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Re: Tunney v. Hilliard, et al.  
C.A. No. 1317-VCN  
Date Submitted: May 29, 2008

Dear Counsel:

For nearly a decade, Plaintiff Patrick B. Tunney (“Tunney”) and Defendant Eugene Hilliard (“Hilliard”) owned and operated Up the Creek Restaurant and Marina in Wilmington, Delaware (“UTC”). In furtherance of that venture, they formed two Delaware entities: an operating entity, Defendant Up the Creek, Inc. (the “Corporation”),<sup>1</sup> and a real estate holding entity, Defendant Up the Creek,

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<sup>1</sup> Tunney and Hilliard are the only stockholders of the Corporation. Each owns 50% of the stock. Transcript of Trial, May 19, 2008 (“Tr.”) at 5, 32-33; *see also* Pretrial Order at ¶ 2(5). A third investor, Earl Rollison, was involved briefly with UTC in the beginning. Tr. at 5-6. Tunney and Hilliard bought out Mr. Rollison’s interest in or about 1997. Tr. at 6.

LLC (the “LLC”)<sup>2</sup> (together with the Corporation, the “Business”). As the owners of UTC, Tunney and Hilliard contributed their time, talents and labor to the venture without compensation. Their overarching goal was eventually to sell the Business and split any profits from the sale equally between them. UTC flourished under their stewardship, and in June 2006 they sold the Business for \$2 million; after payment of indebtedness and various expenses, they netted approximately \$1.6 million (the “Sale Proceeds”).<sup>3</sup> Although each has reaped a handsome profit for his efforts, Tunney and Hilliard now dispute the proper allocation of the Sale Proceeds.

Tunney asserts an entitlement to a 20% “commission” off the top of the Sale Proceeds based upon an alleged oral agreement he reached with Hilliard in October 2000, when Hilliard “scaled back” his time at UTC. He claims that Hilliard agreed to pay him additional money out of the Sale Proceeds in exchange for his (Tunney’s) assumption of additional management responsibilities at UTC in

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<sup>2</sup> Tunney and Hilliard are the only members of the LLC. Each owns an equal membership interest. Tr. at 7, 33; *see also* Joint Exhibit (“JX”) 2 (LLC Agreement).

<sup>3</sup> Over the years, Tunney and Hilliard occasionally loaned money to the Corporation and the LLC. Those loans have been repaid and are not at issue in this proceeding.

Hilliard's absence (the "Commission Agreement"). The remaining 80% of the Sale Proceeds, according to Tunney, would then be divided equally between them in accordance with the original 50-50 agreement evidenced by the governing documents.<sup>4</sup> In the alternative, however, Tunney asserts equitable claims sounding in quantum meruit and unjust enrichment seeking compensation for his "increased" efforts to operate the Business after October 2000.

Hilliard, on the other hand, denies that he made any agreement with Tunney to compensate him for assuming "additional" responsibilities with respect to UTC. According to Hilliard, by October 2000, UTC was running smoothly and largely under the direction of an employee manager; thus, any additional efforts put forth by Tunney were *de minimis* or within the scope of the efforts contemplated under the original 50-50 agreement. Similarly, Hilliard denies Tunney's equitable claims for additional compensation for the same reasons. Hilliard maintains that the

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<sup>4</sup> Throughout this letter opinion, the term "governing documents" refers generally to the operating documents of both the Corporation and the LLC specifying a 50-50 business arrangement between Tunney and Hilliard.

In essence, Tunney alleges that the parties agreed to a 60-40 allocation of the Sale Proceeds through the Commission Agreement. Thus, he seeks approximately \$160,000 in damages from Hilliard (10% of the net, or Hilliard's half of the purported 20% commission off the top of the Sale Proceeds).

parties' original agreement contemplated that both he and Tunney would expend their best efforts and talents (whatever those might have been) to operate UTC and that, eventually, when the Business was sold, they would divide equally any profits from the sale as compensation. In the alternative, however, Hilliard asserts counterclaims and cross-claims also sounding in quantum meruit and unjust enrichment based upon his uncompensated contributions to the Business.

In light of the evidence presented at trial, the Court concludes that Tunney has failed to prove either a modification of the 50-50 allocation agreement expressed in the governing documents or a separate agreement with respect to his right to receive additional compensation for his efforts in operating UTC after October 2000. Furthermore, the Court concludes that any "additional" efforts Tunney or Hilliard put forth with respect to UTC over the years were either *de minimis* or within the scope of the efforts contemplated by the parties' original agreement; accordingly, neither has established his claims in quantum meruit or unjust enrichment. Thus, for the reasons discussed below, the parties shall abide by their original agreement and allocate the Sale Proceeds equally between them.

## I. FACTUAL FINDINGS

Tunney and Hilliard founded UTC and acquired its facilities and property in 1996.<sup>5</sup> Between 1996 and 2000, both invested considerable “sweat equity” to establish the business. In addition, Hilliard contributed his significant knowledge and experience in operating a restaurant and bar, which he had attained through his ownership of the Clayton Tavern and Package Store (the “Clayton Tavern”), in Clayton, Delaware. Tunney, by contrast, did not have any comparable experience, and, so, the task fell to Hilliard to teach Tunney how the Business would operate.

Although Tunney was something of a neophyte in the restaurant business, he and Hilliard shared equally the responsibility for managing UTC and addressing any problems that arose. Thus, before October 2000, Tunney usually was present at UTC on Saturdays through Tuesdays, and Hilliard routinely was present on Wednesdays, Fridays, and Sundays.<sup>6</sup> They also had an employee manager,

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<sup>5</sup> Initially, they acquired the UTC facilities and property pursuant to a lease-purchase agreement through the Corporation. In 1997, the purchase option was triggered, and Tunney and Hilliard formed the LLC to acquire and take title to the real estate on which UTC was located. The Corporation continued to operate UTC.

<sup>6</sup> Tunney and Hilliard had a separate “amusement” business, which installed various types of entertainment devices (e.g., video games, jukeboxes, etc.) in restaurants and bars. Although the amusement business was wholly-owned by Tunney, he agreed to share 50% of the income from certain machines with Hilliard where Hilliard either had purchased an interest in the particular machine or had assisted Tunney in placing the machine in a particular location through his various contacts in the restaurant and bar business. On Mondays, the two would travel around to

Jackqueline Fowler (“Fowler”), who typically worked on Tuesdays through Fridays. Fowler was primarily responsible for managing the general day-to-day operations of UTC, such as ordering food and supplies, managing employees and addressing routine problems and issues.<sup>7</sup> Even on days when Fowler was not on duty, however, Tunney and Hilliard regularly relied upon her (or waited for her return) to take care of problems and issues falling within her managerial domain (e.g., employee issues).

As with any small business, Tunney and Hilliard, the proprietors, wore numerous hats to advance the interests of the enterprise. For example, from time to time, if an employee was called away from work, Tunney or Hilliard filled in for that shift. Additionally, whichever one of them was on-site would take care of routine paperwork, such as running various accounting reports and preparing deposits for the bank, and also the ordering of certain supplies, such as liquor, which they did not delegate to Fowler. Inevitably, emergencies would occur from time to time, and Tunney or Hilliard would be called to UTC at all hours of the day

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their various machines to collect their earnings; thus, neither Tunney nor Hilliard appears to have done much work for UTC on Mondays.

<sup>7</sup> Deposition of Jackqueline H. Fowler (“Fowler Dep.”) at 4, 28-29. Certain witnesses, including Fowler, testified through depositions submitted as part of the trial record.

and night to resolve the problems. In general, however, the parties shared the burden of operating UTC equally, with Tunney focused primarily on the marina and exterior operations, and Hilliard focused primarily on the restaurant and bar and the “business end” of the operation (i.e., the bookkeeping and accounting). With Fowler focused on the details of managing the day-to-day operation, the bulk of Tunney’s and Hilliard’s time at UTC was spent meeting and greeting customers in the restaurant and bar and generally ensuring that the operation was running smoothly. The only arguably exceptional duties either performed was that Hilliard occasionally would stop to pick up fresh produce for UTC on his way into the restaurant (instead of ordering it through UTC’s food vendor) or he would stop at a wholesale club to purchase certain supplies that could be procured more cheaply than from UTC’s vendors.<sup>8</sup> In any event, neither Tunney nor Hilliard ever drew any compensation from UTC for his labor, and both understood that their efforts would be compensated on the backend, if the Business was sold for a profit.

In or about October 2000, Hilliard reduced the amount of time he was spending at UTC for several reasons. First, he required surgery for an old ankle

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<sup>8</sup> These were primarily summertime duties given the somewhat seasonal nature of UTC’s business.

injury, which entailed an extended convalescence. Second, his Clayton Tavern business was “suffering” from his absence.<sup>9</sup> From the outset, Hilliard had made clear to Tunney that the Clayton Tavern was his primary concern and that he would not devote his time to UTC to the detriment of the Clayton Tavern. Third, UTC was, by that time, more or less self-sufficient and no longer required his or Tunney’s constant attention because almost all of the management details were (or could have been) handled by Fowler.

On the whole, Hilliard’s decreased presence at UTC after October 2000 resulted in very few changes in the operation of the Business. Tunney “assumed” the duty, previously performed by Hilliard, of running some miscellaneous errands for Fowler,<sup>10</sup> but, otherwise, their general management responsibilities remained more or less the same. As before, the day-to-day burden of operating UTC

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<sup>9</sup> Evidently, his regular clientele at the tavern missed seeing him.

<sup>10</sup> Thus, at times, he stayed at UTC one more night (Tuesday) than he usually had stayed before Hilliard altered his schedule. (Tunney and Hilliard had placed a trailer on-site where they could spend the night when they were working at UTC, instead of driving the considerable distances to their homes.) Tunney complains about the additional time spent away from his family as a result of his “increased” obligations at UTC. That would appear to be a problem entirely of his own making. If Tunney was unable or unwilling to run Fowler’s errands, either she or another employee could have been delegated that task, or, alternatively, Tunney and Hilliard simply could have paid the increased cost of ordering all of UTC’s supplies through its vendors. Tunney does not appear to have pursued those options.



generally fell to Fowler. Hilliard, although no longer traveling to UTC on a regular basis, continued to manage UTC's bookkeeping, which entailed paying the accounts payable, preparing the payroll and communicating with the accountants; he also continued to receive emergency phone calls from time to time and would either travel to UTC or dispatch an appropriate serviceman to handle the problem. Tunney, meanwhile, continued to watch over the operations on-site several days per week (Saturday through Tuesday),<sup>11</sup> and he also would address emergency situations as they arose. Thus, notwithstanding his assumption of the "additional" errand duty, there was no material change in Tunney's management duties or responsibilities at UTC.

Tunney, nonetheless, maintains that Hilliard agreed in October 2000 that he would be compensated with a 20% "commission" out of the eventual proceeds from the sale of the Business in exchange for assuming "additional" responsibilities in Hilliard's absence. Although Tunney alleges that they reached

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<sup>11</sup> Most of this time, however, appears to have been dedicated to Tunney's "public relations" efforts (i.e., socializing with UTC's clientele). Fowler Dep. at 23-26. Of course, in a business such as UTC, "public relations" may be of paramount importance to the ultimate success of the operation. Whether Tunney's efforts in that regard were primarily devoted to achieving that objective or to his own hedonistic (i.e., drinking) pursuits is a fair point for debate.

an accord on the Commission Agreement in late 2000,<sup>12</sup> he made no effort to reduce the oral agreement to writing until May 2003, when the parties began contemplating a sale of the Business. At that point, Tunney determined that it might be wise to memorialize the terms of the Commission Agreement, and, accordingly, he instructed UTC's corporate attorney to do so.<sup>13</sup> Upon receiving the corporate attorney's draft of the Commission Agreement, Hilliard did not contact Tunney or the corporate attorney; rather, he claims simply to have shredded the document because he had never agreed to give Tunney a larger share of the Sale Proceeds and, thus, in his view, it was meaningless. Tunney asked Hilliard

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<sup>12</sup> Hilliard, of course, denies this assertion. Tr. at 134-35.

<sup>13</sup> JX 5 (Draft Commission Agreement). It is clear from the attorney's cover letter accompanying the draft agreement that Hilliard had no input as to the proposed terms of the purported agreement:

As a follow-up to the instructions I recently received from [Tunney], I enclose herewith a draft agreement for both of you to read. If there are any questions about this or if changes are necessary, please contact me. As you know, [Tunney] represented to me that this is to memorialize an agreement the two of you have reached. I have not personally spoken to [Hilliard] about this. If this document accurately represents the agreement between the two of you, and if there is no further need to discuss this document, please execute the same and provide me with the fully-executed copy for my records. If there any questions whatsoever, you both should obtain independent legal counsel before executing this document.

JX 4.

Although Tunney asserts that he is entitled to the additional 20% of all "profits" from the venture, the Commission Agreement, as drafted, is limited to "profits" from the Corporation and does not include "profits" from the LLC which, as noted, owned the real estate.

whether he had reviewed the draft Commission Agreement, and Hilliard replied that he had, but that he refused to execute the document because he did not agree that Tunney should receive any additional compensation for his efforts. Tunney continued to press the subject of signing the agreement from time to time, but Hilliard steadfastly refused to comply with Tunney's requests.<sup>14</sup>

In or about late 2004 or early 2005, Tunney and Hilliard ran into trouble with the Internal Revenue Service. Evidently, the two had underreported the income from their amusement business. As a result, Tunney and Hilliard were audited as were UTC and the Clayton Tavern. Tunney ultimately reached an agreement with the IRS to pay additional taxes on his earnings from the amusement business. Hilliard, unfortunately, did not fare as well, and he served a brief term in federal prison. At about that time, the friendship between Tunney and Hilliard faltered. Tunney unilaterally cut Hilliard off from any income from the

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<sup>14</sup> Hilliard probably could have been more direct and forceful in his rejection of Tunney's overtures. It is a reasonable inference that Hilliard did not want to deal with the problem, but, more importantly, the Court finds that Hilliard neither acceded to Tunney's entreaties nor gave him any reasonable basis for believing that he had done so. Thus, the two never formed the requisite shared intent to modify the original 50-50 allocation agreement. Of course, ultimately, the Court seeks to ascertain the shared intent of the parties in instances where they reached an agreement. *See, e.g., West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at \*9 (Del. Ch. Nov. 2, 2007) ("The goal of contract interpretation is to ascertain the shared intent of the parties."). Here, however, there was never an "agreement" with respect to Tunney's right to receive additional compensation.

amusement business. In turn, Hilliard refused to contribute additional loan money to the Corporation or the LLC in order to offset the debt he believed Tunney owed him from the amusement business. Their contentious relationship notwithstanding, however, both maintained the status quo with respect to the operation and management of UTC, even while Hilliard was in prison.<sup>15</sup>

In or about November 2005, Tunney and Hilliard agreed to sell the Business for \$2 million. The sale closed in June 2006, and the parties netted approximately \$1.6 million for their efforts in operating the Business. Tunney filed this action to determine the validity of the purported Commission Agreement and the proper allocation of the Sale Proceeds.

## II. ANALYSIS

In order to resolve the parties' dispute, the Court must address two main issues. First, the Court must consider Tunney's theories regarding his right to additional compensation from the Sale Proceeds: (1) an oral modification of the original 50-50 allocation expressed in the governing documents; (2) a separate and

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<sup>15</sup> Hilliard's daughter, Regina Potter, generally filled his role at UTC and specifically did Hilliard's bookkeeping work during the term of his imprisonment; Tunney continued to perform his same duties.

distinct oral agreement to compensate him for his efforts in operating UTC as the result of Hilliard's reduced role; and (3) a promissory estoppel argument. Second, the Court must address the parties' competing equitable claims for additional compensation for their contributions to the success of UTC.

A. *Tunney has not Established an Oral Modification of the Parties' Original 50-50 Agreement, a Separate Agreement Entitling him to a "Commission" from the Sale Proceeds, or a Promissory Estoppel Claim*

1. Oral Modification of the Original 50-50 Agreement

Tunney and Hilliard agree that they initially agreed to split the profits from the Business equally. The governing documents reflect, confirm, and embody this agreement. First, although there is no written shareholders' agreement regarding the Corporation, stock in the Corporation was issued equally to Tunney and Hilliard. In the absence of a shareholders' agreement modifying the consequences of equal stock ownership, the stock certificates evidencing equal ownership demonstrate that the profits, and the other benefits of corporate ownership, are to be divided equally between Tunney and Hilliard. In contrast, the LLC is governed

by a limited liability company agreement which expressly provides for equal distribution of the “profits” attributable to the sale of the real estate.<sup>16</sup>

Tunney, however, seeks to establish a modification of the parties’ original agreement as evidenced by the written governing documents that confer equal rights on both. Specifically, he claims that in October 2000 the parties agreed, in essence, to a 60-40 allocation of the eventual Sale Proceeds, instead of the original 50-50 allocation. Although oral modifications of written contracts are permissible under Delaware law, they are not favored for a host of pragmatic and public policy reasons.<sup>17</sup> Consequently, a party seeking to prove an oral modification bears a heightened evidentiary burden and must prove the intended change to the written agreement with sufficient ““specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document.””<sup>18</sup>

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<sup>16</sup> JX 2 at ¶ 4.4 (“Distribution of Net Cash. Distributions of Net Cash shall be made among the Members in proportion to their Company interests and in such amounts as a majority of the Members, in terms of number, may determine from time to time. [Definition of ‘Net Cash’ omitted.]”). Hilliard has not focused upon paragraph 11.3 of the LLC Agreement, which specifies that any modifications to it must be in writing.

<sup>17</sup> See, e.g., *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1230 (Del. Ch. 2000).

<sup>18</sup> *Id.* (quoting *Reeder v. Sanford School, Inc.*, 397 A.2d 139, 141 (Del. Super. 1979)); see also *Reserves Dev., LLC v. Severn Sav. Bank, FSB*, 2007 WL 4054231, at \*8 (Del. Ch. Nov. 9, 2007) (“[U]nder this high evidentiary burden, Delaware law recognizes oral modifications of written

Tunney falls well short of that mark, and, therefore, he has failed to establish an oral modification of the original agreement. Although Hilliard concedes that Tunney repeatedly sought his assent to the purported Commission Agreement, Hilliard emphatically denies that he ever acceded to that request or that he ever entered into such an agreement in the first place. The Court accepts Hilliard's testimony.<sup>19</sup> As noted, there is no contemporaneous written evidence of the Commission Agreement, nor did Tunney proffer any testimony from witnesses with credible, first-hand knowledge of the alleged oral agreement.

Moreover, there is no clear or direct evidence that Tunney undertook any exceptional responsibilities or duties with respect to the management of UTC in Hilliard's absence after October 2000. Tunney points to his assumption of the task of running miscellaneous errands for Fowler, but those "additional" duties were a *de minimis* burden within the scope of the general proprietary duties contemplated under the original agreement. Tunney also argues that he was primarily responsible for negotiating the sale of the Business. That task, however, is hardly

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agreements only when plaintiffs present specific and direct evidence such that there is no doubt regarding the parties' intention.").

<sup>19</sup> The Court does so even after duly considering Hilliard's impeachment as a result of his federal tax fraud conviction. D.R.E. 609(a).

exceptional and is certainly within the scope of the ordinary duties one would expect a proprietor of a business to undertake.<sup>20</sup> Finally, Tunney contends that his efforts in operating the Business and entertaining UTC's clientele over the years contributed substantially to the popularity and success of the operation, which, in turn, led directly to the premium price paid for UTC. That argument also is unavailing. Although it is clear from the record that Tunney devoted considerable time to his "public relations" efforts at UTC, Fowler's testimony demonstrates that those "efforts" were rendered largely for his own recreational purposes, and, in any event, he has not established a correlation between those efforts and the price paid for the Business.<sup>21</sup> Thus, there is no clear evidence of an oral modification of the original 50-50 allocation agreement based upon Tunney's actual performance of additional duties after October 2000.

In sum, Tunney has not met his heightened evidentiary burden to establish an oral modification of the parties' original 50-50 agreement with respect to the allocation of the Sale Proceeds. Accordingly, that agreement stands unaltered.

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<sup>20</sup> Tunney offered no credible evidence that Hilliard refused to participate in the sale process. Perhaps his direct, personal involvement was limited by incarceration, but even that circumstance did not isolate him fully from having input into the process.

<sup>21</sup> Certainly, Tunney's presence and personality may have contributed to the success of UTC on some level, but the same can be said of Hilliard when he was present.



## 2. Formation of a Separate Agreement

The Court turns next to the question of whether the purported Commission Agreement constituted a separate and distinct agreement with respect to Tunney's right to "additional" compensation from the Sale Proceeds.<sup>22</sup> In its most elementary form, a valid contract is created under Delaware law where a party to the agreement demonstrates, by a preponderance of the evidence, mutual assent to the terms and conditions of the purported agreement and the exchange of sufficient consideration.<sup>23</sup> Tunney, however, has failed to establish a valid contract regarding his right to a 20% commission from the Sale Proceeds.

The parties' conflicting trial testimony plainly demonstrates that they never reached accord on the terms of the Commission Agreement. Looking beyond the parties' testimony to the other evidence in the record, a similar conclusion attains. The only objective evidence of the alleged oral agreement is the corporate attorney's draft of that agreement, which was indisputably prepared solely at

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<sup>22</sup> Because the parties viewed their operation of the Business as a single enterprise, this case is best viewed as involving a possible oral modification of an existing global agreement evidenced by various writings. The notion of a separate and distinct agreement is addressed for purposes of completeness, particularly with regard to the possibility that the parties reached an oral shareholders' agreement to vary the distribution of "profits" in the Corporation.

<sup>23</sup> *Szambelak v. Tsipouras*, 2007 WL 4179315, at \*5 (Del. Ch. Nov. 19, 2007).

Tunney's direction. The evidence clearly shows, however, despite Tunney's several requests, that Hilliard persisted in his refusal to execute that document. In fact, upon receiving the draft Commission Agreement, Hilliard claims to have run it through the shredder because it was so fanciful. Although, at the very least, one would have expected a reasonable person in Hilliard's position to have contacted the corporate attorney to inquire further into his business partner's attempt to undermine his interest in the Business, there is no evidence that he ever consented to the terms of the proposed agreement. Thus, the Court concludes that, although Tunney may have believed (for whatever reason) that he was entitled to additional compensation for his efforts in operating UTC after October 2000, the record demonstrates that Hilliard never consented to such an arrangement.

In sum, because the parties never reached an agreement, Tunney has not proven that the parties formed a separate, valid contract with respect to his right to receive additional compensation from the Sale Proceeds in exchange for his efforts to operate UTC after October 2000.

3. Promissory Estoppel

Tunney's promissory estoppel theory also fails. In order to establish a claim for promissory estoppel, the promisee must prove, by clear and convincing

evidence, that (1) the promisor made a promise with the intent to induce action or forbearance, (2) the promisee actually relied on the promise, and (3) the promisee suffered injury as a result.<sup>24</sup> For the reasons discussed above, Tunney has not proven that Hilliard promised him additional compensation in exchange for his assumption of additional duties and responsibilities at UTC after October 2000. Although Tunney may have believed that he was deserving of additional compensation, there is insufficient evidence that Hilliard ever made a promise to induce such a belief.<sup>25</sup>

In short, Tunney has not proven the essential elements of a claim for promissory estoppel, particularly when his evidentiary support is measured in accordance with the heightened evidentiary standard applicable to such claims. Accordingly, he has not established an entitlement to an additional share of the Sale Proceeds under that theory.

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<sup>24</sup> *Continental Ins. Co.*, 750 A.2d at 1233.

<sup>25</sup> Additionally, for the reasons already cited, Tunney has not established that he actually performed any material additional duties at UTC after October 2000; thus, it is not clear that Tunney relied on any purported promise of additional compensation by Hilliard or that he suffered any cognizable injury.

B. *The Evidence of Tunney's and Hilliard's "Additional" Efforts with respect to UTC Stands in Equipoise, and, therefore, Neither has Established his Equitable Claims for Additional Compensation*

Both parties assert various equitable claims seeking compensation for their respective "additional" contributions to the success of UTC. Tunney asserts that he is entitled to compensation for his "additional" efforts to operate the Business in Hilliard's absence (or significantly reduced presence) after October 2000. For the reasons previously cited, however, Tunney has not established a basis for any such claims. Similarly, Hilliard's claims also must fail. At best, Hilliard argues that, in the beginning, he contributed his substantial knowledge and experience in the restaurant business in order to get UTC up and running, but that was within the scope of the parties' original agreement.

The record is otherwise devoid of examples of exceptional contributions by either Tunney or Hilliard and demonstrates that both parties more or less contributed equally to the management and success of the Business. At times, perhaps, one did more than the other, but, on balance, there is nothing in the record that stands out as an exceptional contribution by either party.<sup>26</sup> Thus, the Court

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<sup>26</sup> During the years they operated UTC, Tunney put in more hours than Hilliard. Time, alone, is not a fair measure of their relative contributions. Hilliard provided critical knowledge and experience in the restaurant and bar business. Due recognition of that skill set and its importance

concludes—based upon the facts in the record—that the evidence stands in equipoise with respect to Tunney’s and Hilliard’s contributions to UTC. To the extent either can be said to have made “additional” or exceptional contributions to the success of UTC, those efforts offset and, consequently, so do their equitable claims for additional compensation. Tunney and Hilliard are therefore left to abide by their original 50-50 agreement with respect to the allocation of the Sale Proceeds.<sup>27</sup>

### III. CONCLUSION

For the foregoing reasons, the Court concludes that the parties’ original agreement to allocate the Sale Proceeds equally between them stands unchanged by any subsequent events in the course of the parties’ ownership of the Business. In addition, neither party has established his equitable claims seeking additional compensation for his contributions to UTC. Judgment is therefore entered in favor of Hilliard, the Corporation, and the LLC, and against Tunney on all of Tunney’s

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to the venture’s long-term success and, perhaps even more importantly, its initial survival, leads to the conclusion that an equal division of the profits is a fundamentally fair resolution, notwithstanding Tunney’s greater time commitment.

<sup>27</sup> Because neither party has prevailed on his claims for additional compensation, the Court need not consider the imposition of equitable remedies.

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claims, and in favor of Tunney, the Corporation, and the LLC, and against Hilliard on all of Hilliard's counterclaims and cross-claims. Each party shall bear his own costs.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-K