782, at *7-8; *Grunstein III*, 2012 WL 3870529, at *1-4.

[316] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 192 (Del. 2009) (quoting *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006)).

Delaware adheres to the transactional approach to res judicata.[317] Claims arise from the same transaction if they are "derive[d] from a common nucleus of operative facts."[318] Even if the "same transaction formed the basis for both the present and former suits," the Defendants must show that Grunstein "neglected or failed to assert claims which in fairness should have been asserted in the first action."[319]

In its simplest form, the test for privity is whether there is a close or significant relationship between MetCap and Grunstein or NASC and Grunstein.[320] Important considerations include whether their interests were aligned and whether

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[317] Under the modern transactional approach to res judicata, the doctrine may be "invoked to bar litigation between the same parties if the claims in the later litigation arose from the same transaction that formed the basis of the prior adjudication." *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980).

[318] *LaPoint*, 970 A.2d at 193-94 (internal quotation marks omitted).

[319] *Id*. (internal quotation marks omitted). The Defendants argue that there is no independent "fairness" inquiry under Delaware's res judicata law except to the extent that it was impossible for the plaintiff in the second action to assert the claims in the first action, such as when the claims were not ripe (*see LaPoint*, 970 A.2d at 193-97) or when the court in the first action lacked jurisdiction over the claims in the second action (*Maldonado*, 417 A.2d at 383-84). DAB at 155-57. Except in these rare instances, they contend that res judicata operates as "an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party, or his privies." *Id*. at 155 n.647 (quoting *Maldonado*, 417 A.2d at 381); *see Hendry v. Hendry*, 2006 WL 1565254, at *8 (Del. Ch. May 26, 2006) ("Res judicata constitutes an absolute bar on all claims that were litigated or which could have been litigated in the earlier proceeding."). The Court disagrees. The fairness test is not so limited. If the fairness inquiry only involved whether the claims could have been brought (*i.e.*, whether it was possible), the Delaware Supreme Court would not have repeatedly expressed the fairness test as whether the claims, in fairness, *should have* been brought. *See, e.g.*, *LaPoint*, 970 A.2d at 193; *Kossol v. Ashton Condo. Ass'n, Inc.*, 637 A.2d 827 (Del. 1994) (analyzing whether the plaintiff should have brought its claims in the first action).

[320] *Grunstein II*, 2011 WL 378782, at *8.

the *MetCap* judgment "may justly be conclusive" on Grunstein, who was not a party to that action.[321] The Court has noted that the "substantial identity of parties' interests has been held to place two superficially separate parties in privity."[322] In a prior letter opinion, the Court ruled that "MetCap Holding's tax returns strongly suggest that there is a close or significant relationship between Grunstein and MetCap[,]" but nonetheless denied summary judgment because there were material facts in dispute.[323]

MetCap Holding is the sole owner of MetCap Securities, which was formed by Grunstein to provide investment advisory services to his clients and clients of his law firm.[324] When asked in his 2008 deposition about who determined his compensation in the IHS transaction, Forman testified that he and Grunstein "reached a consensual agreement that between the two of us, we control MetCap."[325] With respect to the Beverly transaction, Forman testified that "generally we work together on a consensual basis."[326] Grunstein negotiated the

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[321] *Id*.

[322] *Orloff v. Shulman*, 2005 WL 3272355, at *9 (Del. Ch. Nov. 23, 2005).

[323] *Grunstein III*, 2012 WL 3870529, at *2. Grunstein owns the largest percentage of MetCap Holding, roughly 40 percent, and together with Forman, owns approximately 70 percent.

[324] Levinson Dep. (Mar. 27, 2008) at 46.

[325] Forman Dep. (Mar. 25, 2008) at 81.

[326] *Id.* at 60.

MetCap advisory fee ($20 million) and performed some work on behalf of MetCap in the Beverly transaction.[327]

Nonetheless, Grunstein has never been an officer, manager, or director of MetCap.[328] Grunstein testified at trial that Forman operated and controlled MetCap.[329] In his 2012 deposition, Forman testified: "As it relates to MetCap Securities, only I made the decisions."[330] MetCap Holding's operating agreement prohibits Grunstein from having operational control of MetCap.[331] At trial, Grunstein contradicted his deposition testimony when he testified that he did not work for MetCap on Beverly.[332]

With respect to NASC, there is similarly no documentary evidence that Grunstein was ever an owner, officer, or director of NASC, which was created to be the acquiring entity in the Beverly transaction.[333] At least initially, Goldsmith

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[327] Grunstein Dep. (Feb. 25, 2008) at 62, 77-79 ("Typically when I was calling about financing or I was calling investors, I was acting on behalf of MetCap.").
[328] Grunstein Tr. 549-50.
[329] *Id.* at 553.
[330] Forman Dep. (Mar. 6, 2012) at 30-31.
[331] JX 3. At trial, counsel for Silva tried to impeach Grunstein by showing an updated operating agreement of MetCap Holding from 2008 that no longer had the provision stating that Grunstein "shall NOT have any participation in operating decisions of the Company relating to its Broker Dealer subsidiary and shall NOT be involved in the day to day conduct of [that business]." *Id.* at § 8(e)(ii). Even if this were true, however, the earlier operating agreement (dated 2002) was in effect during the relevant time period.
[332] Grunstein Tr. 802. Grunstein further testified that he did not write down his time for work performed on behalf of MetCap. *Id.* at 803. Levinson and Goldsmith both testified that only Forman worked for MetCap in the Beverly acquisition. Levinson Dep. (Mar. 27, 2008) at 87; Goldsmith Dep. (Mar. 26, 2008) at 101-02.
[333] The same applies to NASC Acquisition.

was the nominal shareholder of NASC or a "placeholder" until other shareholders were selected. Goldsmith testified that he had no control over NASC and merely complied with the requests of other Troutman partners, particularly Levinson.[334] Goldsmith further testified that he had no participation in the *MetCap* lawsuit other than his deposition testimony[335] and a discussion with a lawyer representing Grunstein, who represented MetCap and NASC in the *MetCap* litigation and who represents Grunstein in this case.[336]

There is much evidence that Grunstein had a close or significant relationship with MetCap and, to a lesser extent, NASC. His interest was aligned with MetCap because he almost certainly would have received, through MetCap Holding, a substantial portion of the damages if MetCap had been successful in its litigation. Although he lacked formal control over MetCap, Grunstein still worked on its behalf, exercised some control over it, and received an indirect financial benefit from it. As for NASC, it is difficult to believe that Grunstein, who maintained control over the Beverly transaction until the Third Amendment, did not have actual control over which shareholders would eventually be selected. But even if there is sufficient evidence to establish privity between Grunstein and MetCap or Grunstein and NASC, that conclusion does not end the inquiry.

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[334] Goldsmith Dep. (Mar. 7, 2012) at 49-50.
[335] *Id.* at 47.
[336] *Id.* at 43-47. Goldsmith also testified that NASC's decision to bring suit was made by either Grunstein or Forman. *Id.*

If Grunstein and MetCap are in privity, and if the same transaction formed the basis for both the present and former suits,[337] the Defendants must show that the Plaintiffs "neglected or failed to assert claims which in fairness should have been asserted in the first action."[338] The Court has observed that "Grunstein's claims for a partnership or carried interest in the Beverly Acquisition differ dramatically, in terms of both theory and the relief sought, from MetCap's claims for a $20 million fee in the *MetCap* litigation."[339] The Defendants argue, however, that the "asserted MetCap fee and alleged partnership interest are . . . part and parcel of Grunstein's claim that he should be compensated for his participation in the Beverly acquisition."[340]

Although this case and *MetCap* are related in a broad sense, the two actions are very different. The *MetCap* litigation involved various claims to recover

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[337] The Court has previously indicated that "the present dispute arose out of the same transaction that was involved in the MetCap litigation [*i.e.*, the Beverly Acquisition]." *Grunstein v. Silva*, 2011 WL 808879, at *1 (Del. Ch. Mar. 2, 2011) ("Thus, if the Court had determined that the record before it indicated, as a matter of law, that Grunstein is in 'privity' with MetCap and that his individual claims, in fairness, should have been asserted in the earlier action, the Defendants would have been entitled, under the doctrine of *res judicata*, to summary judgment on all of Grunstein's claims in this action.").

[338] *LaPoint*, 970 A.2d at 193-94 (internal quotation marks omitted). The Court need not address whether there is an independent standing requirement under Delaware's res judicata doctrine.

[339] *Grunstein I*, 2011 WL 378782, at *8. Indeed, the Court later noted: "[T]he primary theory of recovery advanced in the MetCap Litigation . . . and the primary theory of recovery advanced here . . . are so different that it is not clear that the Court will be able to find that Grunstein 'neglected or failed to assert claims which in fairness should have been asserted in the first action.'" *Grunstein III*, 2012 WL 3870529, at *4 n.26.

[340] DAB at 142.

MetCap's investment advisory fee. During the negotiations over the Third Amendment, Fillmore's attorney asked Dickerson to delete the parenthetical in Section 5.10 of the merger agreement that referred to the MetCap fee.[341] By this time, in the early hours of the morning, Grunstein and Goldsmith had left the office believing that the negotiations had ended. Nonetheless, Dickerson agreed to delete the provision, which effectively removed the contractual obligation to pay the MetCap advisory fee.[342] Importantly, the relief sought in *MetCap* was based on work performed by Forman. In stark contrast, this case is much broader, encompassing Grunstein's efforts over half a year in pursuing the Beverly acquisition, including the possible formation of a partnership with Silva. In addition, the purported contractual and legal bases for relief asserted in both actions differ considerably. Indeed, Grunstein's primary claim in this action is for breach of an oral partnership.

Even in circumstances where there is a close legal relationship, that "by itself does not justify imposing preclusion on one of them on the basis of a judgment affecting the other."[343] As the Court observed, "preclusion can properly be imposed when the claimant's conduct induces the opposing party reasonably to

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[341] *MetCap Secs. LLC*, 2009 WL 513756, at *2.
[342] *Id*.
[343] Restatement (Second) of Judgments § 62 cmt. c (1982).

suppose that the litigation will firmly stabilize the latter's legal obligations."[344] The Defendants' problem is that Silva knew before and after the Beverly transaction was completed that Grunstein expected compensation as a partner to the Beverly transaction and indirectly through his ownership of MetCap Holding.

Grunstein's letters of March 6, 2006 and March 20, 2006 to Silva establish that Silva could not have reasonably believed that the *MetCap* litigation would have resolved Grunstein's partnership claims.[345] While "reliance by the opposing party could be justifiable in the absence of an explicit admonition by the non-party that the latter might pursue his claim in due course,"[346] Grunstein's March 2006 letters leave little doubt that Silva received an "explicit admonition" that Grunstein might pursue his personal claims. The Defendants assert that fairness dictates a finding of claim preclusion because Grunstein's decision to pursue the *MetCap* litigation first was tactical gamesmanship—to avoid "advancing the theory under which Silva would share in half of the claimed fee for MetCap."[347] But that assertion is speculation, unsupported by any evidence.[348] Grunstein's stated reason

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[344] *Aveta, Inc. v. Cavallieri*, 23 A.3d 157, 180 (Del. Ch. 2010) (emphasis omitted) (quoting *Kohls v. Kenetech Corp.*, 791 A.2d 763, 769 (Del. Ch. 2000)); *see also* Restatement (Second) of Judgments § 62 cmt. c (1982).
[345] *See* JX 641; JX 613.
[346] Restatement (Second) of Judgments § 62 cmt. b (1982).
[347] DAB at 156.
[348] Even if Grunstein controlled the *MetCap* litigation, as Defendants assert, he arguably would only be estopped from litigating the claims asserted in MetCap because, under some authority, "the control of litigation exception does not apply to claim preclusion but only to issue preclusion or collateral estoppel." *Gillig v. Nike, Inc.*, 602 F.3d 1354, 1362

for delaying this litigation was to enlist Dwyer, who at the time of the *MetCap* litigation was apparently not ready to join Grunstein in this action. That may or may not be true,[349] but the significant differences between the *MetCap* litigation and Grunstein's partnership claim asserted in this action and Silva's knowledge of those claims negates the conclusion that Grunstein, in fairness, should have brought those actions in *MetCap*.[350] Accordingly, res judicata does not operate to bar Grunstein's partnership claims.

IV. CONCLUSION

Because Plaintiffs have not met their burden of proof, the Court need not consider the parties' arguments about the appropriate damages to award. For the reasons stated above, Grunstein and Dwyer have failed to prove their claims against Defendants for a partnership interest, breach of contract, promissory estoppel, unjust enrichment, fraud, or mistake regarding the pre-paid fee release.

Judgment will be entered for Defendants.

(Fed Cir. 2010) (internal quotation marks omitted); *see* Restatement (Second) of Judgments § 59(3) (1982).

[349] The Defendants, citing JX 671, contend that Dwyer was ready to sue before the MetCap action was filed. In a string of emails dated late June and early July 2006, Dwyer wrote: "I am going to sue Ron" and "I will probably have to join Len and file suit against that Bastard!" This evidence does not refute Grunstein's contention. The MetCap action was filed in May 2006. Dwyer was still negotiating with Silva over "Fillmore's obligation" to CFG in the Beverly transaction and the possibility of CFG doing the HUD financing as of May 2006. JX 664.

[350] Defendants' post-trial submission of *Radovich v. Y.A. Global Investments, L.P.*, 2013 WL 4012042 (D.N.J. Aug. 5, 2013), does not alter the Court's conclusion that the claims at issue on these facts are not sufficiently similar to warrant precluding them.