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STATE OF DELAWARE

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Re: *Grunstein v. Silva*
C.A. No. 3932-VCN
Date Submitted: May 21, 2012

Dear Counsel:

The Defendants have renewed two of their previously denied motions for partial summary judgment.[1] First, the Defendants reassert that there is no issue of material fact that Grunstein was in privity with MetCap and/or NASC when the *MetCap* Litigation was occurring, and thus, that the *res judicata* effect of that litigation bars all of the claims that Grunstein is asserting in this action. Second,

[1] Those motions were denied in *Grunstein v. Silva,* 2011 WL 378782 (Del. Ch. Jan. 31, 2011) (the "First Summary Judgment Opinion"). For convenience, the Court will generally use the nomenclature that was used in the First Summary Judgment Opinion.

the Defendants reassert that there is no issue of material fact that neither Dwyer nor CFG is entitled to the Pre-Paid Fee. Finally, the Defendants' Third Motion to Compel Discovery Responses (the "Defendants' Third Motion to Compel") is also pending.

For the following reasons, the Court denies the Defendants' renewed motions for partial summary judgment. With regard to the Defendants' Third Motion to Compel, Grunstein shall have three weeks from the date of this opinion to supplement any of his responses to the interrogatories and production requests at issue in that motion. Any documentary evidence on those topics, in the possession of Grunstein or his affiliates, which is not specifically disclosed by September 14, 2012, may not be offered as evidence by Grunstein at trial.[2] With that caveat, the Defendants' Third Motion to Compel is also denied.

[2] This holding does not limit Grunstein's ability to offer testimonial evidence.

A More Thorough Development of the Record Would Help Clarify Whether Grunstein's Claims Are Barred by Res Judicata[3]

The Defendants have renewed their motion for partial summary judgment on the issue of whether Grunstein was in privity with MetCap and/or NASC at the time of the *MetCap* Litigation. Under Court of Chancery Rule 56, summary judgment will be granted when it is shown that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] "The moving party initially has the burden of showing that no material fact issues exist, but once the moving party makes that showing, 'the nonmoving party has the burden of demonstrating that there are genuine issues of material fact that require resolution at trial.'"[5] "The Court 'also maintains the discretion to deny

[3] The background facts of this case have already been outlined several times. *See, e.g.*, First Summary Judgment Opinion, 2011 WL 378782, at *1-5; *Grunstein v. Silva*, 2009 WL 4698541, at *1-4 (Del. Ch. Dec. 8, 2009); *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *1-2 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899, 2009 WL 2470336, at *1 (Del. Aug. 13, 2009) (TABLE); *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *1-3 (Del. Ch. May 16, 2007). Therefore, those facts will not be rehashed here. In analyzing the Defendants' current motions, the Court will refer to the facts that are necessary to decide the narrow issues presented by those motions.

[4] Ct. Ch. R. 56(c); *Advanced Litig., LLC v. Herzka*, 2006 WL 4782445, at *4 (Del. Ch. Aug. 10, 2006).

[5] *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2012 WL 19469, at *5 (Del. Ch. Jan. 4, 2012) (quoting First Summary Judgment Opinion, 2011 WL 378782, at *7).

summary judgment if it decides that a more thorough development of the record would clarify the law or its application.'"[6]

An action is barred under the doctrine of *res judicata* where:

> (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.[7]

Moreover, "Delaware, like the federal courts, follows a transactional approach to *res judicata*."[8] "*Res judicata* constitutes an absolute bar on all claims that were litigated or which could have been litigated in the earlier proceeding."[9] Under the transactional approach, however, "in addition to showing that the same transaction formed the basis for both the present and former suits, the defendant must show

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[6] *Herzka*, 2006 WL 4782445, at *4 (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).
[7] *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006) (citation omitted).
[8] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 193 (2009) (citations omitted).
[9] *Hendry v. Hendry*, 2006 WL 4804019, at *8 (Del. Ch. May 30, 2006).

that the plaintiff neglected or failed to assert claims which in fairness should have been asserted in the first action."[10]

As explained in the First Summary Judgment Opinion:

> Here, the Court is not confronted with a situation in which a plaintiff has filed a second action against defendants they previously sued regarding the same transaction. Instead, Defendants argue that Grunstein's claims here are barred because he is in privity with MetCap, the plaintiff in the *MetCap* litigation, which, the parties agree, arose out of the same transaction as the dispute now before the Court.[11]

"Two parties are in privity where 'the relationship between two or more persons is such that a judgment involving one of them may justly be conclusive on the others, although those others were not party to the lawsuit.'"[12] "[A]t bottom, 'the test of privity is whether there is a close or significant relationship between successive defendants.'"[13]

The Defendants have offered more evidence of privity between Grunstein and MetCap than was offered when the First Summary Judgment Opinion was

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[10] *LaPoint*, 970 A.2d at 193-94 (citation and internal quotations omitted).
[11] First Summary Judgment Opinion, 2011 WL 378782, at *8.
[12] *Levinhar v. MDG Medical, Inc.*, 2009 WL 4263211, at *8 (Del. Ch. Nov. 24, 2009) (quoting *Higgins v. Walls*, 901 A.2d 122, 138 (Del. Super. 2005)).
[13] *Id.* (quoting *Orloff v. Shulman*, 2005 WL 3272355, at *9 (Del. Ch. Nov. 23, 2005)).

issued. Of particular interest to the Court are the unredacted tax returns of MetCap Holding LLC ("MetCap Holding") from 2004 to 2006, which the Defendants did not receive until July 26, 2012.[14] MetCap Holding is the sole member of MetCap, and MetCap Holding's tax returns show that Grunstein received 61.78% of the withdrawals and distributions received by MetCap Holding's owners in 2006, as well as 54.9% and 45.3% of the withdrawals and distributions received in 2005 and 2004, respectively.[15] Moreover, MetCap Holding's tax returns show that from 2004 to 2006 Grunstein received the largest share of MetCap Holding's profits of any of its owners. Specifically, Grunstein received: 47.42% in 2004; 47.66% in 2005; and 61.72% in 2006.[16]

MetCap Holding's tax returns strongly suggest that there is a close or significant relationship between Grunstein and MetCap. There is, however, still some evidence, including Forman's deposition testimony, which indicates that Grunstein had little to do with the decision-making at MetCap. With regard to NASC, there is evidence that Grunstein never owned any portion of that company,

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[14] August 1, 2012 Affidavit of Lily A. North, Esq. ¶ 3.
[15] *Id.* at ¶ 4.
[16] *Id.* at ¶ 5.

and that Mark Goldsmith made all of NASC's decisions. Moreover, even if the Defendants had established privity between Grunstein, on the one hand, and MetCap and/or NASC, on the other, "[t]he Court is [still] not convinced that Grunstein 'could and should' have joined the *MetCap* Litigation in his individual capacity and asserted [his] present claims at that time."[17]

As the Defendants explain, the current action involves "claims by Grunstein against Defendants for breach of an alleged oral partnership agreement and other related claims."[18] There has been no suggestion that those claims could have been brought by the parties who actually participated in the *MetCap* Litigation. None of the plaintiffs in the *MetCap* Litigation would have had standing to assert a claim against Silva for breach of an oral partnership agreement that was allegedly between Grunstein and Silva. The Defendants argue that that does not matter because, under Delaware law, *res judicata* bars a party and its privies from

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[17] First Summary Judgment Opinion, 2011 WL 378782, at *8. *See also Grunstein v. Silva*, 2011 WL 808879, at *1 (Del. Ch. Feb. 21, 2011) ("Thus, if the Court had determined that the record before it indicated, as a matter of law, that Grunstein is in 'privity' with MetCap *and that his individual claims, in fairness, should have been asserted in the earlier action*, the Defendants would have been entitled, under the doctrine of *res judicata,* to summary judgment on all of Grunstein's claims in this action.") (emphasis added) (citation omitted).

[18] Defs.' Br. in Supp. of their Renewed Mot. for Summ. J. as to Pl. Grunstein (*Res Judicata*) at 11.

asserting claims that either could have raised in a previous action regardless of whether those claims could have been asserted in the litigation that actually occurred.[19] In other words, the Defendants argue that this Court can make a determination that a person is in "privity" with a party to an action, and then that person will be barred from bringing any claims that she could have brought had she actually been a party to the action. That is a very broad rule.

It would be an especially broad rule in Delaware where "'the test of privity is whether there is a close or significant relationship between successive defendants.'"[20] Thus, under the Defendants' interpretation of *res judicata*, claims that could not have been asserted in any proceeding would be barred if this Court determined that the party holding those claims had a significant relationship to another party that did bring claims. The Defendants, citing *Levinhar* and *Orange*

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[19] At least one Ohio court may have adopted a version of *res judicata* similar to the version advocated by the Defendants. *See Mohan v. Fetterolf*, 667 N.E.2d 1278, 1282 (Ohio Ct. App. 1995) ("*[R]es judicata* applies if a party or its privity *could have* raised an issue in the prior action, but did not do so.") (emphasis in original) (citation and internal quotations omitted).
[20] *Levinhar*, 2009 WL 4263211, at *8 (quoting *Orloff*, 2005 WL 3272355, at *9).

Bowl Corp. v. Jones,[21] as well as other cases, argue that this is already the law in Delaware.

In *Levinhar*, two of a company's founding stockholders brought an action, which settled. Then those two founding stockholders joined other founding stockholders in a second action that was related to the first, settled action. Although some of the founding stockholders in the second action were not parties to the first action, the court found that all of the founding stockholders had "identical interests,"[22] and that all of the claims asserted in the second action could have been asserted in the first action. In the words of the Court, one question "for the court to decide is whether the particular claims advanced in the present action *could have been* asserted in the prior action . . . . The answer to that question is yes."[23] Thus, *Levinhar* only holds that, under the doctrine of *res judicata*, a person in privity with a party to a prior action is barred from asserting claims that the party to the prior action could have asserted.

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[21] 1986 WL 13095 (Del. Super. Oct. 16, 1986).
[22] 2009 WL 4263211, at *8
[23] *Id.* at *10 (emphasis in original) (citation omitted).

Similarly, in *Orange Bowl Corp.*, the Court concluded that parties to a previous action as well as a corporation in privity with those parties were barred from asserting defenses in an action then before the Court because the parties to the previous action could have asserted the defenses in the previous action. As the Court explained:

> In the previous lawsuit, the Joneses admitted being the franchisee. . . . Now they seek to raise new defenses, such as the assignment of the franchise to Equitable Trust Company, the operation of the franchise by J & K, and lack of seisin, to avoid their liability under the agreements. These defenses were reasonably available to them at the time of the first action, but were not raised.[24]

Perhaps the Court should extend the doctrine of *res judicata* as the Defendants argue, or perhaps *Levinhar* should be the outer bound of that doctrine. The United States Court of Appeals for the Second Circuit, for example, has offered a cogent explanation for why the interpretation of *res judicata* advocated by the Defendants should be rejected:

> Claim preclusion applies when, in the prior action, the merits of the claim were either actually or could have been adjudicated. . . . Simply because the Slymans are now deemed to have been in privity with Accurate did not make them parties to the action against Accurate, nor

[24] *Orange Bowl Corp.*, 1986 WL 13095, at *3.

> did the privity operate in reverse so as to give Accurate standing to assert as counterclaims the Slymans' personal claims against Marine. The Slymans' counterclaims were not decided in the Ohio action, nor could they have been raised there. Thus, claim preclusion does not bar their assertion here.[25]

A more thorough development of the record would help clarify the doctrine of *res judicata* under Delaware law, as well as the application of that doctrine to this case.[26] Therefore, the Defendants' renewed motion for partial summary judgment on the ground that Grunstein's claims in this action are barred by *res judicata* is denied.

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[25] *Marine Midland Bank v. Slyman*, 995 F.2d 362, 366 (2d Cir. 1993) (citation omitted) (applying Ohio law). *Marine Midland* addressed the *res judicata* effect of an Ohio state court judgment. "Federal courts are required by the full faith and credit provision of 28 U.S.C. § 1738 to give a state court judgment the same preclusive effect as it would be given under the law of the state in which the judgment was rendered." *Kester v. Shawnee Mission Unified Sch. Dist. No. 512*, 252 F. Supp. 2d 1180, 1185 (D. Kan. 2003) (citing *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984)). *Mohan*, decided by the Court of Appeals of Ohio applying Ohio law, seemed to adopt a different interpretation of *res judicata* than did *Marine Midland*. See 667 N.E.2d at 1282. Therefore, *Marine Midland* may not correctly state Ohio law. Nevertheless, the reasoning of *Marine Midland* seems consistent with Delaware's approach to the doctrine of *res judicata*.

[26] Moreover, the primary theory of recovery advanced in the *MetCap* Litigation—that certain entities were entitled to a fee for facilitating a transaction—and the primary theory of recovery advanced here—that Grunstein and Silva had an oral partnership agreement—are so different that it is not clear that the Court will be able to find that Grunstein "neglected or failed to assert claims which in fairness should have been asserted in the first action." *LaPoint*, 970 A.2d at 193-94 (citation and internal quotations omitted).

Dwyer and CFG's Claims for the Pre-Paid Fee Present Material Fact Issues

The Defendants have renewed their motion for partial summary judgment on the issue of whether Dwyer and/or CFG are entitled to the Pre-Paid Fee. The standard applied by this Court in determining whether to grant a motion for summary judgment was set forth above.[27] The Court already determined, in the First Summary Judgment Opinion, that the Release extinguished any right Dwyer or CFG had to the Pre-Paid Fee.[28] In the First Summary Judgment Opinion, however, the Court deferred consideration of several defenses that Dwyer and CFG claimed to possess to the release of the Pre-Paid Fee. Dwyer and CFG argue that the release of the Pre-Paid Fee was the result of mutual and unilateral mistake, as well as fraud. Moreover, Dwyer and CFG contend that there was no consideration for the release of the Pre-Paid Fee, and that the parties' post-Release conduct created an implied in fact contract for the Pre-Paid Fee. The Defendants argue that all of those defenses fail as a matter of law.

Delaware recognizes two doctrines of mistake.

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[27] *See supra* notes 4-6 and accompanying text.
[28] First Summary Judgment Opinion, 2011 WL 378782, at *14.

> The first is the doctrine of mutual mistake. In such a case, the plaintiff must show that both parties were mistaken as to a material portion of the written agreement. The second is the doctrine of unilateral mistake. The party asserting this doctrine must show that it was mistaken and that the other party knew of the mistake but remained silent.[29]

To make out a claim for mistake at trial, Dwyer/CFG must show three elements: (1) they did not believe that the Release extinguished their right to the Pre-Paid Fee; (2) either the Defendants held that same belief (mutual mistake) or the Defendants knew that Dwyer/CFG held that belief and the Defendants held a different belief which they did not disclose (unilateral mistake); and (3) the Defendants and Dwyer/CFG specifically agreed that the Release did not extinguish the right to the Pre-Paid Fee.[30] Thus, to prevail on their motion for summary judgment, the Defendants must show that Dwyer/CFG have failed to proffer evidence from which a rational trier of fact could infer proof of the three elements of mistake by clear and convincing evidence.[31]

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[29] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002) (citations omitted).
[30] *Id.* at 1152.
[31] *Id.* at 1149.

The Defendants cannot do that because Dwyer and CFG have proffered evidence which could lead a rational trier of fact to believe that the Release was merely intended to acknowledge that Silva had repaid the Deposit Loan and was not intended to address the Pre-Paid Fee at all. Dwyer has sworn: "I did not understand that the [R]elease . . . applied to the Pre-Paid Fee. If I had understood that the [R]elease applied to the Pre-Paid Fee, I would not have signed it on behalf of myself and CFG."[32] If Dwyer testifies in a similar manner at trial, a rational trier of fact could find Dwyer's testimony to be clear and convincing, and thus, the Defendants have failed to show that Dwyer and/or CFG cannot, as a matter of law, satisfy the first element of a mistake claim.

In his deposition, Silva stated: "I'm aware that Mr. Dwyer signed an acknowledgment. It was in the form of a release. It could have been for the repayment of the [Deposit L]oan, which was not 10 million."[33] Silva further explained that when he provided Dwyer with the Release he told Dwyer that he was "repaying his loan, his portion of the contribution agreement, in full plus

[32] April 23, 2012 Supplemental Aff. of Jack Dwyer ("April 23, 2012 Dwyer Aff.") ¶ 3.
[33] Dep. of Ronald E. Silva at 344.

interest to date."[34] Moreover, when discussing the Release during his deposition, Silva did not suggest that the Release was intended to cover the Pre-Paid Fee. An inference from Silva's deposition testimony is that he believed the Release was merely intended to acknowledge repayment of the Deposit Loan and was not intended to address the Pre-Paid Fee at all, and that supports a defense of mutual mistake. Silva's deposition testimony, however, could also be interpreted to support a defense of unilateral mistake. Silva stated that "Mr. Dwyer signed an acknowledgment. . . . It *could* have been for the repayment of the [Deposit L]oan. . . ."[35] At trial, Silva could testify that although the Release *could* have been for the repayment of the Deposit Loan, it was actually for the Deposit Loan, as well as other things, including the Pre-Paid Fee. Yet, Silva also stated in his deposition that he only told Dwyer that the Release would relate to the Deposit Loan. Therefore, Silva's testimony might suggest that he thought the Release did cover the Pre-Paid Fee, but he told Dwyer that it was only for the repayment of the Deposit Loan. That would support a defense of unilateral mistake. Moreover, if

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[34] *Id.*
[35] *Id.* (emphasis added).

testimony similar to that provided in Silva's deposition is offered at trial, a trier of fact could find that testimony, which would seem to be adverse to Silva's own interests, to be clear and convincing. Thus, a rational trier of fact could find that Silva's testimony constitutes clear and convincing evidence of the second element of mistake.

Silva's statement that when he provided Dwyer with the Release he told Dwyer that he was "repaying his loan, his portion of the contribution agreement, in full plus interest to date"[36] would suggest to an objective observer in Dwyer's position that Silva viewed the Release as not affecting the Pre-Paid Fee. Similarly, Dwyer has sworn: "I did not understand that the [R]elease . . . applied to the Pre-Paid Fee."[37] Thus, statements from Dwyer and Silva suggest that they came to an agreement that the Release did not extinguish the right to the Pre-Paid Fee. If Dwyer and Silva testify in a similar manner at trial, a rational trier of fact could find their testimony to be clear and convincing. Therefore, the Defendants have

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[36] *Id.*
[37] April 23, 2012 Dwyer Aff. ¶ 3.

failed to show that Dwyer and/or CFG cannot, as a matter of law, satisfy the third element of a mistake claim.

"A rational trier of fact could have, after considering all the evidence adduced at trial, an abiding conviction that the truth of [the] [above] factual contentions are highly probable and that . . . the real agreement of the parties [was that the Release was merely intended to acknowledge that Silva had repaid the Deposit Loan and was not intended to address the Pre-Paid Fee at all]."[38] Therefore, the Defendants motion for partial summary judgment on the issue of whether Dwyer and/or CFG are entitled to the Pre-Paid Fee is denied.[39]

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[38] *Cerberus*, 794 A.2d at 1153 (citations and internal quotations omitted).

[39] Although both parties rely principally on Delaware law in their arguments for and against partial summary judgment on the issue of whether Dwyer and/or CFG are entitled to the Pre-Paid Fee, there is still some disagreement as to whether California or Delaware law governs the Release. That disagreement is not critical at this juncture, however, because the above facts are sufficient to raise a triable issue of fact under California law as well as Delaware law. *See, e.g.*, *Pac. Gas and Elec. Co. v. Superior Court*, 19 Cal. Rptr. 2d 295, 307 (Cal. Ct. App 1993) ("In the classic reformation case a contract is formed, but a provision of the writing that is executed, through mistake such as a scrivener's error, contradicts the terms to which the parties agreed. In such a case, upon evidence of the actual agreement a court is empowered to correct the error by striking the mistaken language in the instrument and inserting appropriate language."), *abrogated on other grounds by Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994 (Cal. 1994).

Dwyer and CFG's defense of fraud as well as their arguments that there was no consideration for the release of the Pre-Paid Fee, and that the parties' post-Release conduct created an implied-in-fact contract for the Pre-Paid Fee are based on more precarious reasoning than their defense of mistake. The Defendants, however, did not move for partial summary judgment on each of Dwyer and CFG's defenses. Rather, the Defendants moved for partial summary judgment on the "claim for a Pre-Paid Fee related to certain plaintiffs' advance of the $10 million Business Interruption Fee Deposit associated with acquisition of Beverly Enterprises, Inc."[40] Because there is an issue of material fact as to whether Dwyer and/or CFG can avoid the effect of the Release through a defense of mistake, the Defendants are not entitled to summary judgment on the "claim for a Pre-Paid Fee."[41]

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[40] Defs.' Renewed Mot. for Partial Summ. J. as to Pls. Capital Funding Group, Inc. and Jack Dwyer Regarding their Claim for a Pre-Paid Fee.

[41] *Id.* Although the Court stated that Dwyer and CFG's defenses other than mistake are based on "precarious reasoning," the Court does not mean to invite the Defendants to file another motion for summary judgment. This case has already been subject to that rare bird of a second round of summary judgment motions. The Court sees no utility in yet another round, especially with a November 2012 trial date lurking.

The Defendants Third Motion to Compel is Denied, but Grunstein Will Be Limited in the Documentary Evidence that He May Offer at Trial

The Defendants continue to seek the production of four categories of information: (1) Grunstein's work on the Beverly acquisition other than in his capacity as an attorney; (2) compensation to Grunstein from Troutman Sanders; (3) Grunstein's compensation in connection with the Marnier transaction; and (4) Goldsmith's actions on behalf of NASC and NASC Acquisition Corp.[42] Grunstein has already responded to (1), (3), and (4), and the Court has denied a previous request for (2).[43] The Defendants contend that Grunstein's reponses to (1), (3), and (4) are inadequate and that the circumstances of this case have changed such that their request for (2) should now be granted.

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[42] Defs.' Reply Br. in Supp. of their Third Mot. to Compel Disc. Resps. at 1. The Defendants had originally narrowed their request to five categories, with the fifth category being certain tax returns of MetCap Holding. *Id.* At oral argument on the Defendants' Fourth Motion to Compel Discovery Responses ("Defendants' Fourth Motion to Compel"), the Court ordered that MetCap Holding's "[t]ax returns from 2004 through 2006, inclusive, unredacted and complete, shall be produced by Mr. Grunstein's counsel . . . ." Tr. of July 20, 2012 Teleconference on Defs.' Mot. to Compel. at 11. Grunstein's counsel has complied with that order. To the extent the Defendants' Third Motion to Compel seeks information relating to MetCap Holding's tax returns beyond what the Court ordered be produced in response to the Defendants' Fourth Motion to Compel, the Defendants' Third Motion to Compel is denied. Because, the Court has already disposed of the issues relating to MetCap Holding's tax returns, this letter opinion does not apply to those returns or the issues they present.

[43] *Grunstein*, 2009 WL 4698541, at *23-24.

Grunstein has given vague responses to the production requests at issue. That may be because Grunstein does not have specific documentary evidence to prove certain of his claims or it may be that Grunstein is sandbagging—he has specific evidence, but he does not want to tell the Defendants where it is. "This Court has long recognized that the purpose of discovery is to advance issue formulation, to assist in fact revelation, and to reduce the element of surprise at trial."[44] "It is not helpful to respond to reasonably well-focused discovery requests by asserting that the responses are in there somewhere."[45] Therefore, if Grunstein has specific documentary evidence regarding (1) his work on the Beverly acquisition other than in his capacity as an attorney, (2) his compensation in connection with the Marnier transaction or (3) Goldsmith's actions on behalf of NASC and NASC Acquisition Corp. he must disclose it in the next three weeks or else he is barred from using it at trial.[46] If Grunstein supplements his responses in

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[44] *Levy v. Stern*, 687 A.2d 573, 1996 WL 118160, at *2 (Del. Dec. 20, 1996) (TABLE) (citation omitted).
[45] *Grunstein v. Silva*, 2012 WL 402006, at *1 (Del. Ch. Jan. 26, 2012).
[46] This Court has employed similar mechanisms in the past. *See, e.g.*, *BAE Sys. Info. v. Lockheed Martin Corp.*, 2011 WL 2716020, at *3 (Del. Ch. June 1, 2011) ("BAE contends that it has adequately responded by referencing its detailed complaint. BAE is free to rely on the responses it has already made to these interrogatories if it wishes to be constrained to the factual universe

the next three weeks and the parties still disagree as to the relevance of Grunstein's compensation from Troutman Sanders, the Defendants may again seek to compel discovery on that narrow issue.[47]

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identified by those responses when it presents its case. In the alternative, it must supplement its responses by identifying the additional facts upon which it intends to rely.").

[47] The corollary is that if Grunstein does not supplement his responses, the Defendants' request for information on Grunstein's compensation from Troutman Sanders is denied, and the Defendants are not invited to request it again.

The Defendants' arguments on their motion to compel focused primarily on their contention that Grunstein's failure to produce documents relevant to certain claims suggested either that those claims were meritless, and thus, that Grunstein should abandon them or that Grunstein was hiding evidence of his claims, which he would use unfairly to surprise the Defendants at trial. The Court's decision on the Defendants' Third Motion to Compel adequately addresses those issues. The Defendants, however, have also suggested, at least with regard to some of the categories of information that they still seek, that Grunstein might have information that could help them. The categories of information currently, at issue, however, are likely to be primarily helpful (necessary) to Grunstein. Therefore, if he fails to offer any information, it will likely be his loss. If he does point to specific information that was already provided to the Defendants, it is their job, not Grunstein's, to find contrary evidence. If Grunstein wants to use evidence that he has not previously offered, he will have to disclose, in a very broad fashion, all other information related to that newly offered evidence. This framework will adequately provide the Defendants with the discovery to which they are entitled.

The Court also acknowledges the August 9, 2012 Letter of Arthur L. Dent, Esq. to the Court and the August 10, 2012 Letter of Bruce E. Jameson, Esq. to the Court, both of which address the Defendants' need for information relating to the compensation Grunstein received in the Mariner transaction. Counsel for Grunstein claim they do not intend to rely on the compensation Grunstein received in the Mariner transaction in proving damages, and therefore, that the Defendants are not entitled to it. Counsel for the Defendants argue that Grunstein has relied on the Mariner transaction as evidence of certain claims, and thus, he cannot disclaim its importance now. Moreover, counsel for the Defendants argue that information about Grunstein's compensation from the Mariner transaction may well disprove some of Grunstein's claims.

This disagreement shows the benefit of the route the Court has chosen to deal with the current discovery dispute. If Grunstein actually does not intend to rely on the Mariner transaction in proving any of his claims, the Defendants do not need information relating to that transaction. It

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For the foregoing reasons (1) Defendants' Renewed Motion for Summary Judgment as to Plaintiff Grunstein (*Res Judicata*), (2) Defendants' Renewed Motion for Partial Summary Judgment as to Plaintiffs Capital Funding Group, Inc. and Jack Dwyer Regarding their Claim for a Pre-Paid Fee, and (3) Defendants' Third Motion to Compel Discovery Responses are hereby denied. Grunstein has until September 14, 2012 to offer documentary evidence regarding (1) his work on the Beverly acquisition other than in his capacity as an attorney, (2) his compensation in connection with the Mariner transaction and (3) Goldsmith's actions on behalf of NASC and NASC Acquisition Corp. Any documentary evidence on those topics, in the possession of Grunstein or his affiliates, which is

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seems unlikely that that information could disprove Grunstein's claims—regardless of what happened in the Mariner transaction, Grunstein may be entitled to compensation here. Nevertheless, if Grunstein does not offer any information on his compensation in the Mariner transaction, then several of his claims, including his claim for unjust enrichment, will likely be more difficult to prove. Moreover, the Court may draw adverse inferences against Grunstein if he offers weak evidence when strong should be available. Grunstein is apparently going to try to show damage, at least as to some of his claims, by relying solely on the argument that his conduct provided a benefit to the Defendants. Trial will determine the wisdom of that strategy, assuming it is the one Grunstein chooses.

not specifically disclosed by that deadline may not be offered as evidence by Grunstein at trial.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K