IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GREGORY E. HOMAN, SUSAN E. HOMAN and RWORLD, INC. as successor-in-interest to GREGORY E. HOMAN and SUSAN E. LOUDIN, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 19220
KENNETH W. TUROCZY, KCT ENTERPRISES, INC. and MT ASSOCIATES, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: June 24, 2005
Date Decided: August 12, 2005

David L. Finger, Esquire, FINGER & SLANINA, LLC, Wilmington, Delaware, *Attorney for Plaintiffs.*

Bayard W. Allmond, III, Esquire, ALLMOND AND EASTBURN, Wilmington, Delaware, *Attorney for Defendants.*

STRINE, Vice Chancellor

At the beginning of October 2000, the plaintiffs in this case bought a small printing and copying business from the defendants. The defendants had operated that business successfully for nineteen years. Thirteen months after the sale, at the end of October 2001, the plaintiffs closed the business, and liquidated its assets soon thereafter, in the midst of personal bankruptcy proceedings.

In the complaint in this action, filed two days before the business was permanently closed, the plaintiffs alleged that the defendants and their agent fraudulently misrepresented the condition of the business and sought rescission of the sales agreement. By their own actions in closing the business, wasting over a year before suing, and then failing to press this action promptly, the plaintiffs obviously forfeited any right to seek actual rescission. Nonetheless, they pressed on for an award of damages for fraud. This is the court's opinion after trial.

I find that the plaintiffs have failed to prove their fraud claims. The plaintiffs have failed to prove that the defendants made material representations of fact or, as important, that the plaintiffs reasonably relied upon any alleged misrepresentations. Furthermore, I conclude that it is far more probable that the business failed, not because it was not in a sound condition to be operated profitably as of the time of sale, but because the plaintiffs devoted inadequate attention to the business, and never figured out how to market the business to generate revenues — and because a weak economy did not help. For these and other reasons, I enter a judgment for the defendants on all the plaintiffs' claims.

I. Factual Background[1]

A. Events Leading Up To The Purchase

This saga arises out of a transaction entered into by business entities formed by two different couples: Defendant Kenneth Turoczy and his wife, non-party Carol Turoczy, and plaintiff Gregory Homan and his then-girlfriend, now wife, plaintiff Susan Homan.[2] Before describing the course of events that led to this lawsuit, it is useful to describe the two couples and their circumstances as of the time they first met.

The sellers in the transaction were the Turoczys. The Turoczys had owned and operated a small copying and print shop, called CopyGraphics, since 1981. The Turoczys owned the business itself through a corporation, defendant KCT Enterprises, Inc., and the land upon which the business was situated through a second corporation, defendant MT Associates, LLC. Over its near generation of operation, the business had been modestly successful and had permitted the Turoczys to live an upper middle class lifestyle. But by the late 1990s, the Turoczys were tiring of running the business. Ken Turoczy suffered some health problems and found himself attracted to a life in politics. As a result, he began to divert some of his energies from the business. This diffusion of his focus apparently contributed in some measure to a decline in revenues at CopyGraphics.

As a small operation, CopyGraphics depended heavily on its ability to maintain good relations with a number of small business customers. Through his involvement in

[1] The facts presented in this opinion are compiled from trial testimony and evidentiary exhibits. Citations to joint exhibits ("JX __") or the trial transcript ("Tr. at __") are illustrative of general factual matters. Other portions of the record often support the same findings.
[2] Susan Homan's name was Susan Loudin before she married Gregory Homan.

the community and the church, Ken Turoczy had built and nurtured the firm's clientele. When he ran for office in 1998 and experienced some health issues, his level of attentiveness to marketing and the care and feeding of customers declined a bit, which may help explain the revenue trend for the business depicted below:

Fiscal Year End	Revenue	Owner Cash Flow
1999	$522,718	$99,699
1998	$639,336	$180,319
1997	$681,872	$192,234
1996	$631,735	$200,241

In late 1999, the Turoczys decided to sell CopyGraphics and leave the printing business. In mid-February 2000, they retained David H. Cress as a business broker to help them sell the business. Following initial discussions concerning the status of the business and what the Turoczys hoped to get for it, Cress advised them that the company's relatively weak financial performance in 1998 and 1999 would hinder their sales efforts and that the Turoczys would be in a better position to sell at a favorable price if the downturn in revenues could be reversed. After that, Ken Turoczy stepped up his marketing efforts, reaching out to pursue new customers and trying to strengthen CopyGraphics' relationships with existing customers.[3]

For their part, the Homans were also going through major life changes. Both Greg and Susan Homan were divorcees coming to grips with the realities of single parenthood — both Greg and Susan had two children from their previous marriages. The Homans

[3] Ken Turoczy testified that his enhanced marketing efforts centered primarily on developing personal relationships: "I basically joined a couple other business groups, Chamber of Commerce, and started to network and pay attention to asking for business everywhere I went." Tr. at 351-2.

were both long-time DuPont employees with experience in sales and marketing. Both had obtained Master's degrees in Business Administration and both earned nice salaries with DuPont. Their joint income approached $200,000 annually. But they had major expenses and distractions from their relatively complicated, if not uncommon, personal lives. Notably, neither of the Homans had ever run a small business.

The Homans planned to get married and buy a new home. At the same time, they were considering the possibility of purchasing a small business of their own. They hoped to make a business move that would materially increase their net worth, thereby gaining for themselves eventual economic independence from work as salaried employees. Although they now say otherwise, I am persuaded that their initial objective was to find a business that Susan could run and that would permit her to leave her job at DuPont.[4]

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[4] Both Greg Homan (Tr. at 139) and Susan Homan (JX 66 at 26-30) deny that they ever planned or stated that either of them would leave their day job to run CopyGraphics full time. But Ken Turoczy claims that the Homans told him Susan was going to quit her job and work full time at CopyGraphics (Tr. at 354), and Cress testified that he understood from the Homans that they would collectively spend at least forty hours per week at the business (Tr. at 108). The Homans' version of the story is substantially undercut by information contained in a Request for Credit Approval prepared by CIT, the Homans' lender, trial exhibit JX 68. That document includes a narrative report concerning the transaction which states, in relevant part:

> [Susan Homan] plans to devote 100% of her time to CopyGraphics, and Mr. Homan, who has very flexible hours at DuPont, will work at the business 3-4 hours a day for 3-4 days per week, or as needed.
>
> * * *
>
> Greg will continue to work at DuPont where he earns a sufficient salary to support he and his future wife, the other borrower, Susan. Susan will operate the business on a daily basis, and Greg will assist as needed. The Borrowers explained that Susan will open the store, and Greg will leave DuPont between 2 and 3 pm to come to the store and take over for Susan, approximately 3-4 times per week.

JX 68. The Homans, understandably, have fought vehemently to exclude that document from evidence as hearsay, although they stipulated that JX 68: 1) is a CIT record; 2) was made by a

By late May 2000, David Cress had put together a marketing document to help the Turoczys sell their business. That document, which caught Greg Homan's eyes, provided this basic description of the business:

> The current owner purchased and started the business in 1981, as a franchise. In 1987, the business became independently owned. In 1993, the owner purchased the existing location to accommodate its growth. The owner added over $175,000.00 in improvements to the property.
>
> SALES AND CASH FLOW:
>
> | Fiscal Year End | Revenue | Owner Cash Flow |
> |---|---|---|
> | 1999 | $522,718 | $99,699 |
> | 1998 | $639,336 | $180,319 |
> | 1997 | $681,872 | $192,234 |
>
> NOTE: 1998 and 1999 downturn due to business being run on semi absentee basis and where there was little owner marketing involvement. Owner has returned to extending marketing efforts. In 2000, revenues are up 17.5% from 1999. For 5 months into 2000 revenues were $257,292, and owner cash flow was $65,399. For fiscal year 2000, cash flow is projected to be $164K on revenues of $617K.
>
> <u>MARKETING STRATEGY:</u>
>
> The business is staffed with fully trained employees. <u>A new owner need not have any experience in this industry</u>. *What is needed is a new owner, with marketing and sales skills, who is able to dedicate the time in enhancing revenues {e.g. direct mail, advertising, etc.}*. There is ample business to be had in the area and the equipment can handle double the existing capacity. Further, a new owner will reap benefits from

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person employed by CIT; 3) was made at or near the time of the acts or events recorded in the document; 4) is a record of a type that CIT normally prepares in the course of a loan application; and 5) was kept in the course of the regularly conducted business activity of CIT loan processing. Tr. at 4. Because that exhibit is a document made in the normal course of business, and all of the information contained therein is of a type that a lending institution would reasonably maintain for the purpose of making decisions on small business loans, it is therefore admissible under Delaware Rules of Evidence 803(6). Moreover, it is clear from the language of the narrative report itself that the information that it contains was provided to CIT by the Homans themselves, and the document is therefore also admissible as a party admission.

> introducing software to local businesses making it easier and more convenient to bring more work to the business.[5]

In another portion of the document, which the Homans stress, the following statement was made:

> Revenues have been down for the past few years, solely because owner has been heavily involved in local community work. The owner has made the decision to sell the business to allow him full time to devote to his community interests. In 2000, however, the owner returned to marketing efforts and revenues in 2000 are up 15%.[6]

Interestingly, the results for CopyGraphics for the period January through April that Cress provided to prospective buyers were as follows:

Month	Revenue	Owner Cash Flow
Jan. 2000	$42,088	$8,900
Feb. 2000	$41,158	$7,404
Mar. 2000	$69,408	$21,214
Apr. 2000	$52,127	$14,016

The parties agree that these portrayed results[7] were materially accurate.[8]

Greg Homan contacted Cress to inquire about CopyGraphics in late May 2000, and in June, Cress provided him with the revenue figures for January to April. Homan was attracted to the business. CopyGraphics was an established business with a long history and seemed to have a good staff of employees who could do the technical work. What it needed was owner-operators who were good at sales and marketing. With that, it

[5] JX 47 (underlined emphasis in original; italics emphasis added).
[6] JX 47.
[7] JX 2.
[8] An accountant was retained to reconcile Cress's representations with QuickBooks records and sales invoices kept by CopyGraphics. *See* JX 3. For the period from January through May 2000, the total revenues reported for each of those three sources were $226,232 (QuickBooks), $252,464 (sales invoices), and $254,781 (Cress's representations). Therefore, the parties concede, the original numbers used by Cress were essentially on the mark.

could generate an attractive cash flow. Greg thought that it was an attractive opportunity for Susan and himself, given their backgrounds in business and marketing.

Still, Greg Homan was concerned about the downtrend depicted in the 1999 results and wanted to get some idea of what future results might be achieved. Cress prepared a set of monthly revenue projections (the "Projections") that essentially annualized the results from the first four months of 2000. The record is unclear about the precise basis for the numbers involved. Cress attributes them to Ken Turoczy. Turoczy attributes them to Cress. I find it more probable that Cress, given his role and the various documents he prepared, took the laboring oar and simply asked Turoczy whether an annualization of the early months of 2000 would be a reasonable assumption and Turoczy assured him it was, albeit with the assumption that the business continued to be effectively marketed.

On June 19, 2000, Cress sent Greg Homan the actual gross revenues for January through April 2000 and projected monthly revenues of between $45,000 and $60,000 for the remainder of 2000, and a projected total for the year of $614,343. In his cover note, Cress wrote:

> In follow to the fax I sent to you over the weekend updating you through 4/2000, here is a quick proforma, by month, for 2000. It is a very conservative picture. ***My guess*** is that cash flow will be closer to my earlier estimate of $164K.
>
> May was around $50k+.
>
> This will just give you an idea as to the slow months.[9]

[9] JX 2 (underlined emphasis in original; bold italics emphasis added).

At that point, Greg Homan took more active steps toward buying CopyGraphics, and brought Susan in on the deal.

But by June, Ken Turoczy had embarked on another political campaign, running for state representative. Turoczy began to spend more time campaigning, and less time focused on marketing CopyGraphics.[10] Nonetheless, gross revenues for the month of May 2000 were in line with gross revenues for the months of January through April — around $52,368.00. Cress shared the May results with the Homans in approximately mid-July.

Results for June and July 2000 were weaker, however. June revenues dipped below $40,000 and July revenues dipped below $30,000. These revenues were not tabulated on monthly financial statements, however, and the only way the weakening could have been ascertained at that time was through an analysis of the checks, invoices, and bank deposits for the period. In this regard, I credit Ken Turoczy's testimony that he did not make completion of the company's monthly books and records a priority during this period. The way that CopyGraphics kept its books was a bit antiquated. Ken Turoczy would record the relevant information manually in a paper ledger. He would later enter all the necessary data into a "Quickbooks" computer program to generate

[10] Turoczy credibly testified that, while campaigning, he curtailed his efforts at cold calling, but he continued advertising by print and radio as he had in the past and he continued to work at CopyGraphics every day, making deliveries, picking up jobs, and interacting with customers in that capacity. Tr. at 397. Turoczy was able to maintain his normal duties at CopyGraphics because he campaigned primarily in the evenings and on weekends. Tr. at 412.

financial statements for the company.[11] During the summer of 2000, Ken Turoczy was devoting his evenings to campaigning and neglected this function. Meanwhile, Carol Turoczy was responsible for accounts receivable, and used QuickBooks to record payments made on outstanding accounts and for billing.[12]

By mid-June, the Homans were seriously interested in purchasing CopyGraphics. To that end, in late June or early July 2000, the Homans visited Turoczy at CopyGraphics to view the facilities and to ask questions. Turoczy did not want the Homans to speak with his employees, [13] so they visited on a Sunday when the business was closed. Nevertheless, Turoczy described his employees as hardworking and reliable, to the apparent satisfaction of the Homans.[14] In the course of discussing the 1999 financials, the Homans claim to have heard from Ken Turoczy that CopyGraphics lost steady customers when he was recovering from a heart attack, and lost additional business when CopyGraphics' typesetter left, but that he regained the lost business by spring 2000 by revisiting old customers and hiring a new typesetter.[15] Ken Turoczy also discussed his marketing efforts, which consisted primarily of advertising on a local radio station and in

[11] Tr. at 356-357. Ken Turoczy testified at trial that he typically only entered invoice data two or three times per year to prepare financial statements for tax purposes.
[12] Tr. at 417-418. Carol Turoczy updated accounts receivable data on a regular basis.
[13] This was understandable, because the Turoczys had not informed their staff that the business was for sale, and the prospect of a sale could unsettle the staff.
[14] Tr. at 344.
[15] Tr. 302; Pl. Opening Pre-Trial Br. at 8. Candidly, the Homans' brief does not cite record evidence for these contentions and my review of the trial transcripts did not yield any apparent record basis for some of these claims.

church bulletins, and making personal visits to customers and leaving promotional pads of paper and pens.[16]

According to the Homans, Ken Turoczy did not mention that he had scaled back his renewed marketing efforts in order to concentrate on his political campaign. Nonetheless, the Homans admit that Ken Turoczy told them he was running for office.

The Homans also claim that they were assured that they could achieve $50,000 in revenues on a self-sustaining basis. They now claim to have taken the $50,000 monthly figure as some sort of inviolable minimum that would be achieved irrespective of continuous and successful marketing efforts that personally involved the owners of the business. They contend that they were assured by Ken Turoczy and Cress that $50,000 a month in revenues was essentially "in the bag" and that the only issue is whether they wanted to spend the time necessary to pump up revenues to an even higher level.

I do not believe the Homans' rendition of events and representations made. Rather, I conclude that the conversation was far less clear-cut. For starters, I find that the Homans led the Turoczys and Cress to believe that they would be devoting substantial time to running and marketing the business. Indeed, I find that Ken Turoczy was led to believe that Greg's brother, John, who attended meetings to learn about CopyGraphics and view the premises, would also be helping with that effort.[17] It is against this backdrop that Ken Turoczy spoke to the Homans — that is, Turoczy assumed that the

[16] Tr. at 280, 300.

[17] Ken Turoczy testified that, when they visited CopyGraphics to inspect the premises and gather information accompanied by Greg's brother, the Homans "discussed their plans for the business. They had a business plan. The brother was going to become involved as a salesperson. I was told he was a sales professional." Tr. at 354.

Homans would put at least as much effort, and probably much more effort, into marketing and running the business as he himself had.

I find it more plausible that Ken Turoczy told the Homans that revenues at the levels Cress had projected were achievable with a successful, ongoing marketing program. Ken Turoczy did not tell the Homans that there were any guarantees.

Likewise, I do not believe that either of the Turoczys ever told the Homans that they could run the business without diligent and constant attention. Although CopyGraphics had a good staff, it was clear that both Carol and Ken Turoczy had important functions. Carol Turoczy worked at the business every day, helping keep track of accounts, and servicing customers. Ken Turoczy was the key manager — and the face of the business to his customers and to the community. Indeed, he usually delivered orders to his customers personally, and by doing so he naturally came into contact with customers at their business locations and showed his personal commitment to quality service.

Finally, I do not believe the Homans' contention that Ken Turoczy led them to believe that they could, without risk and without substantially a full-time commitment by one of them to the business, achieve results like those projected by Cress. Rather, I believe that Ken Turoczy only expressed confidence that results of that kind were attainable — as the actual results for 1998 and earlier show — with good management and a good economy. I find it more probable that Cress, as a sales broker, was more bullish, but notably, he too was led to believe that the Homans would be devoting a

substantial amount of personal attention, akin to a full-time effort by one of them, to running the business.

By July, the Homans decided that they wanted to purchase CopyGraphics. Cress sent the outlines of what he called a "construct" — a contractual template — to the Homans. The Homans retained Arthur Connolly, III of Connolly, Lodge, Bove & Hutz to represent them in shaping a final agreement. Put simply, the contract they eventually signed was shaped with their full input and participation, based on advice from an experienced attorney.

The parties settled on a purchase price of $295,000 for CopyGraphics, including its tangible and intangible assets, but excluding cash on hand and accounts receivable. The Homans also negotiated to buy the land on which CopyGraphics was situated for $455,000. The Homans obtained a financing commitment for the purchase from CIT Small Business Lending Corporation ("CIT"), and on July 21, 2000, they executed an Offer to Purchase CopyGraphics and the real estate (the "Agreement"). The sellers in the transaction were KCT Enterprises (of the business, CopyGraphics) and MT Associates (of the real estate). Ken Turoczy executed the Agreement on behalf of both of those entities.

The Agreement granted the Homans broad rights to walk away from the deal. For example, a pertinent portion of the Agreement plainly stated:

> **1.08** The terms of this agreement are contingent upon any of the following:
>
> * * *
>
> 3. Completion of Purchaser's Due Diligence to the satisfaction of the Purchaser that the findings at due diligence represents, favorably, the

> Business as it has been presented to Purchaser by the Seller **{See Section 3.01 as to further conditions of Due Diligence}.**[18]
>
> * * *
>
> **In the event that any of the above mentioned contingencies are not satisfied, and unless Seller and Purchaser agree to either an addendum or an extension for any contingency not satisfied, then this agreement shall become null and void with all monies returned to the Purchaser.**[19]

To facilitate the Homans' free right to walk away on this basis, the Agreement also provided:

> **3.01** . . . Seller shall make available all financial books and records of the Business for Purchaser's review as aforesaid; and, Due Diligence shall be conducted during business hours. In the event that Purchaser is not satisfied with the results of Purchaser's Due Diligence as aforesaid, in Purchaser's sole discretion, then Purchaser shall so notify Seller within 3 business days of the 10-day Due Diligence period, and this Agreement shall be null and void and all deposit monies returned to Purchaser; and, in the absence of such notice, Purchaser shall be deemed to have accepted the results of Due Diligence and this contingency shall be deemed satisfied.[20]

Finally, in the Agreement, the Homans assented to the following provision:

> **7.05** This document contains the entire understanding of the parties *and there are no oral agreements, understandings, or representations relied upon by the parties*. Any modifications must be in writing and signed by all parties.[21]

By the time the Homans signed the Agreement, they had also retained an accountant, Richard Rowland, to help them with due diligence. Rowland identified for Greg Homan a list of items that Rowland wanted to review, which states:

[18] JX 5 (emphasis in original).
[19] JX 5 (emphasis in original).
[20] JX 5 (emphasis in original).
[21] JX 5 (bold emphasis in original; italics emphasis added).

INITIAL LIST OF ITEMS REQUESTED FOR DUE DILIGENCE REVIEW

1. Copies of three most recent Federal income tax returns.

2. Copies of any financial statements for the three most recent fiscal years.

3. Copies of all bank statements.

4. Access to accountant workpapers prepared in the connection with items 1 and 2 above.[22]

In my review of the record, I can find no evidence that Greg Homan formally transmitted this list to the Turoczys or to Cress, or that the Homans or Rowland ever made any written request for the listed information.

Rowland accompanied the Homans to the due diligence investigation at CopyGraphics on August 15, 2000. Rowland reviewed all of the QuickBooks statements that Turoczy had prepared for CopyGraphics, up to May 31, 2000.[23] The disputed portion of the review concerns the months of June and July. For those months, it is undisputed that Ken Turoczy had not taken the papers, receipts, invoices, and the other pertinent information and entered them into the QuickBooks program. Therefore, he did not have formal financial statements for those months. He claims, however, that the bank statements and invoices for those months were present at CopyGraphics and available to Rowland and the Homans. Rowland testified at trial that he asked for the bank statements for those months and was told by Ken Turoczy that they were at the Turoczys' home. For their part, the Homans claim that they were assured by Ken Turoczy and

[22] JX 57.

[23] *Id.* Rowland recorded weekly sales figures for May totaling $50,312.

Cress not to worry — that the results for June and July were in line with the Projections Cress had provided them in June.

Again, I do not believe that the version of events the Homans advance is credible. Put bluntly, I do not believe that the Turoczys or Cress told the Homans that they could treat the Projections for June and July as if they were the actual results. Rather, I conclude that the Homans did not focus carefully or reasonably on what they were doing as buyers.

I find that, at worst, Ken Turoczy failed to have the bank records on site at CopyGraphics on the day of due diligence. In that regard, I actually find it more likely that Rowland reviewed weekly sales data reported in Turoczy's QuickBooks statements for the months of January through May, but did not take the time to recreate that information from the available bank records and invoices for the months of June and July when he found that QuickBooks statements for those months were unavailable.[24]

What is clear to me is that there was no outright, obstinate refusal by Ken Turoczy to provide requested information. Even if I were persuaded that Rowland's version of events is more than likely the correct one — and I am not — his testimony does not demonstrate any resistance by Ken Turoczy to production. At trial, Rowland admitted that he never asked Ken Turoczy to drive the short distance to his home to get the bank statements that would have showed the revenues received by CopyGraphics for June and

[24] As his handwritten notes make clear, Rowland did not arrive at revenue figures for any monthly or weekly period through calculations of raw data from sales invoices or bank statements. *See id*. Rowland testified at trial that his review of weekly sales figures was limited to those reported on financial statements that Turoczy had prepared. Tr. at 488.

July. Moreover, the difficulty for the Turoczys in remembering these events with precision is understandable given, as we shall see, the torpor with which the Homans brought this lawsuit, and another equally important factor, to wit, that the Homans never informed the Turoczys that they viewed the absence of financial records for June and July as a significant issue. Greg Homan admitted at trial that he never contacted Ken Turoczy after August 15 seeking any additional financial information.[25]

Rowland claimed at trial that he advised the Homans not to move forward until they examined sufficient information for June and July to make sure that CopyGraphics was continuing to perform as it had earlier in the year.[26] The Homans, however, did not take his advice.[27] Although the Homans contend that they continuously sought financial information for June and July from Cress after August 15, 2000, Cress credibly denied that the Homans ever expressed any reservations to him concerning due diligence or sought additional financial information for CopyGraphics after August 15.[28] What is undisputed is that the Homans moved forward with the transaction without reviewing the information Rowland stressed.

Notably, neither Rowland nor the Homans made any written request to the Turoczys or to Cress seeking any specific information for June or July. That failure not only constitutes clear evidence of commercially unreasonable behavior on the part of the

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[25] Tr. at 169-170.
[26] Tr. at 22-24; 169.
[27] It is not clear from the Homans' testimony that they understood from Rowland that any further investigation was necessary. Greg Homan testified at his deposition that Rowland never said a review of additional documents was necessary (JX 66 at 21), and at trial that Rowland never said that it was "necessary" for the Homans to review any additional financial records (Tr. at 221)
[28] Tr. at 112-119.

Homans and their advisors, it also creates a forensic problem. Had a formal request been made and answered by a formal denial that the records requested existed or a refusal to make such records available, the Homans' position would be more believable and Ken Turoczy's less-than-clear recollection of the records he actually made available during due diligence less plausible. As things stands, however, the Homans are only able to present their assertion that they orally requested information and were orally told that the information they requested was unavailable. That is a convenient position, but one that I do not find persuasive.

Instead, I believe that the Homans and their advisor Rowland were simply sloppy. Two scenarios suggest themselves as the most plausible, with the more plausible of the two listed first: 1) that Ken Turoczy made the bank statements for June and July readily available on the premises of CopyGraphics on August 15, 2000, but the Homans did not review them; or 2) that Ken Turoczy left the bank statements for June and July at his home on August 15, 2000, and he could have brought them to CopyGraphics with minimal effort, but the Homans never indicated that they wanted to review those statements. That is, I find it most likely that both Rowland and the Homans failed to review — or even to request — records for June and July that were available on August 15, and later compounded that error by failing to follow up with an "oh by the way" request.

In so finding, I note something that was clearly obvious — or should have been obvious — to the Homans and Rowland. If by August 15, 2000, CopyGraphics had no records at all of incoming cash flow and outgoing expenses for June and July 2000, the

Homans should have run away screaming. That would mean that CopyGraphics had no recordkeeping of any reliability and that the Turoczys were putting payments under the mattress somehow.

In this regard, any commercially reasonable buyers, advised by an accountant, could have done one of two things, having an absolute contractual right to walk away but wanting to proceed if it was possible to do so: 1) they could have insisted that the sellers complete the work necessary to present completed financial statements for June and July and represent that those statements were materially accurate; or 2) they could have insisted on access to all of the records of incoming and outgoing funds for those months, including bank statements, and a certification by the sellers that the information was complete.

The Homans did neither. Instead, on August 18, 2000, a mere three days after the due diligence investigation that they now challenge as fraudulent, the Homans signed a "contingency removal," indicating that they were satisfied with the findings at due diligence. The "contingency removal states in pertinent part that:

> We, the undersigned Purchasers of [CopyGraphics] do hereby remove the contingencies from that certain Offer For Purchase Agreement dated July 2000 . . . which read as follows:
>
> * * *
>
> Completion of Purchaser's Due Diligence to the satisfaction of the Purchaser that the findings at due diligence represents, favorably, the Business as it has been presented to Purchaser, up to due diligence, by the Seller. **{See Section 3.01 as to further conditions of Due Diligence}**.[29]

[29] JX 6 (emphasis in original).

This step, which was not contractually required, was an odd one for the Homans to have taken, particularly if, as they now contend, they had orally requested additional information from Cress and the Turoczys after their due diligence investigation and had not received it. In signing the contingency removal, the Homans relinquished their right to walk away from the deal on the basis of unsatisfactory due diligence and took a substantial step toward closing without ever having reviewed any financial results for June or July 2000 — precisely what Rowland advised them not to do.

Even after they signed the due diligence contingency removal, the Homans had not entirely abandoned their broad walk-away rights under the Agreement. By the express terms of that Agreement, the Homans had the right to walk away if they were unable to lease equipment from Canon — the lessor of CopyGraphics existing copying machines — on terms at least as favorable under which the Turoczys had leased their equipment. Section 1.08 of the Agreement made the Homans' duty to close contingent on the following condition:

> Purchaser to attain either a lease assumption or a new lease agreement approval from Canon {the Lessor} for equipment that is equivalent to or better than the equipment the business currently has under lease. If there is an upgrade of equipment by Canon, the cost to the Purchaser shall not be more than that amount which the Seller currently is obligated per year. Seller is to have received satisfactory release of liability from same Lessor for the same equipment.[30]

The Homans found out at the beginning of September that Canon would not permit them to assume the Turoczys' lease. Although the Homans now claim that Cress and the Turoczys had obstinately refused, since mid-August, to honor their requests for financial

[30] JX 5.

results for June and July 2000, they did not take this final opportunity in mid-September 2000 to walk away from the deal. Instead, the Homans negotiated with Canon, entered into a new lease for copying equipment, and continued to move forward with their purchase.

By late September, the Homans still had not received or reviewed any financial statements for June, July or August. Despite the importance they now attach to those results, the Homans proceeded to close on September 29, 2000. In connection with the closing, the Homans and the Turoczys executed a one-page document clearly labeled in bold **"DISCLAIMER."** In that document, the Homans acknowledged in writing that:

> We have not relied on the representations of [Brandywine Business Associates], its principals [i.e., Cress], sales associates or agents regarding any material fact in connection with the subject matter of the sale, the business involved, its value, compliance with any applicable laws, or the financial conditions thereof, or of either party hereto, and acknowledge that each party has conducted an independent investigation of the material facts relied upon in this transaction.[31]

B. The Homans Assume Ownership

The Homans claim that, almost immediately after taking possession of CopyGraphics, it was evident that revenues were not coming in at forecast levels. Gross revenues for October, November and December 2000 were $35,561, $29,628, and $23,569, respectively.[32]

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[31] JX 53.
[32] JX 26.

They continued to run the business until October 2001. For the thirteen months the Homans operated the business, beginning October 2000 and ending October 2001, CopyGraphics generated only $354,507 in gross revenues.

The Homans attribute this sharp drop to Ken Turoczy's increasing focus on election campaigning in the summer of 2000. They claim his inattention drove the poor results they achieved. That is, they claim that although CopyGraphics earned over $600,000 in revenues in 1997 and 1998, and over $500,000 in 1999 (a downyear), Ken Turoczy's focus on political campaigning — as opposed to marketing — between the months of June and September 2000 caused an irreparable decline in CopyGraphics' fortunes.

Although I credit the idea that Ken Turoczy's campaign had some role in Copygraphic's declining fortunes in those months, I believe that the Homans grossly exaggerate that factor's importance. For starters, Ken Turoczy's enhanced marketing only began in earnest in March. Furthermore, it did not really end until June. As important, Ken Turoczy continued to work every day at CopyGraphics, even in the summer of 2000. The Homans unpersuasively characterize his involvement as a minimal investment of time, tantamount to absentee management.[33] But they attach no importance to the fact that he regularly spent a portion of his hours on the job personally making deliveries to his customers, shaking hands, and reinforcing his image in the community as a small businessman devoted to customer service. Notably, this was the

[33] Susan Homan, at trial, succinctly expressed this dismissive attitude, asking: "Ken, what do you really do when you are sitting here for your two hours a day, or whatever?" Tr. at 306.

one element of Ken Turoczy's marketing efforts that disappeared entirely once the Homans took over the business. Even assuming that Ken Turoczy did not continue to otherwise market the business as aggressively in the summer of 2000 as he had in the spring of 2000, the evidence is that he still came to work and made deliveries every day. The Homans have also failed to show that Ken Turoczy did not continue other marketing efforts, such as radio ads and ads in church newsletters. In addition the Homans fail to acknowledge that the American economy was experiencing slow growth by summer 2000. Put simply, even in 1999, the Turoczys never generated revenues at CopyGraphics nearly as low as the Homans achieved.

In an attempt not to burden the reader's patience more than reasonably necessary, let me simply conclude that Ken Turoczy's political campaign was not the most probable reason for the Homans' relative lack of success after closing. I find the following explanations for the decline in CopyGraphics' fortunes more plausible:

- Neither of the Homans spent sufficient time with the Turoczys after closing to understand the business or its customers, or how the Turoczys had made CopyGraphics successful for 19 years. The Agreement provided that the Turoczys had to make themselves available to help during the transition. The Turoczys honored that obligation but the Homans did not take advantage of it. In fact, when the Homans began having trouble generating revenue, Ken Turoczy offered to visit customers with the Homans and they did not take him up on his offer.

- Neither of the Homans knew how to run a business like CopyGraphics, nor did they spend the time to actually learn how to do it. Although perhaps familiar with marketing a big company's products, they were not familiar with how to market services to other small businesses. Instead, they increasingly relied on CopyGraphics' existing staff to do all the functions; they did not have the time or put forth the same amount of effort that Ken Turoczy had put into the business to nurture clients and find new ones.

- Susan Homan suffered an injury in an auto accident that caused her to spend even less time at CopyGraphics. This loss of time came on top of the fact that both she and Greg had full-time jobs elsewhere, and that her business travel had already limited her time at CopyGraphics. For Greg's part, he had taken a new job at Visa soon after taking over the business, and although he says this made it easier for him to be at CopyGraphics, the record does not show that he actually spent more time there. Rather, it is more plausible that he felt special pressure to prove himself to his new employer and would have been careful not to endanger his new employment by spending excessive time out of the office.

- Although the Homans were able to find some new clients, their ties with the surrounding community near CopyGraphics were not as strong as those that the Turoczys had forged over a period of nineteen years. Moreover, the Homans had full-time, day jobs. Therefore, the Homans were rarely at CopyGraphics during the time of day when they could visit existing clients and seek out new ones.

- The Homans' new management practices alienated existing customers, two of whom testified credibly at trial that they found another copy shop after being treated poorly under the new management.

- On top of their professional obligations, the Homans bought a new, more expensive home during this period and were faced with the pressures of being parents to four children.

- The general economic conditions in the United States deteriorated during the period from autumn 2000 to autumn 2001, with the nation arguably entering a recession.[34]

All in all, these are the most plausible explanations for the Homans' lack of success.

The poor revenues CopyGraphics generated under the Homans' management caused real problems for them, given the debts they owed. They had borrowed $700,000 to buy the business and had also bought a new home. According to them, they borrowed from Greg's 401(k) account to cover costs after their line of credit for the business was

[34] There is some debate about whether an actual recession occurred, but no debate that the economy was performing sluggishly during this period.

tapped out. As 2001 proceeded, the Homans cut costs at the business by shortening hours and, so it seems, cutting advertising costs. But they could not turn things around.

Therefore, in the spring or early summer of 2001, the Homans contacted Cress and tried to get him to help them sell the business. Having so recently brokered the business, Cress declined. Then, the Homans retained another business broker, Ron Brucker, to sell the business and provided him with information to help him accomplish that task. The information they gave Brucker was essentially a copy of the business profile that Cress had prepared to market the business in 2000. For example, Brucker's profile includes sections entitled "Business Activity" and "Marketing Strategy" that were taken almost verbatim from Cress's profile, with minor alterations to reflect certain changes in the business, such as new equipment that the Homans had purchased.[35] Brucker's profile also included Sales and Cash Flow data for the years 1997 through 1999. Notably, Brucker's reported revenues for each fiscal year were precisely the same as revenues reported in Cress's profile, but owner cash flows reported in Brucker's profile were substantially higher than those reported in Cress's profile. Where Cress reported cash flows for fiscal years 1997, 1998, and 1999 as $192,234, $180,319, and $99,699, respectively, Brucker reported *higher* cash flows of $230,034, $214,269, and $125,599.[36]

The Homans explained their reasons for selling as follows:

> The current owners purchased the business in 2000 as a couple with the intention of running the business on a part-time basis while both being employed full-time at a large local corporation. Then an automobile accident brought an injury that requires on-going rehabilitation and has

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[35] *See* JX 48 (referring to new software).
[36] Compare JX 47 with JX 48.

> interfered with their plans to grow the business. It has also changed their life priorities and has resulted in their decision to sell the business. *The company employees are proficient to run the day to day; however, normal marketing efforts have been absent to maintain growth. A new owner, with marketing and sales skills, can quickly enhance revenues and could easily double the business volume within a two-year period*. The equipment can easily handle a two-fold increase in business. A new owner does not need have any technical experience in the trade.
>
> * * *
>
> MARKETING STRATEGY:
>
> *Even though the recent circumstances have prevented this business from performing correctly, it really is perfectly positioned for significant growth. What is needed is a new owner, with marketing and sales skills, who is able to dedicate some time in enhancing revenues* (e.g. direct mail, advertising, etc.). There is ample business to be had in the area and the equipment can handle double the existing capacity. Further a new owner will reap the benefits of their new software by introducing the new capabilities to local businesses making it easier and more convenient to bring more work in the business. A new owner need not have any experience in this industry since the business is staffed with fully trained employees.[37]

Although Brucker received some expressions of interest, potential buyers quickly lost interest when they had the opportunity to inspect the company's current records and compare those numbers with the price the Homans were asking. On October 2, 2001, the Homans approached the Turoczys asking them to rescind the transaction. The Turoczys declined and the Homans threatened litigation. On October 29, 2001, the Homans sued for rescission of the Agreement.

But, before they prosecuted the lawsuit, the Homans closed CopyGraphics on October 31, 2001. Following the closure of CopyGraphics, Canon Financial Services

[37] JX 48 (underlined emphasis in original; italics emphasis added).

took possession of the copiers under the lease the Homans had struck with it on or about October 26, 2000 and later sued the Homans personally for their breach of the copier lease contract. In October 2002, CIT — the Homans' lender — auctioned off the CopyGraphics real estate for $345,000 and all of the business' hard assets for a total of $8,300. In February 2003, the Homans filed for Chapter 7 bankruptcy protection to avoid personal exposure to the lawsuit filed by Canon.

II. Legal Analysis

This suit was filed on October 29, 2001, two days before the Homans closed CopyGraphics. Although the complaint is somewhat unclear on this point, the parties agree that the Homans have pressed a claim for equitable fraud against the defendants, Ken Turoczy, KCT Enterprises, and MT Associates. The Homans have also pressed a claim for common law fraud.

Common law and equitable fraud involve almost identical elements. To prove common law fraud, a plaintiff must show: 1) a false representation, usually one of fact, made by the defendant; 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.[38]

To prove equitable fraud, a plaintiff must satisfy all the elements of common law fraud but need not prove knowledge of falsity or reckless disregard of the truth on the

[38] *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

defendent's part.[39] That is, the plaintiff need not prove scienter on the part of the defendant.

For obvious reasons, the Homans have concentrated on their equitable fraud claim, as that is the easier claim to prove. The various defendants, in their pre- and post-trial submissions, have not argued that, because they were not in a fiduciary relationship with the Homans, the Homans are barred from pressing claims of equitable fraud. For that reason, I do not address that issue, although I note it.[40] For the same reason, I consider it

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[39] *Id*.

[40] The concept of equitable fraud is not as well defined as other areas of Delaware jurisprudence. In *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) and *Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996), the Delaware Supreme Court flatly stated that the doctrine of equitable fraud permits plaintiffs to seek relief in the Court of Chancery even when a defendant's misrepresentations were negligent or innocent. That broad language, of course, makes equitable fraud a more attractive remedy than common law fraud. It is also illustrative of a policy divergence with the law of some other key commercial states, such as New York. Under New York law, for example, parties asserting claims of fraud in the absence of scienter must "prove the existence of a fiduciary or confidential relationship warranting his or her repose of confidence in the defendant and consequent relaxation of the care and vigilance he or she would ordinarily exercise under the circumstances." 60A N.Y. Jur. 2d *Fraud & Deceit* § 2 (2003). In some of our court's jurisprudence, there are hints of sympathy with the New York approach. *See US West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, at *26 (Del. Ch. June 6, 1996) (noting that there are normally only two cases where equitable fraud claims can be pled: 1) where equitable rights are founded upon a special relationship over which equity takes jurisdiction, or 2) where equity affords special remedies). The flat statements in cases like *Stephenson* and *Zirn* are not accompanied by a clear rationale for making a scienter-free remedy broadly available in equity.

On independently reviewing recent Delaware case law, admittedly not exhaustively, I was unable to find — and the parties have not cited — any case that sheds much light on the origins of the relaxation of the scienter requirement in Delaware's law of fraud. Presumably, where the defendant owes special duties, such as those of a fiduciary, to the plaintiff, or otherwise has a special relationship of trust with the plaintiff, the defendant's fiduciary or confidential relationship to the plaintiff and the increased duty to speak with candor that accompanies such positions of trust justifies the relaxation of the scienter element of common law fraud. *See* 37 Am. Jur. 2d *Fraud & Deceit* § 30 ("[F]raud is often presumed or inferred where a confidential or fiduciary relationship exists between the parties to a transaction or contract."). Alternatively, the answer may implicitly lie in the encroachment of the common law on a legal domain — that of fraud — that was traditionally the exclusive province of equity courts and a response by equity to broaden the situations when relief would be made available for misrepresentation. For a good, if

conceded by the defendants that the Homans pled a claim for equitable fraud and therefore that this court has jurisdiction, notwithstanding the frivolous nature of the Homans' claim for rescission.[41]

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incomplete, summary of that evolution, *see* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 2-3[b], 2-25 to 2-33 (2005).

No fiduciary or special relationship exists between the Homans and the Turoczys here. The use of a relaxed "equitable" fraud standard, applying to all speakers, regardless of their arms-length relationship with the listener, arguably has greater societal costs than societal benefits, and undercuts the policy justification undergirding the scienter requirement of common law fraud. That is, if equitable fraud claims that do not require the plaintiff to prove scienter can be brought against any defendant, regardless of the relationship between the parties, then there would be no reason to ever assert a fraud claim under the more rigorous common law standard. At any rate, the parties have chosen not to dilate on these points, and without their help — or for that matter, absent any need to do so — I shall delve no further into this arcane realm of our law.

[41] As the previous note would suggest might be the case, Delaware jurisprudence on the circumstances in which a plaintiff may press an equitable fraud claim in this court is, to put it gently, less than clear. The excellent Wolfe & Pittenger treatise gives a hint of this and suggests that the muddle may have to do with the fact that fraud was traditionally policed by equity and that the law courts came late to the party. Wolfe & Pittenger, § 2-3[b], 2-25 to 2-33 (2005). As a result of the confusion, the defendants have, at a very belated stage of the litigation, argued that this court lacks jurisdiction because the Homans did not file promptly enough to seek invalidation of the Agreement and because monetary damages are an adequate form of relief. In so arguing, they cite to this court's decision in *Wolf v. Magness Construction Co*., 1994 WL 728831 (Del. Ch. Dec. 20, 1994). The defendants' overall briefing on this issue is cursory, however, and there is authority to the contrary. That authority rests on the notion that equitable fraud is an equitable cause of action that long preceded the emergence of similar theories of recovery at law and that this court therefore retains jurisdiction to hear an equitable fraud claim. A respected treatise hews to this as the "better view." *See* Wolfe & Pittenger, § 2-3[b][1][ii], 2-32 (2005) (stating that the "better view" is that "[C]hancery's jurisdiction over [equitable fraud claims] is not dependent upon the availability of an adequate remedy at law, and it may proceed to resolve the matter even where the only relief sought is an award of money damages indistinguishable from that which may be secured at law upon a proper showing."). Given the inadequate state of the briefing, the late stage at which this issue is being presented, and the interests of judicial economy, I also adhere to that view, and refuse to punt the case to Superior Court at this post-trial stage. In so concluding, I note that it would be a viable approach for Delaware to hold that equitable fraud can only be pled when a fiduciary or other relation exists between the plaintiff and defendant, or at most in the additional circumstance when the plaintiff is seeking actual rescission and avoidance of the underlying contract altogether. *See, e.g., US West*, 1996 WL 307445, at *26. But the broad language in *Stephenson* and its progeny suggest other rational choices for our law. The task of more precisely defining when and against whom equitable fraud claims may be pressed should be left to future cases with more adequate briefing.

I say frivolous with good reason. The Homans closed CopyGraphics two days after filing this suit. Not only that, they claim to have realized that CopyGraphics was performing poorly within a week of taking over the business. Nonetheless, they proceeded to run the business for more than one year, implementing their own management philosophy. As of the date they filed suit, their inexcusable torpor and alteration of the previous method of operating the business would have made rescission an improper remedy. And after they filed suit, the Homans rapidly closed CopyGraphics, rendering rescission impossible. And even then, the Homans did little to prosecute this action in a timely manner. Their own personal bankruptcy delayed matters even more. For these same reasons, it would be inequitable to permit the Homans to seek an award of rescissory damages now.[42] They fundamentally altered CopyGraphics and are seeking an award that assumes that the business and property they received from the corporate defendants was without any value at all. That is obviously not factually anywhere near correct, and the Homans are in no position to ask this court to grant them such a windfall.[43]

The key issue in this case, therefore, is whether the Homans have proven a claim for equitable fraud and resulting damages. Secondarily, the Homans allege that Ken

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[42] *See Gaffin v. Teledyne, Inc.*, 1990 WL 195914, at *18 (Del. Ch. Dec. 4, 1990) (holding that an award of rescission or rescissory damages is not appropriate where a plaintiff excessively delays seeking them), *rev'd on other grounds*, 611 A.2d 467 (Del. 1992).

[43] The Homans want an award of rescissory damages of $80,000, which they claim is the out-of-pocket funds they paid for CopyGraphics and the real estate. Because their lender, CIT, did not file a proof of claim in bankruptcy against them — no doubt because the loan was guaranteed by the Small Business Administration and CIT was covered by that guarantee — the Homans say this is their only cost of the acquisition itself. They also seek consequential damages for cash they allegedly put into CopyGraphics after the sale, supposedly in order to keep the business afloat, and for their supposed liability to Canon on the copier lease.

Turoczy breached the Agreement because he did not continue his increased marketing efforts thoughout the summer of 2000. This decrease in his stepped-up efforts, the Homans contend, breached an implied covenant of good faith and fair dealing, as the seller, not to alter the condition of CopyGraphics' operation in the period between execution of the Agreement and closing. Oddly, the Homans also allege that the Turoczys' attempt to collect on a receivable from a customer, Precision Forms & Graphics, after the Agreement had been signed constituted a second breach of the implied covenant of good faith and fair dealing, despite the fact that the Homans chose not to purchase CopyGraphics' accounts receivable under the terms of the Agreement.

I address these issues in the following order. First, I explain why the Homans have failed to prove their claim of equitable fraud. Second, I explain why the Homans have failed to prove any breach of the implied covenant of good faith and fair dealing. Finally, I discuss why I conclude that the Homans have failed to prove that any breach of duty by the defendants was the proximate cause of any injury to them, noting my belief that it was more likely that any harm to the Homans came from their own inability to market and manage CopyGraphics effectively.

A. The Homans Have Failed To Prove Their Claim Of Equitable Fraud

The Homans claim that the defendants made several material misstatements of fact upon which they reasonably relied. First and foremost, the Homans claim that they were told that the Projections were reasonable estimates of how CopyGraphics would perform on an inertial basis and that monthly revenues of $50,000 could be depended upon without worry or risk. Second, the Homans argue that they were falsely told that there

were no financial records available for June and July 2000 when such records existed. Third, and relatedly, the Homans contend that they were told that the actual results for June and July were in line with the estimates contained in the Projections. I deal with these claims in turn.

As a predicate, I note that I do not, as a general matter, credit the Homans' testimony. As I will dilate on more later, the Homans are now advancing contentions that are inconsistent with written statements they made on several prior occasions. In effect, they ask me to shrug off the credibility problem presented by these inconsistencies — that if I accept their trial testimony as true, I am forced to conclude that the Homans were willing to tell untruths in the past when that was convenient to them. Notable in that regard, of course, was the Homans' willingness to market CopyGraphics on the basis that it was a fundamentally healthy business that had suffered as a result of their own inattention, and their willingness to sign several documents clearly stating that they were not relying on oral representations in deciding to purchase CopyGraphics. As a trial judge forced to assess a claim by the Homans that other people misled them, I do not find these inconsistencies a trifling matter. Rather, they color my impression of the Homans' present testimony as more driven by self-interest than by a good faith attempt to present an accurate and balanced rendition of poorly-documented past events.

As to the Projections, I do not find that the defendants made any statements telling the Homans that they could rely on CopyGraphics producing $50,000 per month as a virtual certainty and without effective ongoing marketing efforts. As a general matter, our law is reluctant to permit a plaintiff to premise a fraud claim on the failure of future

predictions to come true, because such predictions are, by definition, not statements of past fact, but necessarily imprecise attempts to foresee the future.[44] Here, Cress simply projected the results for the first several months of the year 2000 over the entire year. Moreover, his statement that the Projections were "very conservative," which the Homans emphasize, was unmistakably a statement of opinion accompanied by a second statement, which the Homans do not emphasize, that explicitly describes his bullish cash flow projection as a "guess."[45] It is the law in Delaware that statements of opinion concerning probable future events cannot be deemed fraud or misrepresentation when, as here, they were clearly made as such.[46]

Most important, I do not believe that Ken Turoczy or Cress ever told the Homans that CopyGraphics would achieve revenues of $50,000 per month without an effective, ongoing marketing program. Rather, I conclude that they told the Homans that CopyGraphics could succeed at the levels it achieved in 1997 and 1998 if the Homans put energy in nurturing existing customer relations and building new ones. Although Cress was probably more bullish than he should have been, I see no evidence that persuades me that he made any representation of fact that was false. At most, he presented the Homans

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[44] *See, e.g., Consol. Fisheries Corp. v. Consol. Solubles, Co.*, 112 A.2d 30, 37 (Del. 1955); *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 554 (Del. Ch. 2001) ("Predictions about the future cannot give rise to actionable common law fraud. Nor can expression of opinion.") (citations omitted); *Noerr v. Greenwood*, 1997 WL 419633, at *4 (Del. Ch. July 16, 1997) ("A plaintiff may not simply contrast a defendant's past optimism with less favorable actual results and then contend that the difference must be attributable to fraud.") (internal quotations, alterations, and citations omitted).
[45] JX 2.
[46] *See Wilson v. Pepper*, 1989 WL 268077, at *4 (Del. Ch. Dec. 21, 1989) (citing *Consol. Fisheries*, 112 A.2d at 37).

with a rosy vision of what CopyGraphics could produce, but it was just that — a vision — that was clearly presented as a "guess."[47]

Next, I do not believe that the defendants misled the Homans about the existence of financial records for June and July. To the extent that Ken Turoczy indicated that the QuickBooks program entries had not been made for June and July, that was true. It is not true, however, that Ken Turoczy told the Homans and Rowland that other records — invoices, bank statements, etc. — were not available for those months. Indeed, Rowland testified that Ken Turoczy said the records were at his house.[48] If Rowland's recollection is accurate (which I do not find probable), the fact that neither Rowland nor the Homans asked Ken Turoczy to retrieve them speaks volumes. More likely is that the Homans and their accountant Rowland never thoroughly reviewed the available records during their on-site due diligence review session. And, although Rowland claims that he later advised the Homans not to proceed until they reviewed the bank statements and invoices for June and July, neither he nor the Homans ever made a written request for those records. The perception that emerges from this muddle is one of inattentive buyers who did not ask for available records when those records would have been useful, and who are now willing to recast their own failures in due diligence to their advantage, claiming that they were deprived of access to existing information. I do not find their claim convincing.

Lastly, I do not credit the Homans' claim that they were told that the results for June and July were on track with the Projections. They argue that they accepted this oral

[47] JX 2.
[48] Tr. at 479.

representation in lieu of receiving documentation. I do not find this plausible. Having nothing other than the Homans say-so to go on, I cannot conclude that any such statements were actually made. Statements of this kind are exactly the sort that should be confirmed in writing. Given the Homans' self-interest and willingness to change their stories when convenient, I cannot credit their testimony on this issue.

For all these reasons, I am unconvinced that the defendants made material, false representations of fact. Therefore, the Homans' fraud claims fail.

But the Homans' fraud claims also fail for another equally important reason. To prevail, they must establish that they reasonably relied on false representations. They cannot do so for several reasons.

First, they expressly disavowed any reliance on any oral statements made by the defendants or Cress. In the Agreement, the Homans expressly acknowledged that:

> **7.05** This document contains the entire understanding of the parties, *and there are no oral agreements, understandings, or representations relied upon by the parties*. Any modifications must be in writing and signed by all parties.[49]

And, in the important contract to buy the land on which CopyGraphics was located, the Homans again promised that:

> **10. NO REPRESENTATIONS; ENTIRE AGREEMENT.** Buyer has agreed to purchase the property in its present conditions unless otherwise specified in this Agreement. *Buyer and Seller agree that they have read and fully understand this Agreement, that it contains the entire agreement between them and that they do not rely on any written or oral representation or statement not expressly written in this Agreement.* Without limiting the generality of the foregoing, Buyer acknowledges that Buyer is not purchasing the property based on any representation or

[49] JX 5 (bold emphasis in original; italics emphasis added).

> statement of fact or opinion contained in any advertisement, listing agreement, multi-list description or information sheet, or made by Seller or any agent of Seller. Furthermore, this Agreement shall not be amended except in writing signed by Buyer and Seller.[50]

Lastly, at closing, the Homans signed a "Disclaimer" declaring in part that:

> We have not relied on the representations of [Brandywine Business Associates], its principals [i.e., Cress], sales associates, or agents regarding any material fact in connection with the subject matter of the sale, the business involved, its value, compliance with any applicable laws, or the financial conditions thereof, or of either party hereto, and acknowledge that each party has conducted an independent investigation of the material facts relied upon in this transaction.[51]

The Disclaimer is broad enough to encompass Cress's statements about the conservative nature of the Projections, and indeed, the Projections themselves.

In *Kronenberg v. Katz*, this court stated that:

> [F]or a contract to bar a fraud in the inducement claim, the contract must contain language that, when read together, can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.[52]

Here, the Homans agreed to be bound by not one, but three anti-reliance clauses, which taken together indisputably demonstrate their promise that they were not relying on oral statements. The repeated express indications by the Homans that they were not relying on any oral representations are exactly of the kind that this court has found binding in the commercial contract formation process. Cases such as *Great Lakes Chem. Corp. v.*

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[50] JX 7 (bold emphasis in original; italics emphasis added).
[51] JX 53.
[52] 872 A.2d 568, 593 (Del. Ch. 2004).

Pharmacia Corp.[53] and *H-M Wexford v. Encorp, Inc.*[54] stand for this proposition. Delaware law takes contracts and written representations seriously. Both of the Homans have years of professional experience as executives and hold advanced degrees in business administration. They knew what they were signing[55] and should be held to their words.

In itself, the concept of "reasonable reliance" is an important one. Parties to contracts are expected to act in a commercially sensible manner. Here, the Homans did not. They claim to have relied on Cress's Projections, not as estimates of what the future might hold if they were good marketers and managers, but as some sort of a guarantee. That is unreasonable. If the Homans wanted a warranty of future results or a contractual claw-back, they could have bargained for one. Furthermore, it is obviously unreasonable to blindly rely on Projections that expressly indicate that the speaker (in this case, Cress) was "guessing."

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[53] 788 A.2d 544 (Del. Ch. 2001). In this important case, Vice Chancellor, now Justice Jacobs, convincingly explained why the Delaware Supreme Court's decision in *Norton v. Poplos* (443 A.2d 1 (Del. 1982)) should not be read as governing in situations involving commercial contracts with parties of equal sophistication. *Id.* at 555-6. This court has, in a variety of decisions since, adhered to his sound reasoning. *See, e.g.*, *H-M Wexford v. Encorp, Inc.*, 832 A.2d 129 (Del. Ch. 2003), *Kronenberg v. Katz*, 872 A.2d 568, and *Progressive International Corp. v. E.I. DuPont De Nemours & Co.*, 2002 WL 1558382 (Del. Ch. July 9, 2002). That reasoning is pertinent, here. The Homans are both literate people with MBA degrees who were advised by an experienced business attorney and accountant. Each understood the written promises of non-reliance they were making. Our commercial law, like our corporate law, values freedom of contract and clear anti-reliance clauses should be enforced. The reasons for that are well stated in *Great Lakes*, and in the other decisions cited above, and need not be repeated in full here.

[54] 832 A.2d at 142 n.18 ("The Court of Chancery has consistently held that sophisticated parties to negotiated commercial contracts may not reasonably rely on information that they contractually agreed did not form a part of the basis for their decision to contract.").

[55] Tr. at 290-291, 297-298, 327-328.

The Homans also claim that they relied on representations that CopyGraphics' revenues were "self sustaining." Indeed, the Homans' testimony is replete with expressions of their supposed understanding that CopyGraphics' business and revenues were "sustainable." But the Homans identified no statement by the Turoczys or Cress suggesting that CopyGraphics' revenues were self-sustaining in the sense that $50,000 would flow effortlessly or risk-free into the business each month. The Homans knew from the get-go that CopyGraphics' revenues fell dramatically in 1999, precisely "due to the business being run on semi absentee basis."[56] Because the Homans were fully aware that, in the recent past, revenues declined when Ken Turoczy's direct involvement in the business declined, their expectations that $50,000 in monthly revenues could be achieved without substantial and successful marketing efforts on their part were unreasonable.

Most unreasonable of all, the Homans claim to have accepted the Projections in lieu of actual data for June and July. No reasonable buyer would behave in that fashion. The Homans' failure to follow up on Rowland's supposed recommendation that they review the bank statements and invoices for June and July is commercially unreasonable behavior. In the Agreement, the Homans were granted the right to walk away freely if they were unsatisfied in any way after due diligence.

Instead of verifying that CopyGraphics was continuing to perform well in 2000 — which they could have done by examining the bank statements and invoices for June and July, or by insisting that Ken Turoczy present completed financial statements for those months — the Homans simply proceeded to closing. Not only that, the Homans signed a

[56] JX 47.

document stating that they were satisfied with the due diligence materials they had received. Furthermore, although they knew that Ken Turoczy was running for political office, the Homans apparently never bothered to ask him whether that was distracting him from his duties at CopyGraphics.

In sum, the Homans proceeded in a careless manner at odds with the supposed advice of their own advisor. They failed to ask for relevant information. They failed to ask that factual circumstances supposedly important to them be warranted in writing to exist. To permit them to be relieved of the consequences of their own lack of care would create an incentive for other buyers to act with similar sloth in the future. The requirement that reliance be reasonable is designed in part to ensure diligence on the part of purchasers. Buying a business is not a risk-free venture, and the law of fraud is not a form of strict liability intended to provide recompense to purchasers who proceed to close a deal conscious that they are ignorant of certain information and who promise in writing that they are not contracting on the basis of oral representations by the sellers or any representations by the sellers' broker.

B. The Homans Have Failed To Prove Any Breach Of The Implied Covenant Of Good Faith And Fair Dealing

The Homans claim that the defendants breached an implied covenant of good faith and fair dealing because 1) Ken Turoczy cut back on his marketing of CopyGraphics beginning in June 2000 in order to pursue a political campaign, and 2) the Turoczys tried to collect a bill from Precision Forms & Graphics, a significant CopyGraphics customer. They cite in support of this strained notion an old New York case, *Von Breme v.*

MacMonnies, holding that the seller of a business "is not at liberty to destroy or depreciate the thing which he has sold . . . ."[57]

That century-old statement is wrenched by the Homans out of its original context and bears no material relation to the facts of this case. The quoted language was cited in *Von Breme* in support of the principle that one who sells his business should not then be permitted to intentionally solicit customers away from the business he sold, to the detriment of the purchaser. The Homans have not alleged that Turoczy violated his agreement not to compete with CopyGraphics.Nor do the Homans' relate that statement to the law of our state, which is chary about using the implied covenant of good faith and fair dealing as a license for the judicial crafting of contractual protections that could have been, but were not, extracted at the bargaining table.[58] Under Delaware law, the implied covenant of good faith and fair dealing is employed as a means of honoring the parties' reasonable expectations in forming a contract.[59] Courts must interpret the reasonable expectations of the parties within the context of existing contract terms, however. Accordingly, the implied covenant cannot be asserted to circumvent the express terms of the parties' bargain or to create new duties unattached to the underlying contract,[60] and

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[57] 93 N.E. 186, 189 (N.Y. 1910) (quoting *Trego v. Hunt*, L.R. 21 App. Cas. 7 (1895)).
[58] *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. Ch. 2004), *aff'd* 861 A.2d 1251 (Del. 2004); *see also Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) (stating, with respect to application of the implied covenant of good faith and fair dealing, that "it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement").
[59] *See, e.g., E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996).
[60] *See Dunlap v. State Farm Fire & Casualty Co.*, ___ A.2d ___, 2005 WL 1653454, at *4 (Del. July 13, 2005); *see also Gilbert v. El Paso Co.*, 575 A.2d 1131, 1143 (Del. 1990) (holding that subjective standards of good faith and fair dealing "cannot override the literal terms of an agreement").

courts should not imply alleged obligation where the contract addresses the subject of the alleged wrong, but fails to include the obligation alleged.[61] Thus, the Delaware Supreme Court has consistently held that obligations under the covenant of good faith and fair dealing should be implied only in rare instances.[62]

Here, the Homans allege that Ken Turoczy depreciated the value of CopyGraphics by reducing his marketing efforts and devoting his time to a political campaign in the early summer of 2000. But, although it is common for commercial contracts to contain provisions requiring sellers to operate businesses they are selling in the same manner during the period between contracting and closing as they operated their businesses before contracting, the Homans did not extract any such promise from the Turoczys in negotiating the Agreement. Instead, the Homans protected themselves by bargaining for — and obtaining — a very broad right to walk away from the deal if they were unsatisfied in any way following due diligence. That is, instead of requiring the Turoczys to continue operating the business in the summer of 2000 as he had operated it during the spring of 2000, the Homans retained the right to avoid the deal if the Turoczys failed to do so. But the Homans, fully aware of the fact that Ken Turoczy was campaigning,

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[61] *See Moore Business Forms, Inc. v. Cordant Holdings Corp.*, 1995 WL 662685, at *8 (Del. Ch. Nov. 2, 1995) (citations and quotes omitted).

[62] *See Cincinnati*, 708 A.2d at 992 (noting that "Delaware Supreme Court jurisprudence is developing along the general approach that implying obligations based on the covenant of good faith and fair dealing is a cautious enterprise" and collecting cases supporting that observation); *see also Dunlap*, ___ A.2d at ___, 2005 WL 1653454, at *4 (describing application of the covenant of good faith and fair dealing as a "quasi-reformation" of contracts that the court has employed with "occasional necessity" and which "should be a rare and fact intensive exercise, governed solely by issues of compelling fairness"); *Rizzitielo v. McDonald's Corp.*, 868 A.2d 825, 831 (Del. 2005) ("[T]he implied covenant is to be narrowly construed."); *Pressman*, 679 A.2d at 443 ("Courts have been reluctant to recognize a broad application of the Covenant . . .").

nevertheless failed to effectively use the protections they bargained for. Had they demanded the actual results from June and July, they might have followed up with Ken Turoczy about whether his political campaign was hurting the business. But they did not demand those results, nor did they ever inquire of Ken Turoczy how much time he was spending on his campaign.

Given that and given that Ken Turoczy worked each business day at CopyGraphics during this period,[63] I decline to use the interstitial implied covenant to police the hours of effort an owner puts in during the period between deal signing and closing. The covenant, as has been noted, should be invoked only sparingly, and with strong justification. To use it here would involve imposing a contractual provision the Homans could have extracted but did not, and setting a precedent that would involve the judiciary in making arbitrary and standardless determinations of what degree of decreased effort was sufficient to breach this newly invented, implied duty.

For similar reasons, I also conclude that the Homans' claim that Ken Turoczy breached the implied covenant of good faith and fair dealing by trying to collect a bill from Precision Forms & Graphics[64] lacks merit. To find an implied obligation of the

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[63] Ken Turoczy's testimony that he campaigned in late afternoon and early evenings, and worked at CopyGraphics each business day makes perfect political sense. Door-knocking is a post-work day enterprise.

[64] In their papers, the Homans also claim that Ken Turoczy exaggerated the reliability of Precision Forms & Graphics as a customer. In her deposition testimony, Susan Homan claims that Ken Turoczy said Precision accounted for 40% of CopyGraphics' business. JX 66 at 21. But the Homans were explicitly informed in writing that "[n]o one customer accounts for more than 15% of [CopyGraphic's] revenue base." JX 47. Moreover, I find no specific false representation of fact was made regarding Precision. Precision was, in fact, an important, if difficult, customer, but I find no basis to believe the Homans were told they could expect a predictable revenue stream from Precision. As important, the Homans promised three times that

Turoczys to not collect what they were owed would be to ignore the terms of the underlying contract. In the Agreement, the Homans elected not to buy CopyGraphics' accounts receivable; the right to receive and to collect those accounts remained with the Turoczys. Having failed to pay for the receivables, the Homans cannot fault the Turoczys for attempting to collect what he was owed. Although it might have been better for all concerned if Ken Turoczy had consulted with the Homans about how to approach Precision, I cannot find any contractual breach, as the Turoczys had the legal right to collect the debt. Moreover, one of the Homans' trial witnesses admitted that Precision had long been a "slow pay,"[65] and Ken Turoczy's efforts did not preclude the Homans from procuring later work from Precision.[66]

C. The Homans Have Failed To Prove That Their Injuries Were Proximately Caused By Any Breach Of Duty By The Defendants

Lastly, the Homans have also failed to persuade me that the adverse financial consequences they claim to have suffered resulted from misconduct by the defendants rather than from the Homans' own failures as owner-operators of CopyGraphics.[67] For

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they did not rely on any such promise and could not have reasonably used their decision to purchase on vague, oral representations about a customer that they did nothing to verify.

[65] Tr. at 60.

[66] The Homans also argued in a cursory way that Turoczy breached the implied covenant by promising a customer, before closing, that CopyGraphics would print an event brochure for free, with the work to be done after closing, thus costing CopyGraphics money after the Homans bought the business. I accord this argument no weight. No proof of the amount of that charge is in the record and the Homans' argument in this regard is telling for another reason. Ken Turoczy often agreed to do some printing for community organizations for free to build good will in order to obtain future business. This sort of marketing effort was common and I can discern no attempt by Turoczy to harm the Homans.

[67] I note that the Homans never presented any evidence showing the value of CopyGraphics as of the date they received it from the defendants, nor did they attempt to demonstrate the extent to

reasons I have stated, the Homans did not devote the time necessary to run the company successfully. Their failure to do so, and their failures to take advantage of the Turoczys' transitional help, and to implement an effective strategy to keep existing customers satisfied and to identify new customers, are the most likely cause of CopyGraphic's failure. In essence, the Homans required the existing staff to continue their previous job duties, but to also perform many of the important functions essential to keeping customers satisfied that were previously performed by the Turoczys.

In so finding, I note that I find it improbable that CopyGraphics failed simply because Ken Turoczy decided to run for state representative in the summer of 2000. After all, the business had been around for 19 years. Ken Turoczy's revved up marketing campaign had only begun in March 2000. Even in 1999, the business generated over $500,000 in revenues, and in previous years, it had done much better than that. The level of revenues that CopyGraphics brought in under the Homans is indicative of new owners who did not know how to market a small business that was heavily dependent on the adjacent business community for work.

In reaching this conclusion, I confess that I am influenced in large measure by the Homans' contention that they accurately described CopyGraphics when they attempted to sell the company in the spring of 2001.[68] At that time, they described CopyGraphics as "perfectly positioned for significant growth."[69] That is, the Homans described it as a

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which the value of CopyGraphics when received it differed from they value of CopyGraphics as it was represented to them when they agreed to purchase it.

[68] JX 65 at 23; JX 66 at 43.

[69] JX 48.

fundamentally good business that could be run profitably by a good operator, specifically one "with marketing and sales skills, who is able to dedicate some time in enhancing revenues . . ."[70] — precisely the type of owner that the Turoczys described when they put the business up for sale a year earlier.[71] The Homans also persuasively attribute their lack of success not to acts of the prior owner, but to "recent circumstances [that] have prevented this business from performing correctly . . . ."[72] The "recent circumstances," although described as a debilitating automobile accident and a change in life priorities, ultimately resulted in an inability, or an unwillingness, to put forth the "normal marketing efforts" and "dedicate [the] time" to make the business successful.[73]

In my opinion, it is more likely that the failure of CopyGraphics resulted from these self-described factors than from any harm caused by Ken Turoczy's political campaign in the summer of 2000. With skill and good fortune, CopyGraphics could have achieved the success it had enjoyed in 1997 and 1998, and certainly the level of success it achieved in 1999. But there are no guarantees in life. And when new owners combine inexperience with a lack of time on the job; a failure to understand how the previous owners ran the business; complicated, time-consuming personal lives; the purchase of a new, more expensive home; management changes that alienate existing customers; a dearth of involvement with existing customers and marketing to neighboring businesses

[70] *Id.*
[71] JX 47.
[72] JX 48.
[73] *Id.*

during the business day; and a slowing economy, the chances for failure necessarily become more substantial.

Although one must empathize with the Homans' financial setbacks and the shame that they sincerely feel about their bankruptcy filing, that empathy does not justify holding the defendants responsible for the Homans' self-confessed inability to run CopyGraphics successfully.

III. Conclusion

For all these reasons, the Homans have failed to prove their claims and those claims are dismissed with prejudice.[74] Each side shall bear its own costs. IT IS SO ORDERED.

[74] In the pretrial order, the Homans contended that they were making a claim for mutual mistake. They did not press that claim in their post-trial briefs and it is waived. The claim also lacks factual merit, as the mutual mistake of fact the Homans claimed did not exist.