EFiled: Nov 13 2014 01:18PM EST
Filing ID 56333296
Case Number 569,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEONARD GRUNSTEIN,	:	
	:	
Plaintiff Below/Appellant,	:	
	:	
v.	:	No. 569,2014
	:	
RONALD E. SILVA, PEARL SENIOR CARE, LLC, PSC SUB, LLC, GEARY PROPERTY HOLDINGS, LLC, FILLMORE CAPITAL PARTNERS, LLC, FILLMORE STRATEGIC INVESTORS, LLC, DRUMM INVESTORS, LLC, and FILLMORE STRATEGIC MANAGEMENT, LLC,	:	(Appeal from Court of Chancery C.A. No. 3932-VCN)
	:	
Defendants Below/Appellees.	:	

CORRECTED APPELLANT'S OPENING BRIEF

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Dated: November 13, 2014

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NATURE OF THE PROCEEDINGS

This is an appeal by plaintiff Leonard Grunstein ("Grunstein"), from the September 5, 2014, opinion and judgment ("Opinion," Ex. A hereto) of the Court of Chancery, granting judgment to defendants after trial, on Grunstein's claim for unjust enrichment for the work he performed in connection with the acquisition of Beverly Enterprises, Inc. ("Beverly").[1] For the reasons set forth below, Grunstein respectfully requests that this Court reverse that portion of the trial Court's ruling and remand the case with instructions that the Court of Chancery enter judgment in Grunstein's favor on his unjust enrichment claim, and to determine which of the defendants are liable thereon, as well as the amount of damages to be awarded.

[1] The Court of Chancery also granted judgment to defendants on Grunstein's claims for breach of a partnership agreement, promissory estoppel and fraud. Grunstein does not appeal from the trial Court's rulings on those claims.

SUMMARY OF THE ARGUMENT

1. The Court of Chancery should not have granted judgment to defendants on Grunstein's claim for unjust enrichment, and Grunstein was entitled to judgment on that claim, in light of the following facts, as found by the Court below after trial:

(i) Grunstein performed substantial services throughout the Beverly acquisition beginning with its inception through the closing (including bringing the defendants into the transaction), with the expectation and understanding that he would be compensated;

(ii) Grunstein's services, performed over a seven month period in collaboration with defendants, conferred a substantial benefit on the defendants;

(iii) Grunstein and the lead defendant, Ron Silva ("Silva"), who was also a principal of the other defendants, had an "understanding" and/or an "agreement" that they would share whatever economic benefits either would derive from the Beverly transaction, on a 50-50 basis;

(iv) During the course of the transaction "Silva and Grunstein agreed to change Grunstein's direct interest in the transaction to an indirect one" (Opinion at 32);

(v) Silva and Grunstein discussed Grunstein's financial interest in the Beverly transaction right through the closing, and at no time did Silva tell

Grunstein that he no longer had a financial interest in the acquisition;

(vi) Silva made at least two express requests and several more implied requests to Grunstein to do work in connection with, and throughout the course of, the Beverly acquisition;

(vii) "Silva . . . was content to lead Grunstein … along because he needed" him, "all the while believing he had the option to renege or renegotiate the agreements or understandings he had made with" Grunstein (Opinion at 95); Silva "appears to have taken advantage of the efforts of Grunstein" (*id.* at 88) and "exploit[ed]" him (*id.* at 95); and

(vii) Although Grunstein's law firm received legal fees in connection with the acquisition, neither he nor any other entity with which he was affiliated, received a penny for his work.[2]

2. The Court of Chancery granted judgment to defendants on Grunstein's claim for unjust enrichment (in a two page discussion out of its 112 page opinion), on the grounds that Grunstein had acted "officiously," even if he and Silva "shared an understanding that Grunstein had some interest in the transaction." (Opinion at 90). The Court below held: "That Grunstein was ultimately unsuccessful [in finalizing a partnership agreement with Silva] does not

[2] In the introduction to its opinion, the Court of Chancery stated that defendants "paid fees to an investment banking firm [Metcap] in which the lawyer [Grunstein] had a significant stake" (Opinion at 3). However, there is *no evidence whatsoever* to support this statement. The Court below did not repeat this statement or its substance in its findings of fact.

mean that Silva was unjustly enriched or that Grunstein did not aid Silva of his own volition with the hope that they would finalize an agreement." (*Id.* at 90-91). "Moreover, the Court has not found that Grunstein acted at Silva's insistence. They collaborated and in doing so, Grunstein volunteered to push the transaction forward." (*Id.* at 91 n.278).

However, the fact that Grunstein was unable to prove that he finalized a partnership agreement does not mean that he acted "officiously," in light of the undisputed and decided facts set forth in paragraph 1 above. Furthermore, the trial Court's statement that Grunstein "volunteered" to push the transaction forward ignores the fact, as the Court below found, that he acted at Silva's express and implied requests; and that under the legal authority cited by the Court below, the fact that Grunstein acted at Silva's requests refutes the trial Court's conclusion that he acted "officiously." No other court anywhere has held, as the Court below apparently did, that an unjust enrichment plaintiff must prove that he acted at defendant's "insistence."

3. The Opinion makes repeated references to the fact that, approximately one year after the conclusion of the trial, Grunstein pleaded guilty to a single misdemeanor count of perjury in New York, based on a single false statement given by him at a deposition in an unrelated action. (*Id.* at 5, 39-40; *see also* A228-30). Interestingly, while the Court below did not point to a single specific

instance where it found Grunstein's testimony not to be credible, it expressly rejected Silva's testimony in numerous instances (discussed throughout this brief). The trial Court also found that Silva made numerous false statements to lenders during the transaction (Opinion at 21); it referred to Silva's "general lack of credibility throughout trial" (*id.* at 74 n.236), and to his "evasiveness" (*id.* at 97 n.294); and it stated that Grunstein's narrative "appeared to be slightly better supported by the record than Silva's." (*Id.* at 75).

Nevertheless, Grunstein does not rely on his own credibility in connection with this appeal. He relies solely on the facts as found by the Court of Chancery (which in some instances were based on that Court's acceptance of Grunstein's testimony), other evidence on which the Court below relied, and in a few instances, Silva's own admissions. Grunstein submits that as a matter of law these facts require reversal and a judgment in his favor.

4. If the decision below is affirmed, it would virtually eliminate the cause of action for unjust enrichment in any case where there were contract negotiations. For if the plaintiff and defendant were successful in finalizing an agreement, there could be no cause of action for unjust enrichment, because there could be no claim for unjust enrichment where the rights of the parties are governed by an express contract; and if the parties are unsuccessful in finalizing an agreement, based on the holding of the Court below, the plaintiff would be deemed

to have acted officiously, and could not recover (notwithstanding the facts set forth in paragraph 1 above), unless possibly, he could prove that he acted not only at the defendant's request, but also at defendant's "insistence" (a requirement that finds no support in the law).

STATEMENT OF THE FACTS

A. Grunstein Decides to Acquire Beverly

During the relevant period, Grunstein was an attorney at Troutman Sanders, with significant business experience in the healthcare industry. He participated, as a principal, in the acquisition of two nursing home enterprises: Integrated Health Service ("IHS") and Mariner Healthcare ("Mariner"). (Opinion at 7-8). Grunstein structured both deals, and for his efforts, he received a minority interest in the real estate assets owned by IHS and Mariner, and a majority interest in the operating company which succeeded Mariner. (*Id.*).

In early 2005, Grunstein and his co-plaintiff, Jack Dwyer ("Dwyer") decided to try to acquire Beverly. They had several meetings and telephone conversations with Bill Floyd, Beverly's CEO and Chairman. (*Id.* at 10-11). Grunstein worked on obtaining financing for the transaction and "developed and then submitted . . . a preliminary proposal to acquire Beverly." (*Id.*). Grunstein obtained a signed commitment letter from Wachovia for real estate financing in the amount of $1.325 billion, as well as a signed commitment letter from Capital Source Finance LLC, in the amount of $150 million.[3] (*Id.* at 11-12 & n.28). "As Grunstein continued to work on the financing of the transaction, he then developed and submitted a second

[3] The $150 million amount is set forth in JX79 (A147), cited by the Court of Chancery. (Opinion at 12 n.28).

proposal to acquire Beverly." (*Id.* at 12 & n.29).

B. Grunstein Brings Silva into the Picture

Richard Lerner of Credit Suisse, who had been involved in both the Mariner and IHS transactions, recommended to Grunstein and Dwyer that they ask Silva to raise the equity needed for the Beverly acquisition, and they agreed to do so. (*Id.* at 12). Silva and his wife owned defendant Fillmore Capital Partners ("Fillmore"), which had arranged for the Public Sector Pension Fund ("PSP") to invest in Mariner. (*Id.* at 10). Although Silva had extensive real estate experience, "the Mariner investment was Silva's first foray into the healthcare industry." (*Id.*). By early August, Silva had committed "to use his best efforts" to come up with the equity for the Beverly acquisition. (Silva had testified that he did not even discuss an equity investment with Grunstein until *mid-August*, and that he had not secured the right or obligation to provide equity until November 18, 2005 [*Id.* at page 14.]. The Court of Chancery expressly rejected this testimony [*Id.* at pages 13-15, 23]).

C. Silva Authorizes Grunstein to Offer $12.80 per Share

Grunstein submitted a revised acquisition proposal dated July 29, 2005, to acquire Beverly for $12.70 per share. (*Id.* at 13). Four days later, on August 2, 2005, Silva sent Lerner an email which stated: "I just gave Len the green light at 12.80 [per share of Beverly]. God help me!!!" (*Id.*). The Court of Chancery rejected Silva's testimony that these words meant merely that "we would still be

interested in the transaction at $12.80." (*Id.* at 13-14). Instead, the Court below interpreted the words to mean that "Silva had given his approval [to Grunstein] to increase the offering price." (*Id.*). (At the very least, this email was an *implied request* by Silva to Grunstein to offer the $12.80 per share to Beverly.)

Entities affiliated with Grunstein and other Troutman attorneys entered into the merger agreement with Beverly on August 16, 2005. (*Id.* at 15). As Silva acknowledged at trial, "the signed merger agreement was the product of Mr. Grunstein's work, not anything that [I] did or contributed." (Tr. 54:17-20 (A134)). The merger agreement required a $7 million deposit. (Opinion at 15). Although Silva "denied ever agreeing to fund the deposit or a portion of it," the Court of Chancery, after reviewing the evidence, found that "more likely than not, [Silva] had agreed to do so or at least to try." (*Id.* at 16). Dwyer, through his company (co-plaintiff CFG) ultimately funded the entire $7 million deposit. (*Id.*). Shortly thereafter, Grunstein signed an undertaking payable to CFG for $3.5 million, representing his obligation to repay CFG for half of the deposit. (*Id.*). Grunstein also advanced $1.5 million in legal fees to his own law firm in connection with the transaction. (*Id.* at 36).

D. The First Amendment

On August 18, 2005, an unrelated entity, Formation Capital, submitted an offer of $12.90 per share for Beverly, which was $0.10 more than the $12.80 which had been agreed to in the merger agreement (following Silva's "green light" email to Grunstein). (*Id*. at 18). If Beverly had accepted the higher offer, it would have been obligated to return the $7 million deposit plus a $3.5 million breakup fee (*Id*. at 18-19). However, in an email to Grunstein on August 21, 2005, "Silva seemingly consented to a higher counterbid." (*Id*. at 19). "Thus, with Silva's *tacit consent,* Grunstein submitted a revised proposal of $13.00 per share which was accepted by Beverly, and memorialized in the form of a first amendment to the merger agreement." (*Id.* at 19) (emphasis added). (Once again, Silva's email and consent are at the very least, an implied request by Silva to Grunstein to continue working on the Beverly Acquisition and to submit a higher bid.)

E. Silva's False Statements and Concealment of Grunstein's Involvement

During this time period, Silva and his firm were preparing written presentations to Fillmore's institutional investors, PSP and Washington State Investment Board ("WSIB"), to try to raise the equity. These presentations "included several false statements, including that 'Fillmore . . . has tendered a $7 million deposit . . . and entered into' a merger agreement to purchase and

privatize Beverly." (*Id.* at 21, 29).[4] The Court of Chancery found that these "obviously false statements" were "not casual misstatements of fact; Silva paid careful attention to details." (*Id.* at 21). The Court also found that Silva's failure to mention Grunstein's name even once, in written and oral communications to WSIB, "raises a strong inference" that he was deliberately concealing Grunstein's participation in the deal." (*Id.* at 23).

F. The Second Amendment

The first amendment to the merger agreement had required *a firm equity commitment letter, and a letter of credit and/or a* $53 million deposit by September 22, or else the $7 million deposit would be forfeited. (*Id.* at 19). When it became apparent that "Fillmore was unable to deliver" these items by the deadline, the terms of the merger agreement had to be renegotiated. (*Id.* at 24). "Both Grunstein and Silva were involved in those negotiations" with Beverly, and "Grunstein managed to negotiate a conditional equity commitment, which Fillmore provided" (another example of an implied request by Silva to Grunstein to negotiate on Silva/Fillmore's behalf). (*Id.*).

[4] A presentation from documents and information provided by Silva, "also includes numerous inaccuracies." Among them is the statement that Fillmore had "worked closely with Mr. Grunstein to improve investment results at Mariner," when in fact, Fillmore "had not participated in the management of Mariner in any way." (*Id.* at 22 n.76). The presentation also stated falsely that "this opportunity [to acquire Beverly] is controlled by Fillmore." (*Id.*; Tr. 2036:13-19, 2040:14-21 (A145-46)).

G. Silva Requests That Grunstein Diffuse Opposition to the Acquisition

In late September 2005, opposition to the acquisition of Beverly emerged in Arkansas. "At Silva's [express] request" Grunstein "worked to diffuse the opposition. Among other things, he hired various lobbyists, met with Arkansas senators and state legislators, and worked with Beverly's public relations personnel." (*Id.* at 25).[5]

H. Grunstein and Silva Have an *Understanding* to Share the Benefits of Beverly

Based on Silva's admissions, the Court of Chancery found that there was an "understanding" that "Grunstein and he shared a fifty-fifty interest" in the benefits of Beverly (*Id.* at 67;[6] *see also id.* at 64) ("Silva admitted to an understanding to share the carried interest equally with Grunstein . . ."). [7] Silva's testimony is noteworthy:

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[5] Although this finding was based on Grunstein's testimony, the Court of Chancery stated: "Silva did not dispute any of this testimony at trial." (*Id.* at 25 n.92). Indeed, when asked about the work which Grunstein claimed to have done to diffuse the opposition, and whether he kept Silva advised of it, Silva testified: "if he says he did, then I'll believe him." (Tr. 463:13-464:8 (A142-43)).

[6] The Court of Chancery also found that Grunstein and Silva (along with Dwyer and Lerner) had all agreed to "share expenses up to $14 million." (Opinion at 51, 54).

[7] Silva also acknowledged Grunstein's fifty percent interest to various third parties. (*Id.* at 64, 55-56 n.192).

> Q: Didn't you have an oral understanding with Mr. Grunstein that he would share in whatever you or your companies received out of the Beverly transaction?
>
> A: Yes, we had an understanding.

(Tr. 118:6-10 (A135)). Although Silva claimed that Grunstein's participatory interest was contingent upon Grunstein providing certain deliverables (Opinion at 64), the Court found "there is no evidence that Silva ever insisted that Grunstein provide the deliverables as a condition to their agreement aside from his self-serving testimony." (*Id.* at 74 n.236). Notably, not even Silva testified that he "ever insisted" that Grunstein provide the deliverables after Grunstein's alleged initial agreement to do so; and besides, the alleged deliverables were to be delivered after closing, by which time Grunstein had already been cut out of the transaction. (Tr. 413:2-414:7 (A140-41)).

I. The Third Amendment

Grunstein and Silva continued working on the acquisition from August until mid-November. (Opinion at 62). Sometime in November, "Grunstein suggested that the names of the acquiring entities be changed 'to break their identification with the Mariner transaction' which had been subjected to some negative publicity in the context of the proposed acquisition" of Beverly. (*Id.* at 30). Silva agreed, and his law firm formed three new entities: defendants Pearl, PSC Sub and Geary, to replace the original acquiring entities. Based on Silva's admissions, the Court of

Chancery found that this change "did not have anything to do with eliminating Mr. Grunstein from the transaction" (*id.*), and that by his change, Grunstein was not giving up his financial interest in the transaction. (*Id.* at 63-64).

On November 17, 2005, Silva's institutional lender, WSIB, approved the equity investment in Beverly. (*Id.* at 30). A Silva entity (defendant Fillmore Strategic Management or "FSM") and WSIB entered into an operating agreement for a limited liability company (defendant Fillmore Strategic Investors or "FSI"). Through FSI, WSIB contributed $350 million in equity under FSI's operating agreement. FSM was to receive a yearly management fee plus a carried interest equal to 20% of whatever was left over after the repayment of equity and a 9% rate of return. (*Id.* at 30-32). (The 20% is set forth in Section 9.3 of JX438 (A160), the limited liability company agreement of FSI, cited in the Opinion at 32 n.122).

J. Silva and Grunstein Agree to Change Grunstein's Interest to an Indirect One

The Court of Chancery found that around the time of the third amendment (which substituted Silva's entities for the original acquirers), "Silva and Grunstein agreed to change Grunstein's direct interest in the transaction to an indirect one," and that Grunstein "would have no role in the Fillmore management entities." (*Id.* at 32). On December 16, 2005, Grunstein wrote Silva that "we should also sign up a letter agreement between us replacing the direct equity interest with the indirect equal share in your interest that we discussed on the phone." (*Id.* at 33). Silva

admitted to having such a conversation with Grunstein. (Tr. 153: 21-154:11 (A137-38)).

On December 27, 2005, Brink Dickerson, a partner at Grunstein's law firm, sent an email to his partners at Troutman Sanders, stating that he "just got off the phone with Ron Silva," who was objecting to paying fees to Troutman Sanders for Grunstein's time: "Given Len's carried interest he is not willing to pay for business time as contrasted with legal time." (JX558 (A225); Opinion at 65-66). On December 29, Dickerson wrote another email to his partners, recounting "an extensive conversation yesterday [December 28] with Ron Silva." In that email, Silva again complained about paying Troutman fees for Grunstein's time in view of Grunstein's "50% interest in the carried interest of the transaction." (*Id.* at 65-66; JX562 (A226)). Although Dickerson's December 29 email referred to an entity which Grunstein owned as having the 50% share of Silva's carried interest, Silva testified at trial and the Court below found, that he had told Dickerson on December 28, (the date referred to in Dickerson's email) that "Grunstein had a 50% interest in the carried interest." (Tr. 133:17-18 (A136); Opinion at 66 n.223).

While the Court of Chancery stated that Dickerson's two emails were sent to "another Troutman attorney" (Opinion at 65), Grunstein himself was copied on both emails. (JX558, JX562 (A225-26)). Thus, Grunstein continued to work on the acquisition through closing (Opinion at 74 n.236) after receiving written

confirmation twice (from Silva via Dickerson) of his 50% interest. Moreover, Silva's admission as to Grunstein's 50% interest was made more than a month after Silva's lender had already agreed to provide the equity, and Silva's agreement with that lender, via FSM and FSI, regarding the carried interest. (*Id.* at 30-32).

Silva and Grunstein continued to discuss Grunstein's economic interest in the transaction through closing (Opinion at 36), and at no time prior to closing did Silva ever deny Grunstein's carried interest. (*Id.* at 64). (The Court of Chancery expressly rejected Silva's trial testimony that Grunstein withdrew from the transaction prior to the closing, stating that Silva's testimony "defies reason and is unsupported by the evidence." [*Id.* at 74 n.236].)

K. <u>Grunstein Works on the Transaction at Silva's Request Through Closing</u>

Grunstein continued to work "actively" on the transaction "during the latter half of December and in January" (*id.* at page 34), and he "assisted with the transaction through closing." (Id. at 74 n.236). On December 29, Silva wrote Grunstein "I am interested in [y]our counsel on all issues" (another implied request by Silva to Grunstein to continue working). (*Id.* at 65). Silva also wrote to Grunstein: "We have also made fee payments to our team." (*Id.*). In an email to Grunstein on January 5, after a meeting regarding the acquisition (for which Grunstein helped him prepare), Silva wrote: "I did well for us today, Len." (*Id.* at 65, 34 n.133). As the Court of Chancery noted, "This is not the type of email that one writes to his attorney." (*Id* at

65).[8]

On March 6, 2006, eight days before the closing of Beverly, and feeling that he was being "squeezed out," Grunstein wrote a letter to Silva in which he stated in part:

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

(*Id.* at 35-36).

"Just before the closing of the transaction, Silva sought Grunstein's help in resolving an emergency caused by the change in structure [an express request by Silva to Grunstein]. Not only did Grunstein get involved, but he offered a solution to the problem which was ultimately utilized." (*Id.* at 34). Thus, at the very time that Grunstein was reaffirming his financial participation in the transaction, Silva expressly requested that Grunstein help solve an emergency concerning the acquisition, and Grunstein complied.

The Beverly acquisition closed on March 14, 2006. (*Id.* at 35). Grunstein received nothing. (*Id.* at 36). As the Court found: "Silva appears to have taken advantage of the efforts of Grunstein." (*Id.* at 88). "Silva . . . was content to lead Grunstein and Dwyer along because he needed them – all the while believing he had the option to renege or renegotiate the agreements or understandings he had

[8] In dismissing the claim for fraud, the Court of Chancery noted: "Silva . . . was content to lead Grunstein and Dwyer along because he needed them." (*Id.* at 95).

made with" Grunstein. (*Id*. at 95).

After the closing, Beverly's value increased substantially (as did the value of Silva's carried interest). As of December 31, 2011, FSI valued the Beverly investment (of $350 million) at $1.084 billion. (*Id.* at 38).

L. The Opinion Below

Grunstein had asserted claims for breach of a partnership agreement, promissory estoppel, fraud and unjust enrichment. Following a two-week trial, the trial Court dismissed the partnership claim on the grounds that Grunstein did not demonstrate "by a preponderance of the evidence that Silva assented to carry on a business for profit." (Opinion at 76).[9]

The Court below dismissed the claim for promissory estoppel because Grunstein was unable to prove by "clear and convincing evidence" that a "definite and certain promise was made." (*Id.* at 85). In addition, the Court held that "it was unreasonable for Grunstein to rely on Silva's promise, if indeed one

[9] The Court of Chancery stated that "Silva's admissions that Grunstein and he shared a fifty-fifty interest, that his control of the Beverly acquisition entities did not change Grunstein's interest, that Grunstein's direct participatory interest would be converted to an indirect interest, or that he 'did well' for himself and Grunstein do not, by a preponderance of the evidence, prove Silva's assent to carry on a business to share profits. Although this evidence could be consistent with a partnership interest, it could also be consistent with two individuals who presented a unified front to others while they continued to negotiate a final deal. Agreement on several terms is not the same as agreement on all the terms the parties understood to be essential. Similarly, Silva's silence for seven months and the compatible working relationship between Grunstein and Silva (which included Grunstein's taking a variety of actions to push the deal forward) do not demonstrate the existence of a partnership." (*Id.* at 67). Significantly, the Court made no reference to any of this evidence in dismissing the unjust enrichment claim on the grounds that Grunstein allegedly acted "officiously."

was made." (*Id.*).

The Court below dismissed Grunstein's fraud claim (which was based on Grunstein's contention that Silva never intended to share the economic benefits of Beverly with him equally) on the grounds that "Silva likely intended to share at least some portion of the economic benefits at the beginning." (*Id.* at 95). The Court found that "Silva . . . was content to lead Grunstein and Dwyer along because he needed them . . . . The question is whether this exploitation amounted to fraud." (*Id.*). While the Court concluded that the exploitation did not amount to fraud, the Court did not discuss Silva's "leading" Grunstein "along," or his "exploitation" of Grunstein, in the context of the unjust enrichment claim.

The Court's dismissal of the unjust enrichment claim was based on its holding that Grunstein acted officiously, for the reasons discussed in paragraph 2 of the Summary of the Argument, above. Because the dismissal of the unjust enrichment claim is the only subject of this appeal, it is discussed more fully below.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN DISMISSING GRUNSTEIN'S CLAIM FOR UNJUST ENRICHMENT.

A. Question Presented

Whether based on the facts found by the Court of Chancery and Silva's admissions, the Court erred in granting judgment to defendants on Grunstein's claim for unjust enrichment. Grunstein preserved this question at the trial Court by arguing for judgment on his unjust enrichment claim in his post trial briefs. (Plaintiffs' Opening Post-Trial Brief at 84-90 (A236-42); Plaintiffs' Post-Trial Reply Brief at 38-42 (A246-50)).

B. Standard of Review

The standard of review for what Grunstein submits was an error of law in holding that he acted officiously, is *de novo* review. *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990).

C. The Merits of the Argument

It is an established maxim of equity that "[e]quity will not suffer a wrong without a remedy." *Pharmathene Inc. v. Siga Techs., Inc.*, 2011 WL 4390726, at *34 (Del. Ch.), *aff'd. in part, reversed in part*, 67 A.3d 330 (Del. 2013) (citation omitted). By denying Grunstein's unjust enrichment claim notwithstanding its express findings regarding the work he performed and the mutual understanding with Silva under which he did so, the Court of Chancery effectively negated this

venerable maxim.

This Court has defined unjust enrichment as the "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999). To prevail on an unjust enrichment claim, a plaintiff must prove that: "(1) the Defendants were enriched; (2) the Plaintiffs suffered an impoverishment; (3) there is a relationship between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy provide by law." *Id.* Although the Court below quoted these five elements (Opinion at 89), it did not discuss them individually. However, based solely on the facts as found by the Court and Silva's admissions, each of the five elements (discussed below, *albeit* out of order) have been satisfied, and Grunstein was entitled to judgment.

1. It is beyond dispute that defendants were enriched by Grunstein's efforts. Even before Silva came into the picture, Grunstein prepared and submitted proposals to, and negotiated with, Beverly. After Silva arrived, Grunstein, *inter alia*, negotiated the final price with Beverly; negotiated the first and second amendments to the merger agreement; worked to diffuse opposition to the agreement in Arkansas; continued to render advice to Silva; and helped solve an emergency that threatened to derail the transaction just prior to closing. As the

Court below stated, Silva and Grunstein "shared a seven month history of collaboration to complete the transaction," during which Grunstein took "a variety of actions to push the deal forward." (*Id.* at 85, 67).

2. Grunstein clearly suffered an impoverishment because he was not paid for his work. *Boulden v. Albiorix*, 2013 WL 396254, at *14 (Del. Ch.) ("To the extent that Boulden's work went uncompensated, he was impoverished").

3. A relationship clearly existed between defendants' enrichment (the acquisition of Beverly), which came about largely because of Grunstein's efforts, and Grunstein's impoverishment – a failure to be compensated for his time and efforts. *See Boulden*, 2013 WL 396254, at *14 ("a relationship clearly exists between Janus' enrichment [acquisition of the Plant] which allegedly resulted from the time and effort of Boulden, and Boulden's impoverishment – a failure to be compensated for that time and effort").

5. "An absence of a remedy at law may exist if there is no contract." *Boulden*, 2013 WL 396254, at *11. Since the Court of Chancery found that there was no partnership agreement in this case, the fifth element is satisfied.

4. Although the Court below did not expressly discuss the "absence of justification" factor, its holding that Grunstein acted "officiously" obviously meant that defendants' enrichment was not "unjust."[10] However, based on the Court's findings of fact and Silva's admissions discussed earlier, as a matter of law, Grunstein did not act officiously, and thus, he is entitled to judgment on his claim of unjust enrichment.

The *Pharmathene* case is very much on point. There, plaintiff sued defendant for, *inter alia*, unjust enrichment, claiming that defendant "Siga was unjustly enriched by the management expertise, technical know-how, and capital it received from [plaintiff] Pharmathene to help develop ST-246," a smallpox drug. 2011 WL 4390726, at *12.

After trial in *Pharmathene*, the Court of Chancery held that plaintiff had proven its claim for unjust enrichment. The Court expressly rejected Siga's contention that plaintiff had rendered its assistance "officiously," because Siga had asked plaintiff to become "less involved."

> A request that Pharmathene become less involved in clinical development of ST-246 is not an outright rejection of the assistance Pharmathene provided. Indeed, it implies acceptance of at least some part of it. Lastly, *Pharmathene provided ongoing assistance to Siga for over six months*, from March to September 2006.

[10] The Court did say that Grunstein acted "with justification." (Opinion at 91). This statement is difficult to understand, since "justification" in the context of an unjust enrichment claim means that the *defendant* is justified in retaining the benefit received without payment.

> Throughout that period, *Siga knew that Pharmathene was providing its assistance only because it reasonably anticipated that it would control ST-246,* and *Siga had every opportunity to refuse to accept the assistance.* Under the circumstances, *where Siga knowingly accepted the benefits of an ongoing personal services relationship for an extended period of time without rejecting those services,* I find that *Pharmathene did not confer a benefit officiously.* Accordingly, Siga lacks justification for retaining the benefits conferred.

Id. at *28 (emphasis added).

Here, as in *Pharmathene, defendants "knowingly accepted the benefits of an ongoing [seven month] personal services relationship [with Grunstein] for an extended period of time* without rejecting those services." Indeed, not only did defendants accept and not reject Grunstein's services, the Court below found that Silva was content to "lead" Grunstein "along" because he "needed" Grunstein. (Opinion at 95), that Silva "exploit[ed]" Grunstein (*id.*), and that he "appeared to have taken advantage" of Grunstein. (*Id.* at 88). Silva "knew" that Grunstein "was providing [his] assistance" only because Grunstein "anticipated" that he would be "compensated."

Furthermore, although the Court of Chancery in *Pharmathene* cited Section 112 of the Restatement (First) of Restitution, which stated that an officiously conferred benefit is one in which "a person who without mistake, coercion or *request* … unconditionally conferred a benefit upon another," 2011 WL 4390726, at *27 n.148, it did not point to any *request* by Siga to plaintiff in finding that

plaintiff did not act officiously. Here, on the other hand, the Court of Chancery also quoted the same section 112 of the Restatement. (Opinion at 89-90). Yet, the Court ignored its own finding of fact that Silva made at least two express requests of Grunstein and several other *implied* requests to work on Beverly. (All of Grunstein's actions after Silva joined the transaction summarized in paragraph 1 above were done at Silva's express or implied request.)

Proof of express or even implied requests is sufficient to support a claim for unjust enrichment. *Reserve Development LLC v. Severn Savings Bank,* 2007 WL 4054231, at *1 (Del. Ch.), *aff'd,* 961 A. 2d 521 (Del. 2007) (judgment for plaintiff after trial on unjust enrichment claim, where plaintiff demonstrated that "some of the actions it took . . . were with at least the implicit authorization" of the defendants); *Fahlsing v. Fahlsing,* 2013 WL 1449827, at *4 (Ind. App.) ("a party seeking to recover [for unjust enrichment] … must demonstrate that the benefit was rendered to another at the express or implied request of such other party"). Here, the Court below found that there were both express and implied requests.

The existence of these express and implied requests alone precluded a finding that Grunstein acted "officiously." Nevertheless, the Court of Chancery ignored these requests (as well as the applicable law) in holding that Grunstein did act officiously, and that he "volunteered" to push the transaction forward. (Opinion at 91 n.278). Instead, the lower Court appeared to create a new test to determine

whether the plaintiff acted officiously, when it noted that it had "not found that Grunstein acted as Silva's *insistence*." (*Id.*) (emphasis added).

However, no court anywhere has held that an unjust enrichment plaintiff does not act officiously *only* when he acts at defendant's *insistence.* While Section 112 of the First Restatement of Restitution indicates that a benefit conferred as a result of "coercion" is not officious, that section indicates that the same is true of a benefit conferred as a result of a "request." Here, as the Court below found, Silva made many such express and implied requests.

Furthermore, in dismissing the unjust enrichment claim on the grounds that Grunstein acted officiously, the Court below did not discuss many of the same facts that it discussed in connection with Grunstein's claims of partnership, promissory estoppel and fraud. While those facts (discussed below) might not have been sufficient to prove those other claims, they are relevant, but were not discussed, in the context of the unjust enrichment claim.

For example, the facts found by the Court of Chancery and recited in note 9 above are certainly relevant to the issue of whether Grunstein acted officiously, and whether Silva was "justified" in retaining the benefits conferred upon him by Grunstein. Equally relevant to the unjust enrichment claim, and specifically to the issues of officiousness and justification, are the Court's findings that Silva was "content" to "lead" Grunstein "along" (*id.* at 95), that he "exploited" Grunstein (*id.*

at 95), and that he took "advantage" of Grunstein. (*Id.* at 88). None of these facts are discussed in the unjust enrichment portion of the Opinion.

In discussing the claim for unjust enrichment, the Court of Chancery stated:

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

(*Id.* at 90-91). Grunstein respectfully submits that, although the Court's statement might justify denying Grunstein's claim of a partnership agreement, it does not, and cannot, support the dismissal of his claim for unjust enrichment on the grounds that he acted officiously.

To affirm the dismissal of the unjust enrichment claim based on the reasoning quoted above would mean that no plaintiff could prevail on an unjust enrichment claim when no agreement was finalized, even where, as here, there was an agreement or understanding that plaintiff would be compensated; the defendant made numerous requests of plaintiff to perform services over an extended period of time; and the defendant was "content" to "lead Grunstein . . . . along" because he

"needed" him, "all the while believing that he had the option to renege or renegotiate the agreements or understandings that he had made." (*Id.* at 95). And, of course, if Grunstein had "protected himself" with a final agreement as the Court stated he "should have done" (*id.* at 91 n.277; *id.* at 90), there could be no claim of unjust enrichment either, because an express contract would govern the rights of the parties. *Redus Peninsula Millsboro, LLC v. Mayer*, 2014 WL 4261988, at * 5 (Del. Ch.).

Restatement (Third) of Restitution & Unjust Enrichment, § 9, Comment f supports Grunstein's position:

> A party may perform services for another in the mistaken belief that the transaction between them is governed by a contract . . . .
>
> Where the parties have had prior negotiations not resulting in a contract, the recipient of services performed by mistake will sometimes be aware that the claimant has undertaken performance and (moreover) that the claimant is mistaken about the existence of an agreement . . . .

In Illustration 20 to Comment f, the owner of property and a builder discuss the construction of a stone wall to protect the owner's lakefront property and the price owner would be willing to pay for it. In owner's absence, builder proceeds to erect the massive stone wall in the location owner has indicated. "Owner learns of the circumstances and permits Builder to continue. Owner is liable in restitution for the reasonable value of Builder's work." *See also Smith v. Rials*, 595 So.2d 490,

492 (Ala. App. 1991), cited by the Restatement's notes as the basis for Illustration 20 ("When Smith authorized the completion of the work, he recognized that his property would increase in value and he would benefit greatly thereby . . . . Smith became obligated to pay the reasonable value of his benefit").

Here, even though the Court found that there was no contract, at the very least, Silva was certainly aware that Grunstein was operating under the (mistaken) belief that there was a contract. Moreover, not only did Silva "permit" Grunstein to continue working on the acquisition, they worked side by side for seven months, during which time Silva repeatedly requested Grunstein to do work and benefited from it. A fortiori, Grunstein is entitled to recover for unjust enrichment.

In dismissing Grunstein's claim for unjust enrichment, the Court of Chancery relied on only a single case, *Stein v. Gelfand*, 476 F.Supp.2d 427 (S.D.N.Y. 2007). The most obvious distinction between this case and *Stein* is that unlike here, there is nothing in the *Stein* opinion which indicates that defendant ever *requested* Stein to do specific work on the transaction. In addition, plaintiff's work in *Stein* does not appear to have been nearly as extensive as Grunstein's work on Beverly which (unlike in *Stein*) continued right up until closing. Furthermore, here the Court *found* that the parties had an understanding or agreement to share benefits, which was re-affirmed many times throughout the course of the transaction. Moreover, there was no finding in Stein that defendant was "content"

to "lead" plaintiff along, that he took "advantage" of plaintiff or that defendant "exploited" plaintiff. Finally, in *Stein*, defendant allegedly offered plaintiff the opportunity to participate in the transaction. Here, it was Grunstein who brought Silva into the picture.

CONCLUSION

For all of the foregoing reasons, Grunstein respectfully requests that the judgment of the Court of Chancery be reversed, and that it be instructed to enter judgment in Grunstein's favor on his unjust enrichment claim, and to determine which defendants are liable [11] and the amount of damages.

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Dated: November 13, 2014

[11] Grunstein has maintained that all of the defendants are liable, even those formed during the course of the transaction. *See Seibold v. Camulos Partners LP*, 2012 WL 4076182, at *22 n.210 (Del. Ch.).

CERTIFICATE OF SERVICE

Kurt M. Heyman, Esquire, hereby certifies that on November 13, 2014, copies of the foregoing Corrected Appellant's Opening Brief were served electronically on the parties listed below as follows:

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