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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEONARD GRUNSTEIN, Plaintiff-Appellant, v. 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 STRATEGY MANAGEMENT, LLC., Defendants-Appellees.	No. 569, 2014 Appeal from Court of Chancery C.A. No. 3932-VCN

DEFENDANTS-APPELLEES' ANSWERING BRIEF TO APPEAL OF LEONARD GRUNSTEIN

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NATURE OF PROCEEDINGS

After nearly nine years of litigation in multiple fora, several reported decisions, and two weeks of trial, the Court of Chancery issued a Memorandum Opinion (the "Opinion" or "Op.") on September 5, 2014 granting judgment for Defendants-Appellees and rejecting all of Plaintiff-Appellant Leonard Grunstein's ("Grunstein") claims. Grunstein's claims arise out of a transaction in which the Defendants-Appellees acquired and took private Beverly Enterprises, Inc. for over $1 billion. Despite the lack of any written agreement between Grunstein and the Defendants-Appellees providing Grunstein with the right to receive consideration from the Beverly transaction, Grunstein claimed the right to receive over $60 million based on claims of breach of oral partnership agreement, promissory estoppel, fraud, and unjust enrichment. Grunstein now appeals only the ruling on unjust enrichment.

The other plaintiffs-below, Jack Dwyer and Capital Funding Group, Inc., have filed a separate appeal in this Court, No. 572, 2014. If the Court determines to hold oral argument on this and the Dwyer appeals, Appellees intend to move the Court to hear both appeals in one consolidated hearing.

SUMMARY OF ARGUMENT

1. Appellees deny the allegations of this paragraph because they are substantively incorrect and mischaracterize the Court of Chancery's holding. Grunstein's sole question presented on appeal, challenging only two pages of the 112-page Opinion, is whether the court correctly determined that Grunstein had "officiously" collaborated with certain Appellees on a $2.2 billion acquisition of Beverly Enterprises, Inc. ("Beverly")—a transaction for which his law firm received over $10 million in legal fees and his one-employee "investment bank" claimed a $20 million fee in a related lawsuit. The Court of Chancery's determination of Grunstein's intent in providing this work was a finding of fact, for which de novo review is not appropriate on appeal. Instead, that factual determination is entitled to substantial deference and this Court should only review the factual determination that Grunstein acted officiously for clear error. *See, e.g.*, *Delaware Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 650 (Del. 2006); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

Contrary to the selective factual findings cited out of context by Grunstein in subparagraphs (i) through (vii) (Grunstein Opening Brief ("GOB") at 2), the Court of Chancery made numerous specific factual findings negating unjust enrichment. The lower court found that "Grunstein acted in his own self-interest in assisting Silva in the deal," "provided [his] services in pursuit of [his] own self-interest,"

and aided Appellee-Silva "of his own volition with the hope that they would finalize an agreement." Op. at 90-91, 93. The trial court stressed that "the Court *has not found that Grunstein acted at Silva's insistence* . . . . Grunstein *volunteered* to push the transaction forward." *Id.* at 91 n.278 (emphasis added). These factual findings, among others, negate unjust enrichment.

Appellees also deny the allegation in subparagraph (vi) (GOB at 3) that the Court of Chancery found that Grunstein worked on the transaction on account of Appellee-Silva's specific "requests." The trial court found the opposite (Op. at 91 n. 278) and this argument was not briefed below and is therefore barred by Delaware Supreme Court Rule 8 and is contrary to Court of Chancery's discovery ruling of August 24, 2012. *See Grunstein v. Silva*, 2012 WL 3870529, at *6 (Del. Ch. Aug. 24, 2012) ("*Grunstein IV*").

Finally, Appellees deny the allegations of this paragraph for the independent reason that Grunstein's unjust enrichment claim is barred by res judicata because of the holding in *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (Del. 2009). That case involved the same Beverly transaction, the same counsel, and essentially the same parties in interest. Both cases included unjust enrichment causes of action, and discovery in the two actions was consolidated. The court below refused to apply the doctrine of res judicata based on an erroneous legal standard focused on differences between

the legal theories and requested remedies in the two cases. *Id.* at 109 n.337. If the correct legal standard as articulated in *ZVI Levinhar v. MDG Med. Inc.*, 2009 WL 4263211 (Del. Ch. Nov. 24, 2009) and *Maldonado v. Flynn*, 417 A.2d 278, 381 (Del. Ch. 1980) is applied, res judicata bars Grunstein's unjust enrichment claim.

2. Appellees deny that the lower court's determination that Grunstein acted officiously was incorrect or unsupported by the record. The Court of Chancery's finding that Grunstein volunteered his services in a self-interested but unsuccessful gamble is well-supported by substantial evidence in the record. Appellees further deny the allegation that the court below found that Grunstein worked on the transaction because of Silva's "requests." That argument was not briefed below and well-supported findings of fact by the lower court directly contradict that assertion. Op. at 90 n.278 ("[t]he Court *has not found* that Grunstein acted at Silva's insistence . . . . Grunstein volunteered to push the transaction forward") (emphasis added).

3. Appellees deny the allegations of this paragraph because they are substantively incorrect and mischaracterize the Court of Chancery's holdings and factual findings. The determinations of Grunstein's credibility, particularly in light of his admitted perjury (Op. at 39-40), must be affirmed on appeal. *Levitt v. Bouvier*, 287 A.2d 671, 672 (Del. 1972) ("When the determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the

trial judge, *his findings will be approved upon review*.") (emphasis added). Appellees further deny that the purported facts asserted in Grunstein's brief establish a valid unjust enrichment claim because they mischaracterize the holding below, do not establish grounds for setting aside the substantial deference owed to the lower court's determinations, and are offered, in part, to raise an argument not fairly presented below.

4. Appellees deny the allegations of this paragraph because they are substantively incorrect and mischaracterize the lower court's holdings and factual findings. The court correctly recognized that the reasonable expectations of the business world would be disturbed if a party could voluntarily perform work in the hopes of reaching an agreement in the future, and then later demand a remedy for unjust enrichment. *See* Op. at 86-87.

STATEMENT OF FACTS

A. Transaction Background

Grunstein is a man who wore many hats in connection with the Beverly acquisition. He was a law partner at Troutman Sanders LLP ("Troutman") and also held a dominant ownership interest in his captive one-employee investment bank, MetCap, through a holding company, MetCap Holding, LLC. Op. at 7, 9. Grunstein also formed and controlled two shell companies, North American Senior Care ("NASC") and SBEV Holdings LLC ("SBEV"), to serve as acquisition vehicles for the Beverly transaction. *Id.* at 11, 15, 108.

In early 2005, Grunstein began to explore the possibility of acquiring Beverly after an unrelated hostile offer had been made. *Id.* at 10-11. He was introduced to the opportunity by Jack Dwyer ("Dwyer"), who knew Beverly's CEO, Bill Floyd. *Id.* at 11. Dwyer's business was arranging take-out financing through the United States Department of Housing and Urban Development ("HUD"). *Id.* Grunstein and Dwyer had worked together to arrange financing for a prior acquisition of Mariner Healthcare ("Mariner"), another long-term healthcare business. *Id.* at 9. After introducing Grunstein to the Beverly opportunity, and over the course of several months, Grunstein and Dwyer had "several meetings" and "numerous phone conversations" with Floyd, during which they persuaded Floyd that they could consummate the deal. *Id.* at 11.

During this period, Appellees had no involvement in the Beverly acquisition, but Grunstein and Dwyer continued to work on the potential deal. Dwyer began meeting with HUD officials and doing some preliminary underwriting work in an effort to arrange HUD financing for the transaction. *Id*. Grunstein worked on obtaining the debt and equity financing. *Id.* He initially approached Wachovia Bank and Credit Suisse First Boston through Richard Lerner ("Lerner") to provide the debt financing. *Id*. at 6-7, 12. He also approached Rubin Schron ("Schron"), with whom he had worked on the Mariner transaction, to provide the equity. *Id*. at 8, 13. On May 9, 2005, through his shell company, SBEV, Grunstein submitted a preliminary proposal to acquire Beverly for $12.65 per share. *Id.* at 11, 13; B001-28 (JX 31-33). The court below found that Grunstein was prospecting the Beverly transaction from many angles: he was providing legal advice (through his law firm Troutman), acting as a potential principal (through his shell companies, SBEV and NASC), and acting as a potential investment banker (through MetCap). Op. at 11, 13, 15.

The Court of Chancery set out its factual conclusions in great detail in the 112-page Opinion. It found that soon after Silva became involved in the collaboration with Grunstein, Dwyer and Lerner, Grunstein's shell entities NASC and SBEV entered into a merger agreement (the "Merger Agreement") to acquire Beverly without a real equity source (Schron was not interested), and relied on

Silva to find an equity source. *Id.* at 15-16. After numerous stops and starts relating to the necessary deposits and financing under the Merger Agreement, the transaction was delayed, two amendments to the Merger Agreement were signed, the foursome exchanged proposals to form various legal relationships among them that were not accepted, and Silva's equity source finally committed, leading to the execution of the Third Amendment in late November 2005. *Id.* at 17-19, 23-26, 28-32. Under the terms of the Third Amendment, the right to acquire Beverly was transferred from entities controlled by Grunstein to entities controlled by Silva. *Id.* at 31. Soon after, Silva decided to abandon Grunstein's acquisition model, which was based on the Mariner transaction. *Id.* at 33. Grunstein continued to be involved in the Beverly transaction, which closed in March 2006. *Id.* at 35.

B. Grunstein's Unjust Enrichment Claim

The following facts regarding Grunstein's unjust enrichment claim were found by the lower court:

> The Court concludes that Grunstein acted in his own self-interest in assisting Silva in the deal. As already described, Grunstein likely thought his best chance to participate in the deal was to continue to prove his worth and assist in the transaction.
>
> 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 the 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 or that Grunstein did not aid Silva of his own volition with the hope that they would finalize an agreement. He therefore acted officiously and with justification.

Id. at 90-91. The court added:

> [T]he Court has not found that Grunstein acted at Silva's insistence. They collaborated and, in doing so, Grunstein volunteered to push the transaction forward while trying to conclude a partnership.

Id. at 91 n.278.

C. Procedural History

The first lawsuit stemming from the Beverly transaction involved MetCap and Grunstein's shell company, NASC, represented by Grunstein's then-and now-counsel Martin Stein ("Stein"), in New York state court in March 2006. Defendants were Silva's acquisition entities Pearl Senior Care, Inc., PSC Sub LLC, Geary Property Holdings LLC, and Beverly Enterprises, Inc. B160-68. MetCap claimed entitlement to a $20 million fee, and sought to enjoin the closing of the acquisition. Defendants removed the case to federal court and the action was subsequently dismissed without prejudice pursuant to stipulation. B169-70.

Shortly after, in May 2006, MetCap and NASC filed essentially the same complaint against the same defendants in the Delaware Court of Chancery. B171-77. Appellees moved to dismiss the complaint, and the Court of Chancery granted that motion in part, dismissing the fraud and third party beneficiary claims.

MetCap Sec. LLC v. Pearl Senior Care, Inc., 2007 WL 1498989, at *11 (Del. Ch. May 16, 2007) ("*MetCap I*"). Following discovery, the court granted Appellees' motion for summary judgment, dismissing the remainder of Grunstein's claims on February 27, 2009. *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *11 (Del. Ch. Feb. 27, 2009) ("*MetCap II*"), *aff'd*, 977 A.2d 899 (Del. 2009) (Table).

On May 10, 2007, during the pendency of the motion to dismiss *MetCap*, Grunstein, Dwyer, and CFG (all represented by Stein, the same counsel as for MetCap and NASC, and additional counsel in Delaware and Los Angeles) filed a new action in the Southern District of New York against all of the same defendants in this lawsuit. B178-91(Compl., *Grunstein v. Silva*, Case No. 07-cv-03712 (S.D.N.Y. filed May 10, 2007)). Appellees moved to dismiss that federal action. B192-222. In April 2008, District Judge Berman dismissed the case, holding that there was no subject matter jurisdiction, and that the claims were subject to the Delaware forum selection clause contained in the Merger Agreement entered into by NASC, SBEV, and Beverly. B288-303.

In July 2008, Grunstein, Dwyer, and CFG filed this action, asserting very similar claims to those alleged in the Southern District of New York case. B304-28. Appellees moved to dismiss and the Court of Chancery granted the motion as

to the breach of fiduciary duty and tortious interference claims. *Grunstein v. Silva*, 2009 WL 4698541, at *7, 17, 25 (Del. Ch. Dec. 8, 2009) ("*Grunstein I*").

Following the Delaware Supreme Court's affirmation of summary judgment in *MetCap II*, Appellees filed a motion for summary judgment in this case, arguing that res judicata barred each of Grunstein's (but not Dwyer/CFG's) remaining claims. *See Grunstein v. Silva*, 2011 WL 378782, at *7 (Del. Ch. Jan. 31, 2011) ("*Grunstein II*"). In response to the motion, the court below held that Appellees had not established that res judicata barred Grunstein's claims solely because the evidence presented in the summary judgment proceedings did not establish the requirement of privity between Grunstein and MetCap as an undisputed fact. *Id*. at *7-9. The holding that privity was not yet established was primarily influenced by Grunstein's representations to the court about his relationship with MetCap. *Id.* at *8; *Grunstein v. Silva*, 2011 WL 808879, at *1 n.10 (Del. Ch. Mar. 2, 2011) ("*Grunstein III*").

The Court of Chancery noted that "in a different procedural posture" after further discovery, Appellees "might be able to adduce evidence sufficient to support findings that Grunstein and MetCap *are* in privity and that fairness did require Grunstein to bring his individual claims in the prior litigation." 2011 WL 808879, at *2 (emphasis in original). Appellees then conducted substantial additional, and heavily resisted (*see Grunstein IV*, 2012 WL 3870529, at *6),

discovery into the relationship between Grunstein and NASC and MetCap, and uncovered evidence establishing his privity with both entities. Appellees renewed their motion for summary judgment on the basis of res judicata, presenting voluminous evidence of Grunstein's control and ownership of MetCap and NASC. The court below noted that the evidence presented with that briefing "strongly suggest[s] that there is a close or significant relationship between Grunstein and MetCap," but nonetheless determined that Appellees had not fully satisfied the Court of Chancery Rule 56 standard of undisputed material facts. *Id.* at *2.

After trial, on September 5, 2014, the court below issued the Opinion, finding for Appellees on all claims. In addition to the findings quoted above, the court concluded that Grunstein and Dwyer acted "officiously" because they "provided their services in pursuit of their own self-interest." Op. at 93. Moreover, the court found that Grunstein decided as part of his "gamble" not to "adequately protect[]" himself and "secure consideration" for his work on the transaction, and consequently he could not now "claim unjust enrichment for such voluntarily provided services." *Id*. at 90, 93.

Although not necessary to the court's analysis (*id.* at 104 n.314), the trial court also concluded that res judicata did not bar Grunstein's claims, ruling that even if Appellees had carried their burden of persuasion in proving privity between Grunstein, MetCap, and NASC, res judicata did not apply. The court noted the

substantial amount of evidence demonstrating strong relationships between Grunstein and both MetCap and NASC, but determined that application of res judicata would not be fair because Appellees could not have reasonably believed that the *MetCap* litigation resolved Grunstein's individual claims because of "significant differences" between the theories and remedies in the two litigations. *Id*. at 104-12. This determination was incorrect as a matter of law (*see Maldonado,* 417 A.2d at 381) and provides a separate and independent basis for this Court to affirm the Opinion below. Notably, the *MetCap* litigation, like this case, involved a claim for unjust enrichment, the only claim now on appeal by Grunstein. Grunstein testified at his deposition (taken in both *MetCap* and this case) that he was working for MetCap in connection with financing or discussions with investors. B226 (Grunstein Dep. (2/25/08) at 62:2-7). Grunstein also asserted that it was impossible to segregate his work as a businessman from his work as an attorney on the Beverly transaction. B383 (Grunstein's Op. to Defs.' Third Motion to Compel Discovery Resp. at 8).

ARGUMENT

I. The Court of Chancery's Rejection of Grunstein's Unjust Enrichment Claim Is Supported By Substantial Evidence And Was Not Clearly Erroneous

A. Question Presented

Is the Court of Chancery's finding that Grunstein acted officiously and there was no unjust enrichment of Appellees by Grunstein supported by substantial evidence? Grunstein's argument that the question should be whether the trial court "erred in granting judgment" assumes the wrong standard of review.

B. Scope of Review

This appeal can be decided on the scope of review alone. Grunstein erroneously maintains that the standard of review on appeal is de novo. But as this Court has repeatedly held, where the Court of Chancery reaches "a correct formulation" of the law at issue, the court's "findings upon application" of the law "are, on appeal, entitled to substantial deference unless clearly erroneous or not the product of a logical and deductive reasoning process." *Technicolor*, 634 A.2d at 360; *accord Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999); *Levitt*, 287 A.2d at 673. Grunstein admits that the lower court reached the "correct formulation" of the unjust enrichment standard. GOB at 21. Grunstein adopts the same standard (*id.*) and therefore cannot contend that there was an error of law.

Whether Grunstein was acting officiously depends on whether he voluntarily provided his services with the intention that doing so would allow him to negotiate

and enter into a lucrative agreement in the future. Op. at 90-91. The determination that his acts were "officious" therefore involves a determination of Grunstein's intentions and motives, both of which are questions of fact, not law. *See, e.g.*, *Delaware Bay*, 900 A.2d at 650 ("the intent of the parties is a question of fact"); *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) ("[t]he intent of the parties is generally a question of fact . . ."); *Monteiro v. City of Elizabeth*, 436 F. 3d 397, 405 (3d Cir. 2006) ("Motive is a question of fact").

Grunstein's call for de novo review confuses the distinction between challenging whether the Court of Chancery has applied the "correct formulation" of the law, which would warrant de novo review, and challenging the Court of Chancery's "findings upon application" of the law, which will only be overturned if "clearly erroneous or not the product of a logical and deductive reasoning process." *Technicolor*, 634 A.2d at 360; *see generally* Hon. Richard Cooch, Delaware Appellate Handbook, Chapter 6 (1996) § 6.03 ("[I]t is relatively rare . . . that an appeal from a nonjury decision after trial . . . will involve a pure question of law."). Grunstein asserts that whether a party acted officiously is subject to de novo review but the only case cited to support this argument (GOB at 20) did not involve officious conduct.

In reviewing a finding of fact, this Court determines only whether "there is sufficient evidence to support the findings of the trial judge" and, if so, "this Court

. . . must affirm." *Levitt*, 287 A.2d at 672. When the determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, *his findings will be approved upon review*." *Id.* (emphasis added). Further, "a fact finder's choice between two reasonable interpretations of the evidence cannot be 'clearly erroneous.'" Hon. Richard Cooch, Delaware Appellate Handbook, Chapter 6 (1996) § 6.03 (citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985)). The factual determination that Grunstein acted out of self-interest is accordingly entitled to substantial deference. *See, e.g.*, *Technicolor*, 634 A.2d at 360; *Schock*, 732 A.2d at 224; *Adams v. Jankouskas*, 452 A.2d 148, 151 (Del. 1982).

C. Merits of the Argument

Delaware law requires any party asserting a claim for unjust enrichment to prove by a preponderance of the evidence that: (1) the defendants were enriched; (2) the plaintiff suffered an impoverishment; (3) there is a relationship between the enrichment and the impoverishment; (4) an absence of any justification; and (5) the absence of a remedy provided by law. Op. at 89 (quoting *Schock*, 732 A.2d at 232); GOB at 21. Grunstein's failure to prove any one of these elements defeats his claim for unjust enrichment. *See MetCap II*, 2009 WL 513756, at *9-10.

In this case, as in *MetCap II*, the Court of Chancery focused on the fourth element – the absence of any justification for Appellees to retain the benefit. The

trial court concluded that because Grunstein acted "officiously" and "of his own volition with the hope that [the parties] would finalize an agreement," it was justifiable for Silva and the other Appellees to retain any benefit that Grunstein might have conferred as they worked toward consummation of the Beverly transaction. Op. at 90-91. That finding is supported by substantial evidence.

In addition, Grunstein failed to carry his burden of proof on the causation/damages elements of his unjust enrichment claim, and the decision below can rightly be affirmed for those alternative reasons raised below as well. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

1. Substantial Evidence Supports The Court of Chancery's Conclusion That Grunstein Acted Officiously Rather Than Because of A Request By Appellees

In determining that there was a justification for Appellees to retain any benefit Grunstein may have bestowed, the court below drew support from *Stein v. Gelfand*, 476 F. Supp. 2d 427 (S.D.N.Y. 2007). *See* Op. at 90 & n.277. In that case, as here, the parties worked together for many months to complete the acquisition of assets, the assets ultimately were acquired by a company owned solely by the defendant, and the parties were unable to reach agreement on the terms of their business relationship. *Stein*, 476 Supp.3d at 428-31. Plaintiff then sued, claiming the existence of an oral partnership and, alternatively, asserting

promissory estoppel and unjust enrichment claims. *Id.* at 428-29. The *Stein* court granted summary judgment against plaintiff on all claims. *Id.* at 435-36.

Regarding unjust enrichment, *Stein* emphasized several key points. The court noted that "[t]he opportunity itself was contingent," requiring "a certain amount of work . . . to be done in order to move the transaction forward" and emphasized the parties' expectation that they would need "to agree upon terms." *Id.* at 435. In such a transaction, it was "entirely reasonable for both parties to invest effort in attempting to bring the proposed transactions to a successful conclusion," and during that time, plaintiff "took a chance that he and [the defendant] would be unable to reach a deal." *Id.* Thus, there was "nothing unjust" about defendant's refusal to compensate plaintiff "for having made a losing bet by engaging in preparatory activities against the possibility that they would prove to be of value to him." *Id.*

The parallels between the facts of *Stein* and the facts of this case are compelling. The acquisition of Beverly was "contingent" upon a number of things, including a source of equity for the deal, the parties' ability to fend off potential competing bids, and the resolution of various other regulatory issues that could have impeded the deal's closing. *See* Op. at 10-34. As in *Stein*, the record demonstrates that "Grunstein understood Silva's desire for formal documentation." *Id.* at 73. The court emphasized that "[t]he record is replete with failed attempts to

document the specific rights and obligations of the parties." *Id.* at 72-73 (citing B029-046 (JX 169); B049-118 (JX 196); B130-37 (JX 289).) Thus, "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" governing his financial stake in the deal. Op. at 90. Grunstein openly acknowledged that he was "proceeding on spec" – *i.e.*, bearing his own risk that the deal would not turn out as planned. *See id*. at 20 (citing B047 (JX 192); B048 (JX 195); B119-20 (JX 202).) In the absence of a formal written agreement, Grunstein "gambled" that he would be able to reach agreement on his financial stake as the transaction progressed. Op. at 90. That he was "ultimately unsuccessful does not 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.

2. The Record Does Not Support Grunstein's Argument That He Acted Because Of Appellees' Request Or By A Mistaken Belief That An Enforceable Partnership Agreement Existed

There are several problems with Grunstein's argument that he could not have acted officiously. GOB at 25. First, Grunstein failed to adequately raise his argument regarding express and implied requests in the pre-and post-trial briefing. In that briefing, he focused instead on the argument that all of his work during the Beverly transaction should be compensated in quantum meruit based on expectation damages relating to his failed oral partnership claim. B400-01.

Grunstein's opening post-trial brief failed to describe any particular request by Silva for Grunstein's services, choosing instead to refer only to "Defendants' continuous requests," purportedly described on pages 12-13 of the opening post-trial brief. B399. Those pages of the post-trial brief reference only an email from Silva to Lerner in August 2005 in which Silva indicated that he was comfortable with bidding up to $12.80 per share for Beverly and general requests for information. B396-97. None of the cited references evidence any particular "request" for work from Grunstein. Those pages do not reference any of the other supposedly specific requests relied on now.

At post-trial argument, Grunstein's counsel asked to "add one point or elaborate on one point to what was said in our brief . . . virtually everything [Grunstein] did after Mr. Silva came into the picture was done at Mr. Silva's request." B437 (May 9, 2013 Oral Argument at 28:1-11). That non-specific passing mention did not fairly present the issue to the trial court and is waived. Supr. Ct. Rule 8; *see Peterson v. Hall*, 421 A.2d 1350, 1354 (Del. 1980).

The court below warned Grunstein that his inability to establish the details of his unjust enrichment theory could prove fatal to that claim. Appellees served discovery requests, and filed a subsequent motion to compel, demanding that Grunstein provide information regarding the non-legal work upon which his unjust enrichment claim was purportedly based, as opposed to the legal work for which

his law firm had already been paid more than $10 million. Grunstein refused to identify *any* purely non-legal work, conceding that "it is virtually impossible to segregate what Grunstein did as an attorney from what he did as a businessman." B383. Recognizing the "vague responses" offered by Grunstein, the Court of Chancery ordered him to provide any "specific documentary evidence regarding . . . his work on the Beverly acquisition other than in his capacity as an attorney . . . in the next three weeks or else he is barred from using it at trial." *Grunstein IV*, 2012 WL 3870529, at *6. The court observed that details of Grunstein's non-legal work on the Beverly transaction would be "helpful (necessary) to Grunstein . . . if he fails to offer any information, it will likely be his loss", and that if Grunstein did not provide specific information substantiating his unjust enrichment cause of action, "the [c]ourt may draw adverse influences against Grunstein." *Id.* at *6 n.47. The trial court was prescient in predicting that "Grunstein is apparently going to try to show damage . . . by relying solely on the argument that his conduct provided a benefit to the Defendants." *Id*. Grunstein did not supplement his responses nor did he identify any document demonstrating a request for non-legal work, including the email to Lerner described above.

Grunstein inaccurately asserts that the court below "found" that Grunstein acted because of Silva's "requests" (GOB at 25), when the court found precisely the opposite. The court below concluded that "Grunstein acted in his own self

interest in assisting Silva in the deal," and stressed that "[t]he Court *has not found* that Grunstein acted at Silva's insistence . . . . Grunstein volunteered to push the transaction forward." Op. at 90 & 91 n.278 (emphasis added). If Silva made any requests of Grunstein, it was in the context of their entire collaboration, and Grunstein acted because he "likely thought his best chance to participate in the deal was to continue to prove his worth and assist in the transaction." *Id*. at 90.

Grunstein latches onto the lower court's use of the word "insistence," arguing that it somehow fashioned a new test for determining whether a defendant acts officiously by requiring that the plaintiff act at the defendant's "insistence" rather than at his "request." GOB. at 25-26 (quoting Op. at 91 n.278). But just one page earlier, the court expressly defined an "officiously conferred benefit" as "one in which a 'person who without mistake, coercion, or *request* . . . unconditionally conferred a benefit upon another.'" Op. at 89-90 (quoting RESTATEMENT (FIRST) OF RESTITUTION § 112). The court's interchangeable use of the closely-related words "insistence" and "request" does not change the test for an officiously-conferred benefit and does nothing to undermine the court's finding that Grunstein acted officiously.

MetCap I held that Grunstein's investment banking firm, MetCap, could not state a claim for unjust enrichment against defendants for work it allegedly performed on the Beverly transaction before the Third Amendment transferred the

right to acquire Beverly from Grunstein's entities (NASC and SBEV) to Silva's entities. 2007 WL 1498989, at *6. Before the Third Amendment, MetCap's relationship to the Beverly transaction was governed by an Advisory Agreement with NASC. *Id.* All work done by Grunstein through MetCap or as counsel for NASC/SBEV was for the benefit of NASC/SBEV (or MetCap) rather than the named defendants. *Id.* In *MetCap II*, the Court of Chancery held that MetCap also could not recover from the defendants under a theory of unjust enrichment for work performed by MetCap after the Third Amendment because it was undisputed that MetCap did not do any work for Appellees at their "request." 2009 WL 513756, at *10. This Court affirmed the ruling in *MetCap II*, fully adopting its reasoning. *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 977 A.2d 899 (Del. 2009) (Table). The decision below is in line with those prior decisions and is "the product of a logical and deductive reasoning process," supported by "substantial evidence" adduced at trial. *See Technicolor*, 634 A.2d at 360; *Baker v. Long*, 981 A.2d 1152, 1156 (Del. 2009). Furthermore, because of the privity relationship between Grunstein and MetCap and/or NASC (Op. at 108), the *Metcap* decision constitutes the "law of the case" as to Grunstein as well as binding precedent. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 38-39 (Del. 2005).

Grunstein cobbles together selective snippets of the lower court's Opinion in a belated attempt to formulate the supposed "requests" that were never the focus of his argument for unjust enrichment:

(1) Silva "impliedly" requested that Grunstein increase the offer price for Beverly to $12.80 per share, as evidenced by an August 2, 2005 email sent by Silva to Lerner (but not to Grunstein) explaining that Silva "would still be interested in the transaction at $12.80." GOB at 8-9.

(2) In an e-mail to Grunstein dated August 21, 2005, Silva gave his "tacit consent" to a $13.00 per share counterbid for Beverly. *Id.* at 10.

(3) In late September 2005, "'[a]t Silva's [express] request,' Grunstein 'worked to diffuse the opposition'" to the Beverly acquisition that had arisen in Arkansas. *Id.* at 12 (quoting Op. at 25).

(4) On December 29, 2005, in response to an email from Grunstein raising various issues, Silva "implied[ly] request[ed]" that "Grunstein . . . continue working" on the Beverly transaction by emailing in response, "I am interested in [y]our counsel on all issues." *Id.* at 16.

(5) Finally, Silva allegedly made an express request for Grunstein's services when, "'just before the closing of the transaction, Silva sought Grunstein's help in resolving an emergency caused by the change in structure.'" *Id.* at 17 (quoting Op. at 34).

None of these supposed "requests" supports Grunstein's argument. The first, second and fourth items were not "requests." They were expressions of interest in proceeding with the Beverly acquisition. The first three alleged "requests" were made before the Third Amendment, at a time when all parties were working "on spec" and at their own risk. *See, e.g.,* Op. at 19 (citing B121-22 (JX209).). Further, as recognized in *MetCap I,* during the period prior to November 21, 2005 when the Third Amendments was signed, Grunstein acted for the benefit of NASC/MetCap and not for Appellees. 2007 WL 1498989, at *3, *9. Anything he did on the Beverly transaction prior to the Third Amendment was done for his own benefit or the benefit of his controlled entities, NASC/SBEV and MetCap. Finally, the other two supposed "requests" were made after Appellees hired Grunstein and his partners at Troutman to represent them as counsel in connection with the Beverly transaction. *See* Op. at 32 & n.124. To the extent Silva could be said to have made any request of Grunstein at that stage of the transaction, it was a request for legal counsel ("I am interested in your counsel" (Op. at 34 n.133 (citing B438-39 (JX 561)), and Troutman (and indirectly Grunstein) was handsomely paid for any legal work done by Grunstein.[1]

[1] In total, FSI paid Troutman approximately $10.9 million in legal fees and costs, including approximately $500,000 for Grunstein's personal time. *See* Op. at 32 n.124 (citing B146-52 (JX 533); B153-55 (JX534); B156-58 (JX 584); B159 (JX 590)).

As the court below explained, the "functional working relationship" between Silva and Grunstein "may be attributed to Grunstein's multiple roles throughout the transaction." Op. at 67. Grunstein "would have been incented to facilitate the transaction to continue earning fees through his associated entities, MetCap and Troutman." *Id.* Prior to the Third Amendment, Grunstein was working as a principal on behalf of his controlled shell entities (SBEV and NASC) and also as an owner of his captive investment banking firm, MetCap. The decision in *MetCap I* recognized that any work done by MetCap or its owners prior to the Third Amendment was done for the benefit of NASC and in conjunction with the Advisory Agreement between MetCap and NASC. 2007 WL 1498989, at *6. The court therefore dismissed MetCap's unjust enrichment claim to the extent it was based on events prior to the Third Amendment. *Id.* The same result is warranted here.

After the Third Amendment, Grunstein and his law firm, Troutman, continued to act as attorneys, but now for Appellee-Fillmore Strategic Investors. Where the "relationship of the parties and the services involved" are "the subject of an express contract, the terms of that contract control and there is no occasion to pursue the theory of quantum meruit." *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 854 (Del. Super. Ct. 1980); *accord MetCap I*, 2007 WL 1498989, at *6. In the end, the court below weighed all the evidence and found, not that "Grunstein

acted at Silva's insistence," but that in the context of their collaboration, "Grunstein volunteered to push the transaction forward." Op. at 91 n.278.

In arguing that the lower court erred, Grunstein relies heavily on dicta in a small portion of *Pharmathene Inc. v. Siga Techs., Inc.*, 2011 WL 4390726 (Del. Ch. Sept. 22, 2011); GOB at 20, 23-24. Grunstein did not rely on this case to support his unjust enrichment claim in his post-trial briefing below and the pages he cites as preserving this issue omit any mention of this case. *See* GOB at 20 (citing to A236-42, A246-50). Therefore this argument, to the extent premised on the *Pharmathene* opinion was not fairly presented below.

If this Court nonetheless considers the argument, the case is readily distinguishable. In *Pharmathene*, the trial court addressed but expressly declined to decide the unjust enrichment claim because it was "subsumed" by plaintiffs' alternate breach of contract and promissory estoppel claims. 2011 WL 4390726, at *29. This Court ultimately overruled the promissory estoppel decision based on the existence of the contract but did not address the lower court's unjust enrichment dicta. *See Siga Techs. v. Pharmathene Inc.*, 67 A.3d 330, 353 (Del. 2013). In addition, the facts of *Pharmathene* are easily distinguished from this case: (1) the parties executed two written agreements specifically obligating themselves to negotiate in good faith; (2) the parameters of the parties' express commitment to negotiate were specifically identified in a written "term sheet"

expressly incorporated by reference into the executed contracts; and (3) those enforceable contractual obligations supported an award of expectation damages where there was a factual finding that the parties "would have reached an agreement but for the defendant's bad faith negotiation." *See, e.g.*, *id*. at 343, 346, 351. None of these critical factual elements are present here.

Grunstein alternatively contends that he acted under the "mistaken" belief that "there was an agreement" between him and Silva that would allow Grunstein to share in the upside of the Beverly transaction on an unjust enrichment theory. GOB at 28-29. But the court below made factual findings that directly contradict the existence of any cognizable "mistake" on Grunstein's part about the necessity for a formal, written agreement. Op. at 85-86, n.264, and 72-73 n.235 (citing B029-046 (JX 169); B049-118 (JX 196); B130-37 (JX 289)) (noting "Grunstein was aware the parties had, on multiple occasions, attempted to document the transaction in a manner more befitting the complexity of the acquisition").) Because "[t]he record suggests that Grunstein understood Silva's desire for formal documentation," the court concluded as a matter of fact that Grunstein was under no mistaken belief. Op. at 73. These findings are well supported by the trial record, and are not clearly erroneous.

3. Grunstein Failed To Prove The Other Elements Of Unjust Enrichment – Causation And Damages

Alternatively, the judgment should be affirmed because Grunstein failed to prove the other elements of his claim for unjust enrichment.[2] First, Grunstein proffered no proof of the quantum of supposed "enrichment" enjoyed by Appellees as a result of his work, arguing instead for his "benefit of the bargain" on the contract claim. B390 (Tr. [Bavis] at 1849:4-10). But the measure of restitution in an unjust enrichment action is "the value of the claimant's performance to the recipient, not . . . what was promised in exchange, nor by what the claimant's performance cost the claimant." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. i (2014). Grunstein provides no record cite to the proceedings below where he attempted to prove the value of his services to Appellees. Grunstein's expert witness admitted that his unjust enrichment damages analysis depended on there being an oral partnership agreement. B390 (Tr. [Bavis] at 1849:4-10) (conceding that his "conclusion[s]" would "probably" have "no application" if "the Court does not find a contract exists"). In the absence of evidence regarding the value conferred by Grunstein's acts, Grunstein's unjust enrichment claim fails. *See Gibbons v. Whalen*, 2010 WL 8250809, at *3 (Del. Super. Ct. Mar. 22, 2010) (rejecting claim where plaintiffs failed to introduce any credible evidence as to the value of damages).

[2] This Court may affirm the lower court's holding "on the basis of a different rationale than that which was articulated by the trial court." *Unitrin*, 651 A.2d at 1390. This issue was raised below. B427-30.

II. GRUNSTEIN'S UNJUST ENRICHMENT CLAIM IS BARRED BY THE RES JUDICATA EFFECT OF THE METCAP JUDGMENT

A. Question Presented

Did the Court of Chancery err by not applying res judicata law to bar Grunstein's unjust enrichment claim based on the final Judgment in *MetCap*, which also included an unjust enrichment claim? This issue was briefed to the court below. B408-26 (Def. Post-Trial Br. at 140-58).

B. Scope of Review

The court below failed to formulate the correct legal standard to make its res judicata determination. Under these circumstances, this Court reviews the res judicata ruling de novo, correcting the legal errors made by the court below to arrive at the correct decision. *Smith v. Guest*, 16 A.3d 920, 933 (Del. 2011) (Supreme Court reviews "formulation and application" of the doctrine of res judicata "*de novo*"). The lower court's legal errors were effectively to ignore the "transactional" test in *Maldonado*, 417 A.2d at 381. Instead, it relied on differences in legal theories and remedies (Op. at 109) even though Grunstein's unjust enrichment claims in *MetCap* and this case could have been brought in the same case. This is inconsistent with *Maldonado*, which expressly disapproved of analyzing the "underlying transaction" in terms of "substantive legal theories or types of relief which are sought." 417 A.2d at 381.

C. Merits of Argument

An independent and alternative basis for affirming the judgment is that Appellees proved their res judicata defense as to Grunstein's unjust enrichment claim.[3] The elements of res judicata in Delaware are well-established: (1) the original court had jurisdiction; (2) the parties to the original action were the same as, or in privity with, those in the second action; (3) the issues in the second action are the same as, *or could have been raised in*, the original action; (4) the issues in the prior action were decided adversely to a plaintiff in the second action; and (5) the decree in the prior action is final. *Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001); *Trans World Airlines, Inc. v. Hughes*, 317 A.2d 114, 118 (Del. Ch. 1974). Grunstein conceded that elements (1), (4), and (5) were established because the Court of Chancery had jurisdiction over the *MetCap* action, *MetCap* was decided adversely to plaintiffs in that case, and the judgment of the Court of Chancery in *MetCap* is final. B356. Grunstein also conceded, and the court below concluded, that the *MetCap* litigation and this case meet the "same transaction" test relating to element (3). Op. at 109 n.337; B434 (conceding that "both cases arose out of the Beverly transaction"). The lower court found the third element of res

[3] Defendants were not required to file a cross-appeal on this issue because they are not seeking affirmative relief from the trial court's judgment. Instead, Defendants are defending the trial court's judgment, but "question[ing] the trial court's reasoning" based on the record evidence. *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996).

judicata to be lacking because under a subjective "fairness" analysis, Silva could not reasonably believe that the *MetCap* litigation would resolve the claims here because of differences between the claims and legal theories asserted in the two cases. Op. at 109-11. This conclusion is erroneous.

1. Grunstein's Unjust Enrichment Claims Raised In This Case And In *MetCap* Arise Out Of The Same Transaction

Application of res judicata is not dependent on the assertion of identical claims, legal theories, and remedies in the two actions. Instead, Delaware courts assess the similarity of issues by applying the modern "transactional view" to determine if

> claims in the later litigation arose from the same transaction that formed the basis of the prior adjudication. The determination, therefore, whether [res judicata] shall be invoked is now based on the underlying transaction . . . .

Maldonado, 417 A.2d at 381 (citations omitted). The application of res judicata does not depend on the substantive legal theories or types of relief which are sought. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 193 (Del. 2009). In this litigation, it has already been determined that the claims asserted by Grunstein arose out of the same set of "underlying transactions" at issue in *MetCap*: the events leading up to the acquisition of Beverly. Op. at 109 n.337; B434. Despite the court's recognition of the legal principle and finding that the claims arose from the same transaction, the court ignored the controlling precept in its conclusion.

2. The Court Below Improperly Failed To Apply The Same Transaction Test By Concluding That "Fairness" Precluded The Application Of Res Judicata Where The Legal Theories And Remedies In The Two Cases Were "Very Different"

In support of its decision applying a "fairness" inquiry to the facts of this case, the court below (Op. at 109) cited *LaPoint*, 970 A.2d at 193-94. At most, Delaware case law supports a "fairness" check on the "same transaction" test only when it was impossible to bring the second action claims in the first action because the facts were not then "ripe" (*id* at 195) or when the court in the first action would have lacked jurisdiction over the second action claims. *See, e.g., Maldonado*, 417 A.2d at 383-84. Here, (1) all facts giving rise to the unjust enrichment claim asserted in this case existed and were known to Grunstein and MetCap at the time of the *MetCap* litigation; and (2) there was no "jurisdictional" or other impediment to Grunstein's asserting his personal claims in the *MetCap* Litigation.

The court below also cited *Aveta, Inc. v. Cavallieri*, 23 A.3d 157, 180 (Del. Ch. 2010) finding that "Silva could not have reasonably believed that the *MetCap* litigation would have resolved Grunstein's partnership claims." Op. at 111. But *Aveta* does not stand for the proposition that res judicata depends on a party's subjective knowledge of a potential claim, or that claim splitting is acceptable so long as all the parties have notice that it is happening. *See generally Maldonado*, 417 A.2d at 385 (noting that the harsh effect of res judicata was created by party's strategic decision to pursue duplicative litigation). Instead, *Aveta* merely notes

that preclusion may be compelled in certain instances where a claimant's conduct detrimentally changes a defendant's legal expectations, not that specific detrimental reliance is an element of res judicata. *See Aveta*, 23 A.3d at 180. The instant case is much more closely analogous to *Maldonado*.

3. The Evidence Established Privity Between Grunstein And MetCap And/Or NASC

The court recognized Grunstein's privity with MetCap and NASC finding that "[t]here is much evidence that Grunstein had a close or significant relationship with MetCap and, to a lesser extent, NASC." Op. at 108. Evidence proffered at trial demonstrates that Appellees satisfied the Delaware test for establishing privity and that a "'close or significant relationship'" existed between either or both Grunstein and MetCap and/or Grunstein and NASC. *ZVI Levinhar v. MDG Med. Inc.*, 2009 WL 4263211, at *8 (Del. Ch. Nov. 24, 2009) (quoting *Orloff v. Shulman*, 2005 WL 3272355, at *9 n.60 (Del. Ch. Nov. 23, 2005)). That evidence, including testimony from Grunstein and his business partners, demonstrated that Grunstein controlled both MetCap and NASC and made all significant decisions on their behalf. *See generally* B411-16. Further, despite Grunstein's herculean effort to evade discovery on this issue, the evidence conclusively established that Grunstein held the largest ownership interest and control of MetCap's sole owner, MetCap Holding, at all relevant times. B414-15.

This is not a case where an unwitting, non-party discovers that his claims are precluded based on litigation conducted by strangers, in which he could not have joined. Quite the opposite: this is a case of overt, fully-conscious claim-splitting and forum shopping by highly sophisticated players. Res judicata is no "mere technicality" but rather "stands as a foundation of the legal system, judicially created in order to ensure a definite end to litigation," (*Orloff*, 2005 WL 3272355, at *7) by operating "'as an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party, *or his privies*." *Maldonado*, 417 A.2d at 381 (emphasis added). That bar should apply to Grunstein's claims here.

CONCLUSION

The Court of Chancery applied the correct formulation of Delaware's unjust enrichment law. The trial record contains substantial evidence supporting the court's determination that Grunstein's work on the Beverly transaction was officious and that determination is the product of logical reasoning, is not clearly erroneous and therefore must be affirmed. In addition, all the elements of res judicata have been established by Appellees and Delaware's strong policy against tactical claim splitting provides another basis for entering judgment in favor of Appellees and against Grunstein. For these reasons, the decision below should be affirmed and the judgment in favor of Appellees upheld.

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CERTIFICATE OF SERVICE

I, Bruce E. Jameson, hereby certify on this 9th day of December, 2014, that I caused the attached **Defendants-Appellees' Opening Brief** to be served via eFiling through LexisNexis File and Serve upon counsel for Plaintiff-Appellant as follows:

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