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Mr. Alexander Tsipouras
Mrs. Elizabeth Tsipouras
595 Gravesend Road
Smyrna, DE 19977

Re: Szambelak v. Tsipouras
C.A. No. 936-VCN
Date Submitted: August 2, 2007

Dear Mr. Malmberg, Mr. Tsipouras, and Mrs. Tsipouras:

I. INTRODUCTION

This is an action for specific performance of a real estate sale contract. Petitioners Stanley and Susan Szambelak (the "Szambelaks") claim to have a valid, binding contract to purchase a 100 acre farm located at 595 Gravesend Road, Smyrna, Kent County, Delaware (the "Tsipouras Farm" or the "Property"), owned by Respondents Alexander and Elizabeth Tsipouras (the "Tsipourases"). To date,

the Tsipourases have refused to convey the Property. The Tsipourases argue that the parties never entered into a valid contract because there was no meeting of the minds on the amount of the deposit required under the purported Agreement of Sale and, in any event, the Szambelaks cancelled the transaction, thereby releasing them from any obligation to convey the Property.

In this post-trial letter opinion, the Court finds that the parties did enter into a valid, binding contract for the sale of the Tsipouras Farm in October 2004 and that the Szambelaks were ready, willing, and able to perform. Although an order of specific performance is an extraordinary remedy, the balance of the equities in this case favors such an order. Accordingly, the Court will enter judgment in favor of the Szambelaks and order the Tsipourases to convey the Property in accordance with the parties' Agreement of Sale.[1]

II. FACTUAL BACKGROUND

In the summer of 2004, the Szambelaks, residents of New Jersey, began searching for property in Delaware where they could train and eventually breed their horses. The Szambelaks owned nine horses at the time which they boarded, trained, and raced exclusively in Delaware. As out-of-state owners, however, the

[1] Plaintiffs' Exhibit ("PX") 1.

Szambelaks' participation in the Delaware horse racing circuit was limited. Thus, by becoming "Delaware owners," the Szambelaks would be entitled to enter their horses in more races and increase their opportunities to earn purse money.[2] In addition, the Szambelaks hoped that owning their own facility would reduce the operating costs for their horse racing venture and afford them the ground needed to breed, raise, and maintain their horses.[3]

During the same timeframe, a series of misfortunes had befallen the Tsipourases. Mr. Tsipouras had suffered a heart attack, and their business in Wilmington, Delaware was failing.[4] With Mr. Tsipouras convalescing, the Property was becoming too much for the Tsipourases to handle. In addition, they had fallen behind in their repayment of a business loan for which their farm served as collateral, and consequently, they were facing foreclosure and a possible bankruptcy. The Tsipourases had listed the Property for sale with a broker on several occasions, without success. Thus, with their financial condition growing more dire by the day, the Tsipourases were almost desperate to sell the Property.

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[2] Transcript of Trial ("Tr.") 14.
[3] *Id.*
[4] Tr. 69.

Enter Harvey Folk. Mr. Folk is something of a "Jack of all trades" in the horse business[5] (and, apparently, an amateur facilitator of land transactions) and a mutual business acquaintance of both the Szambelaks and the Tsipourases. In June 2004, Mr. Folk was at the Tsipouras Farm working on their horses when Mrs. Tsipouras related to him some of the details of their impending financial crisis. Mrs. Tsipouras lamented that the cost and burden of operating the Property had become too much for her and Mr. Tsipouras to handle, and she stated that she was thinking of selling all or part of the Property to pay their debts. Mr. Folk expressed an interest in purchasing a portion of the Tsipourases' land, and they inspected a twenty acre tract that Mrs. Tsipouras offered to sell to him.[6] Shortly thereafter, Mr. Folk and his wife, Patricia, entered into a contract with the Tsipourases to purchase a twenty acre parcel that would be subdivided from the Tsipouras Farm.[7]

During latter part of the summer of 2004,[8] the Szambelaks mentioned to Mr. Folk their interest in purchasing a horse facility in Delaware. According to Mr.

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[5] Tr. 15.
[6] Tr. 68.
[7] Defendants' Exhibit ("DX") 8.
[8] The parties, understandably, could not be certain in their trial testimony as to the precise dates when events relating to this transaction, which is now several years old, occurred. The timeline reported in this letter opinion is the Court's best approximation of the sequence of events, given all the trial testimony. Specific dates are noted whenever possible.

Szambelak, he thought Mr. Folk might be a good resource for locating a suitable property because he knew so many people in the Delaware horse industry.[9] As luck would have it for the Szambelaks, Mr. Folk knew of just the property that might suit their needs—the Tsipouras Farm, which included stables, a racetrack where the Szambelaks could exercise and train their horses, and plenty of space to allow the Szambelaks to breed and maintain their horses.[10]

In the beginning of October 2004, without contacting the Tsipourases to seek their permission, Mr. Folk drove the Szambelaks to the Tsipouras Farm to have a look around. Mr. Folk told the Szambelaks that the Property totaled 100 acres, but that he and his wife already had a contract to purchase a twenty acre parcel from the Tsipourases. The Szambelaks indicated to Mr. Folk that they were interested in purchasing the entire farm, including the twenty acres which the Tsipourases had promised to the Folks.[11] Thus, on October 11, 2004, Mr. Folk

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[9] Tr. 16.

[10] It is not clear from the record whether the initial discussions between Mr. Folk and the Szambelaks concerned only Mr. Folk's twenty acre parcel to be subdivided out of the Tsipouras Farm, a possible sale of the remaining eighty acres of the Property, or both. In any event, the Szambelaks ultimately offered to purchase the entire 100 acre property from the Tsipourases.

[11] Mr. Folk apparently made an agreement with the Szambelaks whereby he would not pursue his contract to purchase a twenty acre parcel of land from the Tsipourases so that the Szambelaks could purchase the entire 100 acre property. Given the informal manner in which the parties dealt with each other in this case, however, the precise nature of that arrangement is not clear. According to the terms of the contract between the Folks and the Tsipourases, their transaction

contacted the Tsipourases to ascertain if they would be willing to sell the entire farm to the Szambelaks. The Tsipourases were interested in such a transaction, and Mrs. Tsipouras offered to sell the Property for $450,000.[12] Later that same evening, the Szambelaks accepted the Tsipourases' offer, and Mr. Folk contacted the Tsipourases to let them know.

Mr. Folk then asked his wife, a licensed Delaware real estate agent, to assist in preparing a contract on the Property for the Szambelaks. Mrs. Folk chose a form real estate sale contract from her real estate agency and she completed certain sections of the contract with the basic information about the transaction, *e.g.*, the $450,000 purchase price, a $5,000 deposit, a closing date of December 17, 2004, the description of the property, and the tax parcel number.[13] Mrs. Folk then faxed the contract to the Szambelaks for their review. The Szambelaks had decided to

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for the twenty acre parcel was scheduled to close on or before September 15, 2004, almost a month before the Szambelaks' offer for the entire 100 acre tract. DX 8. For reasons that were not explained at trial, that transaction was not completed prior to the stated closing date. Mr. Folk testified that he did not have an interest in the Szambelak-Tsipouras transaction as such, but that he would receive a $25,000 payment from the Szambelaks to release his (perhaps unenforceable) interest in the twenty acre parcel upon the Szambelaks' closing their deal to purchase the entire 100 acre farm. Tr. 199-200.

[12] Tr. 69.

[13] Mrs. Folk was not involved in Szambelak-Tsipouras transaction in her professional capacity, notwithstanding the fact that a preprinted Patterson Schwartz-New Castle County Board of Realtors form was used for the Agreement of Sale. Mrs. Folk testified that she invested very little time into this transaction, *see generally* Tr. 150-59, and assisted with the paperwork only at the request of her husband, Tr. 152.

make an all-cash acquisition of the property; in light of the Tsipourases' financial problems, they added a handwritten term emphasizing the requirement that the Tsipourases convey clear, marketable title, free from any liens or other encumbrances.[14] The Szambelaks also added a term requiring the Tsipourases to remove all of their personal belongings from the Property before the closing because the farm was in such a state of disarray.[15] They initialed their changes to the contract, signed it, and faxed it back to Mrs. Folk.[16]

The next day, October 12, 2004, Mrs. Folk went to the Tsipourases' store in Wilmington to have them sign the contract. Mrs. Tsipouras reviewed the contract, but Mrs. Folk did not explain the terms to her because she was not acting in any professional capacity in the transaction.[17] The only change Mrs. Tsipouras made to the Szambelaks' contract was to increase the amount of the down payment from $5,000 to $10,000.[18] In addition, Mrs. Tsipouras completed a seller disclosure form concerning the condition of the Property, essentially stating that it was being

[14] PX 1. *See also* Tr. 40-41. The form contract provided by Mrs. Folk also included a standard preprinted term requiring conveyance of fee simple title, free and clear of all liens and other encumbrances.
[15] PX 1.
[16] Tr. 18.
[17] Tr. 157.
[18] PX 1. *See also* Tr. 71.

sold in "as-is" condition.[19] Mrs. Tsipouras initialed her change to the Szambelaks' contract, signed it, and had Mr. Tsipouras do the same. She then returned the fully executed contract to Mrs. Folk. Mrs. Folk then gave the Agreement of Sale to her husband[20] who in turn gave it to the Szambelaks that same day, October 12, 2004.[21]

The Szambelaks immediately took the Agreement of Sale to their attorney in Delaware.[22] They did not object to Mrs. Tsipouras' request for a $10,000 deposit, and they gave their attorney a check for that amount to hold in his escrow account pending final settlement in December 2004.[23] According to the Szambelaks, they then returned a copy of the deposit check and the Agreement of Sale to Mr. Folk to give to the Tsipourases.[24] The Tsipourases claim never to have received those documents from Mr. Folk, and, thus, it is not clear whether they ever knew that the $10,000 deposit had been delivered to the Szambelaks' attorney.[25]

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[19] *Id.*
[20] Tr. 153.
[21] Tr. 20-22.
[22] Tr. 21.
[23] Tr. 21. *See also* PX 3. The Szambelaks' attorney's records carry an "item date" of October 18, 2004. For purposes of this letter opinion, the precise date of delivery of the escrow check is immaterial.
[24] Tr. 21.
[25] The form real estate sale contract utilized by the parties recites that the deposit is to be held by the listing broker. *See* PX 1. However, there were no real estate brokers involved in this transaction, and the Tsipourases did not have an attorney representing them in the sale. Thus, under the circumstances, the Szambelaks reasonably believed that their attorney, who maintains

After delivering the Agreement of Sale and deposit check to their attorney, the Szambelaks again visited the Tsipouras Farm with Mr. Folk late in the afternoon of October 12.[26] Over the years, the Tsipouras Farm had deteriorated, and the Szambelaks were anxious to reestablish the racetrack and refurbish it before winter set in. The necessary work included cutting down the six-foot grass and weeds that had overgrown the track, raking the track bed to remove the roots, and resurfacing the track with new material.[27] Accordingly, they asked Mr. Folk to contact the Tsipourases to seek their permission to begin repair of the racetrack.[28] The Tsipourases acceded to the Szambelaks' request, and the Szambelaks asked Mr. Folk to arrange for work to begin on the racetrack immediately.[29] In addition, Mr. Folk offered to facilitate the Szambelaks' acquisition of a farm tractor so they could subsequently maintain the property themselves, and the Szambelaks agreed.[30]

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an escrow account for such funds, would the best person to hold the $10,000 deposit pending final settlement. *See generally* Tr. 42-52.

[26] Tr. 22.
[27] Tr. 23-25.
[28] Tr. 23.
[29] *Id.*
[30] Tr. 25-26.

Over the course of the next several weeks, in addition to the Szambelaks' improvement projects, Mrs. Tsipouras hired a company to begin removing some of the Tsipourases' personal items from the Property in anticipation of the December settlement.[31] Evidently, this frenzy of activity at the Property was disturbing and upsetting to Mrs. Tsipouras' ailing father who lived with them.[32] Consequently, she asked Mr. Folk to tell the Szambelaks not to enter the Property again without her express permission until closing. The Szambelaks honored that request and abandoned their projects on the Tsipouras Farm pending the anticipated closing in December.[33]

At some point in late October or early November 2004, the Tsipourases began to grow anxious about the Szambelaks' commitment to purchasing the Property because they had not yet received the $10,000 deposit. The Tsipourases, however, never contacted the Szambelaks directly regarding their concerns. Instead, they made numerous phone calls to Mr. Folk over the course of several days and asked him to find out the status of the sale.[34] Eventually, Mr. Folk reported to the Tsipourases that the Szambelaks were having trouble pulling the

[31] Tr. 78.
[32] Tr. 78-79.
[33] Tr. 26-27.
[34] Tr. 80; 192-93.

money together to complete the purchase of the farm and he speculated that they would not be proceeding with the transaction.[35] By this time, Mrs. Tsipouras also had second thoughts about selling the Property; thus, she was content to treat Mr. Folk's message as a release from the Agreement of Sale.[36] Also by this time, the Tsipourases' financial problems had reached a crisis. One of their mortgagees commenced foreclosure proceedings on the Property, and they were anxious for a solution to their financial problems. Mr. Folk offered to revive his contract to purchase a subdivided twenty acre parcel, and the Tsipourases agreed.[37] Accordingly, Mr. Folk and Mrs. Tsipouras embarked on the administrative process to subdivide the Property.

The day after Mrs. Tsipouras and Mr. Folk agreed to revive their deal to subdivide the Property, Mrs. Tsipouras received a telephone call from one of the real estate agents with whom she had previously listed the Property for sale.[38] The agent said that he had a buyer who was willing to make an offer for the Property.[39] The Tsipourases were frustrated that their deal (as they believed) with the

[35] Tr. 80-81; 193-94.
[36] Tr. 81.
[37] Tr. 81-82.
[38] Tr. 86.
[39] *Id.*

Szambelaks had fallen through, and Mrs. Tsipouras was content with her arrangement with Mr. Folk to subdivide the Property because it provided a solution to their financial problems. Thus, she declined the overture from the real estate agent.[40]

Mrs. Tsipouras and Mr. Folk were scheduled to meet with Kent County officials on November 18, 2004, to obtain a necessary variance from certain zoning requirements in order to move forward with their plan to subdivide the Tsipouras Farm.[41] Just before the date of that meeting, however, one of the Tsipourases' horses was mysteriously killed in a ghastly manner.[42] Mrs. Tsipouras was terrified by that incident, and she decided that she simply wanted to sell the Property once and for all.[43] She discussed her concerns with Mr. Folk, and he agreed that the Tsipourases should pursue a sale of the entire property, instead of moving forward with the subdivision plan.[44] Mrs. Tsipouras contacted her real estate agent and advised him that she would, after all, be willing to consider a sale to the agent's

[40] *Id.*
[41] *See* DX 12.
[42] Tr. 83-84 (the horse was decapitated).
[43] *See generally* Tr. 83-87.
[44] Tr. 87.

buyer for $550,000.[45] Shortly thereafter, on December 2, 2004, the Tsipourases entered into a second contract on the Property with a new buyer for $550,000.[46]

Meanwhile, the Szambelaks were moving forward with the purchase of the Tsipouras Farm and the scheduled December 17, 2004 closing. On December 15, their attorney faxed a letter to the Tsipourases' longtime attorney confirming the details for the scheduled settlement.[47] The Tsipourases' attorney knew nothing about the sale of the Tsipouras Farm or the scheduled closing two days later, and he immediately contacted the Tsipourases. The Tsipourases, apparently, were equally surprised to learn that the Szambelaks intended to settle on the Property.[48] They advised their attorney that they did not believe the sale was going forward because they had never received a deposit from the Szambelaks and because Mr. Folk had stated that the Szambelaks did not have the funds to complete the sale. Accordingly, the Tsipourases' attorney contacted the Szambelaks' attorney to advise him that the Tsipourases did not believe they had a valid contract with the

[45] Tr. 89.
[46] *Id.* *See also* PX 10; DX 24 (letters confirming that a second offer had been made for the Tsipouras Farm on December 2, 2004).
[47] PX 8. It is not clear how the Szambelaks' attorney knew to contact the Tsipourases' attorney because there is no evidence that the Tsipourases ever requested their attorney to become involved in this transaction.
[48] Tr. 89-90.

Szambelaks and that they would not attend the scheduled closing.[49] The Szambelaks nonetheless wired $350,000 to their attorney's escrow account on December 16,[50] and they arrived at his office on December 17 with a certified check in the amount of $100,000 to close on the sale of the Property.[51] The Tsipourases did not appear for the scheduled closing. The Szambelaks commenced this action for specific performance of the Agreement of Sale three days later.

III. ANALYSIS

Specific performance of a contract is an equitable remedy firmly committed to the sound discretion of the Court.[52] In order to be entitled to such a remedy, the party seeking specific performance of a contract must establish, by clear and convincing evidence, (1) that a valid and specifically enforceable contract exists between the parties; (2) that the party seeking specific performance was ready, willing, and able to perform under the terms of the contract; and (3) that the

[49] DX 21.
[50] Tr. 28.
[51] *Id. See also* DX 25.
[52] *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 638 (Del. Ch. 1953).

balance of the equities favors an order of specific performance.[53] The Court will now assess each prong of the analysis to determine whether the Szambelaks have carried their heavy burden of establishing their entitlement to an order of specific performance.

A. *Does a Valid and Specifically Enforceable Contract for the Sale of Real Property Exist Between the Parties?*

The Court first notes that the Tsipourases may have admitted to the contract with the Szambelaks in their testimony at trial.[54] Nevertheless, because the Tsipourases tried this case *pro se*, the Court will perform a more detailed analysis to confirm that a valid contract exists between the parties. The basic elements of a contract under Delaware law are mutual assent to the terms and conditions of an agreement between the parties and the exchange of consideration.[55] In addition, the essential terms of the contract must be sufficiently definite to be specifically enforced by the Court. In this case, the evidence demonstrates that the Agreement of Sale satisfies the requirements for a specifically enforceable contract for the sale of the Tsipouras Farm.

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[53] *See, e.g.*, *Deene v. Peterman*, 2007 WL 2162570, at *5 (Del. Ch. July 12, 2007); *Walton v. Beale*, 2006 WL 265489, at *3 (Del. Ch. Jan. 30, 2006).
[54] *See, e.g.*, Tr. 104 ("MR. MALMBERG: Actually the point I am trying to make is you knew that you were under contract with the Szambelaks. MRS. TSIPOURAS: Correct.").
[55] *See, e.g.*, *In re Estate of Justison*, 2005 WL 217035, at *10 (Del. Ch. Jan. 21, 2005).

The Szambelaks and the Tsipourases assented to the essential terms of the Agreement of Sale—namely, price, date of settlement, and the property to be sold. The Szambelaks' offered to purchase the Tsipouras Farm for $450,000 and suggested a closing date of December 17, 2004 in their proposed contract. The Tsipourases apparently had no qualms with the terms proposed by the Szambelaks, and they made no changes to the contract, except to increase the amount of the deposit from $5,000 to $10,000. Thus, both parties manifested their assent to the essential terms of the contract by signing the Agreement of Sale.

The Tsipourases urge the Court to find that no contract exists between the parties (their admission at trial and signing of the Agreement of Sale notwithstanding) because the Szambelaks failed to acknowledge the Tsipourases' proposed change to the amount of the deposit required under the Agreement of Sale. Whether the required deposit in this case would be $5,000 or $10,000 is not an essential term of the contract and is immaterial to the overall transaction.[56]

[56] *Cf. River Enters., LLC v. Tamari Props., LLC.*, 2005 WL 356823 (Del. Ch. Feb. 15, 2005) (noting the parties' agreement on the essential terms of price, date of settlement and property to be conveyed and holding that a failure to agree on the terms of collateral for the release of deposits from escrow prior to the scheduled closing was not an essential term of the real estate sales contract). To the extent the Tsipourases' change to the amount of the deposit could be viewed as a counteroffer to an essential term of the contract, the Szambelaks manifested their assent to the new term by depositing $10,000 in escrow.

Accordingly, the Szambelaks' alleged failure to acknowledge the Tsipourases' change to the Agreement of Sale is not fatal to the existence of a valid contract for the sale of the Property.

The Tsipourases further argue that they did not know they were under contract with the Szambelaks because they never received the $10,000 deposit[57] nor were they ever notified that the deposit had in fact been made to the Szambelaks' attorney. Even if the latter is true, their claim that they were ignorant of the fact that they were under contract to sell the Property to the Szambelaks is belied by their actions after the Agreement of Sale was executed. First, Mrs. Tsipouras testified that she hired a company to begin removing their personal items from the Property in accordance with their obligations under the Agreement of Sale. Second, the Tsipourases granted the Szambelaks permission to begin making improvements to the Property. A reasonable seller in the Tsipourases' position would have interpreted the Szambelaks' efforts to make valuable improvements to

[57] It is not the generally accepted practice in real estate transactions, despite the Tsipourases' belief (or hope) to the contrary, that the seller, personally, should hold the deposit pending final settlement. It may be somewhat unusual for a deposit on real estate to be held on the buyer's side until closing. Perhaps typically, a buyer would deposit his earnest money with the seller's real estate agent or attorney. For this transaction, however, there were no real estate agents involved in the transaction (Mrs. Folk was not acting in an official capacity.) and the Tsipourases did not have an attorney representing them in the sale. As such, the Szambelaks' decision to deposit the $10,000 with their attorney, who maintained an escrow account for such funds, was the most reasonable alternative.

the Property as confirmation of their acceptance of the Agreement of Sale and intention to move forward with the purchase. Thus, there is little doubt that the Tsipourases understood that they had a valid contract with the Szambelaks for the sale of the Property.

Finally, the Tsipourases argue that even if the Agreement of Sale was a valid contract, they were released from their obligations by Mr. Folk. The Tsipourases strongest argument in this regard is that an agency relationship[58] existed between the Szambelaks and Mr. Folk and that Mr. Folk was cloaked in some type of apparent authority[59] to speak on behalf of the Szambelaks, given his role in facilitating this transaction. If that is the case, then where "a third party relies on the agent's apparent authority in good faith *and is justified in doing so by the*

[58] "An agency relationship is created where one party consents to have another act on his behalf, with the principal controlling and directing the acts of the agent." *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997) (internal quotations and citations omitted). Although not necessary to resolve, the contention that Mr. Folk had authority to act on behalf of the Tsipourases is a much closer question.

[59] "'Apparent authority may be defined as that authority which, though not actually granted, the principal knowingly or negligently permits the 'agent' to exercise or which he holds him out as possessing.'" *Old Guard Ins. Co. v. Jimmy's Grille, Inc.*, 860 A.2d 811, 2004 WL 2154286, at *3 (Del. 2004) (TABLE) (quoting *Finnegan Constr. Co. v. Robino-Ladd Co.*, 354 A.2d 142 (Del. Super. 1976)).

surrounding circumstances, the principal is bound to the same extent as if actual authority had existed."[60]

This argument ultimately fails in the first instance because the relationship between the Szambelaks and Mr. Folk does not rise to the level of an agency relationship. There is no evidence to suggest that the Szambelaks consented to having Mr. Folk speak or act on their behalf with regard to the substance of this transaction with the Tsipourases. Indeed, when Mr. Folk told Mrs. Tsipouras that the Szambelaks did not have the money to close on the Property and would not be going through with the sale, he was merely stating his opinion. There is no evidence that the Szambelaks ever specifically instructed him to relay that message to the Tsipourases.

Even if the Court accepted the Tsipourases' belief that Mr. Folk was an agent of the Szambelaks and had some type of apparent authority to act or speak on their behalf, their argument also fails because their reliance on Mr. Folk's apparent authority was not justified under these circumstances. Mr. Folk did not negotiate the specific details of the Agreement of Sale on the Szambelaks' behalf, nor did the Szambelaks otherwise ever hold him out to the Tsipourases as their agent with

[60] *Id.* (emphasis added).

regard to matters of substance concerning their purchase of the Property. At best, the evidence suggests that Mr. Folk was a messenger for the Szambelaks with regard to the ministerial aspects of this transaction. Accordingly, there was no legitimate basis for the Tsipourases to believe he could speak with any authority regarding the Szambelaks' intentions with respect to the contract. Thus, under the circumstances, the Tsipourases were not justified in relying on Mr. Folk's purported oral release.

In sum, the written Agreement of Sale, the actions of the parties following the execution of that document, and the testimony at trial provide the Court with overwhelming evidence that a valid contract for the sale of the Tsipouras Farm exists between the parties. The essential terms of that contract—price, date of settlement, and property to be sold—are definite and are therefore specifically enforceable by this Court. Accordingly, the Szambelaks have satisfied the first prong of the specific performance analysis.

B. *Were the Szambelaks Ready, Willing, and Able to Perform Under the Terms of the Agreement of Sale?*

At trial, the Tsipourases argued that the Szambelaks failed to demonstrate that they had the funds to close on the sale of the Property on December 17, 2004.

The Szambelaks testified that the funds had been timely wired and offered a statement from their attorney's escrow account as evidence that they had in fact wired $350,000 to their attorney in anticipation of the scheduled settlement.[61] The Tsipourases noted, however, that the date of the purported wire transfer, at least as it was recorded in attorney's accounting program, was December 28, 2004, over ten days after the scheduled closing date. No other documentary evidence of the $350,000 wire transfer was offered by the Szambelaks at trial.

In response to the timing issue raised by the Tsipourases, the Szambelaks called Marcia Wilson, their attorney's real estate paralegal involved in this transaction, to testify in rebuttal and to confirm their attorney's receipt of the $350,000 wire transfer prior to the scheduled closing.[62] Ms. Wilson was unable to explain why the entry in the accounting records indicated that the funds were received on December 28, 2004, but she testified credibly that the disbursement of

[61] PX 3.

[62] Ms. Wilson was not identified as a witness in the Pretrial Order because the Szambelaks believed that the statement from their attorney's escrow account showing receipt of a $350,000 wire transfer would be sufficient evidence that the wire transfer was timely made. The Tsipourases did not object to the escrow account statement and the discrepancy as to the date the funds were received prior to trial; the Szambelaks did not have notice that they would need to adduce additional evidence to confirm the wire transfer. Although the Court typically limits litigants to calling only the witnesses identified in the Pretrial Order, the Court allowed testimony from Ms. Wilson to clarify the record in this case because the Szambelaks did not have prior notice that the Tsipourases were challenging whether they had in fact wired sufficient funds to close on the sale of the Property prior to the December 17, 2004 closing.

a $350,000 refund to the Szambelaks on December 20, 2004 would not have occurred if the funds had not already been in the escrow account before that date.[63] Although Ms. Wilson was perhaps not the most qualified witness to explain the discrepancy in the bookkeeping entries, the Court is nevertheless satisfied that the $350,000 wire transfer was received by the Szambelaks' attorney on or before the scheduled closing date.

In addition to the Szambelaks' testimony and evidence regarding the $350,000 wire transfer, the Tsipourases introduced into evidence a copy of a certified check dated December 17, 2004 in the amount of $100,000 drawn on one of the Szambelaks' bank accounts and payable to their attorney. Thus, the evidence presented at trial demonstrates that the Szambelaks had the $450,000 purchase price in cash and that they stood ready, willing, and able to perform under the terms of the Agreement of Sale on December 17, 2004. The Szambelaks have therefore satisfied the second prong of the specific performance analysis.

[63] Tr. 222. The Court also notes the Szambelaks' attorney's professional responsibilities with respect to the disbursement of funds from his escrow account. *See* Del. Lawyers' Rules of Prof'l Conduct R. 1.15. For that reason, in addition to Ms. Wilson's testimony, the Court is satisfied that the wire transfer was received prior to the December 20, 2004 disbursement of $350,000 from the escrow account. The Court also takes judicial notice of the fact that December 17, 2004 was a Friday and that December 20, 2004 was a Monday. Thus, the reasonable inference is that the wire transfer must have been received by the attorney on or before December 17, 2004.

C. *Does the Balance of the Equities in this Case Favor an Award of Specific Performance?*

Finally, the Court must balance the equities to determine whether specific performance under the Agreement of Sale would be an appropriate and fair remedy. A balancing of the equities "reflect[s] the traditional concern of a court of equity that its special processes not be used in a way that unjustifiably increases human suffering."[64] In other words, the Court must be convinced that "specific enforcement of a validly formed contract would [not] cause even greater harm than it would prevent."[65]

In this case, the equities favor the Szambelaks because they will suffer greater harm if the Court does not specifically enforce their right to purchase the Tsipouras Farm. Real property is unique; thus, specific performance of a real estate sale contract is often the only adequate remedy for a breach by the seller, except in rare circumstances.[66] Although it may be true that there are other farms that would adequately accommodate the Szambelaks' needs, they nevertheless

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[64] *Bernard Pers. Consultants, Inc. v. Mazarella*, 1990 WL 124969, at *3 (Del. Ch. Aug. 28, 1990).
[65] *Walton* 2006 WL 265489 at *7.
[66] *See, e.g.*, *Morabito v. Harris*, 2002 WL 550117 (Del. Ch. Mar. 26, 2002) (denying specific performance of a real estate contract where the subject property was located in a subdivision of fungible homes and specific enforcement of the contract essentially would have left the seller homeless).

chose the Tsipouras Farm for all of its unique attributes. The Szambelaks have not engaged in any inequitable conduct in this case, and they have at all pertinent times stood ready, willing, and able to perform in accordance with the Agreement of Sale. In addition, they did not delay in asserting their right to specific performance of the Agreement of Sale.

The Tsipourases, on the other hand, have acted inequitably by refusing to close on the sale of the Property. Moreover, they have failed to demonstrate any countervailing equities that would preclude an order of specific performance in this case. Although the Tsipourases have not expressly articulated this argument, any financial loss they might suffer as a result of the natural appreciation (to the extent there may have been any) of real property during the course of this litigation is a direct consequence of their own refusal to proceed with the sale of the Property on December 17, 2004. Furthermore, the Tsipourases should not be heard to complain about the $450,000 purchase price the Szambelaks offered for the Property because that amount was suggested by Mrs. Tsipouras. Thus, to the extent the Tsipourases may have sought to avoid this transaction because they later found out that another buyer was willing to pay them an additional $100,000 for

the Property, the Court is in no position to relieve them of their now regretted business judgment.

The only evidence offered by the Tsipourases arguably suggesting some type of "unfair" conduct on the part of the Szambelaks is that they never notified the Tsipourases of the $10,000 deposit to their attorney. Perhaps the Szambelaks could have taken additional steps to ensure that the Tsipourases were aware of the deposit. However, as already noted, whether or not the Tsipourases knew of the deposit was immaterial to their understanding that they were under contract to sell their Property to the Szambelaks. The conduct of the parties in the days and weeks following the execution of the Agreement of Sale confirms their understanding that a valid contract existed for the sale of the Tsipouras Farm. Furthermore, the Tsipourases chose not to hire an attorney or other professional advisor to assist them in this transaction. Instead, they chose to rely on Mr. Folk, who is neither an attorney nor a real estate agent. Given the informality of the parties' dealings throughout this transaction, the Tsipourases can hardly complain that they did not receive some type of formal notification that the Szambelaks had made the required $10,000 deposit.

Thus, in balancing the equities of this case, the Court is convinced that any harm the Tsipourases might suffer is slight when compared to the harm resulting to the Szambelaks if the Agreement of Sale is not specifically enforced. Accordingly, the Szambelaks have satisfied the third prong of the specific performance analysis.

IV. CONCLUSION

In light of all the evidence, the Court finds that a valid contract exists between the Szambelaks and the Tsipourases for the sale of the Tsipouras Farm for $450,000. The Szambelaks have carried their heavy burden of demonstrating, by clear and convincing evidence, their entitlement to a decree of specific performance. Accordingly, the Court will enter judgment in their favor and order the Tsipourases to convey the Property to the Szambelaks in accordance with the Agreement of Sale.

The Szambelaks' attorney, on notice to the Tsipourases, shall submit a form of order to implement this letter opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K