EFiled: Nov 20 2014 07:43PM EST
Filing ID 56366956
Case Number 572,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JACK DWYER and CAPITAL FUNDING GROUP, INC., Plaintiffs Below, Appellants, 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 STRATEGIC MANAGEMENT, LLC, Defendants Below, Appellees.	:	No. 572, 2014 Appeal from the September 5, 2014 Memorandum Opinion and Implementing Judgment of the Court of Chancery of the State of Delaware in C.A. No. 3932-VCN

OPENING BRIEF OF PLAINTIFFS BELOW-APPELLANTS

POTTER ANDERSON & CORROON LLP
Arthur L. Dent (# 2491)
Ryan T. Costa (# 5325)
Hercules Plaza, 6th Floor
1313 North Market Street
P. O. Box 951
Wilmington, DE 19899

Attorneys for Plaintiffs Below-Appellants Jack Dwyer and Capital Funding Group, Inc.

OF COUNSEL:

FENIGSTEIN & KAUFMAN
Ron S. Kaufman
1900 Avenue of the Stars
Suite 2300
Los Angeles, CA 90067-4314

Dated: November 20, 2014
1172858

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

Jack Dwyer and his company Capital Funding Group, Inc. (collectively "CFG"), with Leonard Grunstein, brought this action against Ronald E. Silva and his affiliated entities (collectively "Silva") on claims arising out of their acquisition of Beverly Enterprises, Inc. ("Beverly") in March 2006.

CFG proceeded to trial in the Court of Chancery on its claims for breach of oral partnership, breach of contract, promissory estoppel, unjust enrichment, and fraud. Trial was conducted over ten days from November 26, 2012 through December 7, 2012. After post-trial briefing and oral argument, the court granted defendants' motion to reopen to introduce evidence of proceedings and the judgment in *Capital Funding Group, Inc. v. Walker & Dunlop, Credit Suisse, et al,* Circuit Court of Maryland, Montgomery County, case number 344649-V ("the Maryland case").

On September 5, 2014, the trial court issued its opinion and judgment in favor of defendants and against CFG. Ex. A (Opinion); Ex. B (Judgment).

CFG filed a Notice of Appeal on October 3, 2014. This is CFG's opening brief in support of its appeal. CFG contends the Court of Chancery rejected the claims for unjust enrichment and fraud based on errors of law. The judgment should be reversed on those claims, and the case remanded for determination of relief in favor of CFG on those claims.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred as a matter of law in rejecting CFG's unjust enrichment claim against Silva based on its interpretation of the judgment in the Maryland case in favor of CFG and against Credit Suisse. Interpretation of the Maryland judgment is a legal issue determined *de novo*.

CFG worked for months to produce proprietary HUD underwriting information and release prices for 272 health care properties acquired in the Beverly transaction which was necessary both for the $1.2 billion short-term bridge loan funded by commercial mortgage backed securities ("CMBS") Silva used to close the acquisition (the "CMBS loan") and for long-term HUD insured loans under Section 232 of the National Housing Act ("HUD financing") that would replace the CMBS loan. Ex. A at 81. "At trial, Silva testified that he reached an understanding with Dwyer that CFG would be awarded the HUD financing." Ex. A at 78. CFG's compensation for the HUD underwriting and release prices was to come from what CFG would receive from Silva through the HUD loans. [1]

If Silva retained CFG to provide the HUD financing, CFG agreed to allow Silva and Credit Suisse to use the underwriting and release prices to structure the

[1] The CMBS bridge loan was used to close the acquisition because sellers do not want to wait the 18 or so months required to complete HUD financing, and CMBS lenders and investors require assurance their loan will be repaid through HUD financing. Ex. A at 81.

CMBS loan and sell the CMBS *provided* Credit Suisse agreed the HUD financing would be done by CFG and Credit Suisse would not compete with CFG for it. Credit Suisse's agreement with CFG was to protect CFG's expected compensation for the HUD underwriting and release prices, which was to be paid by Silva through the HUD financing.

Based on the understanding reached between Silva and Dwyer that CFG would do the HUD financing, CFG provided the HUD underwriting and release prices to both Silva and Credit Suisse. This benefitted Silva by enabling Silva to obtain the CMBS loan and complete the Beverly acquisition. Silva then refused to proceed with HUD financing. CFG received nothing.

Three years later Silva attempted HUD financing. He contracted with a Credit Suisse affiliate, not CFG, to be the HUD-insured lender. CFG sued Credit Suisse in Maryland for breach of its promise not to compete for the HUD financing. In the Maryland trial the court limited the issues to Credit Suisse's obligation to CFG, and excluded evidence of CFG's relations with Silva including Silva's promise to and understanding with Dwyer that CFG would be awarded the HUD financing. The Maryland court also instructed the jury to disregard CFG's claims in the Delaware case and not speculate on their outcome. As so limited, the Maryland jury found that Credit Suisse breached its agreement not to compete and awarded CFG $1.75 million in damages.

The Court of Chancery denied CFG's unjust enrichment claim based on its interpretation of the Maryland judgment as having determined that CFG had a contractual obligation to provide Credit Suisse with the HUD underwriting and release prices in exchange for the covenant not to compete even though Silva did not compensate CFG through the HUD financing. This was error because the Maryland jury was precluded from considering anything regarding Silva or Silva's obligations to or relationships with CFG. Moreover, the jury did *not* determine that CFG was obligated to provide Credit Suisse with the HUD underwriting and release information regardless of whether CFG was awarded the HUD financing or otherwise compensated. The Maryland judgment does not preclude an unjust enrichment award to CFG.

2. The Court of Chancery also erred by misapplying the elements of promissory fraud to reject CFG's fraud claim. Silva made an oral promise to Dwyer that CFG would get the HUD financing, yet Silva "all the while" believed he could be bound to do so only by a written contract if he chose to enter such a contract in the future. The court's decision posed the legal issue "whether this exploitation amounted to fraud." Ex. A at 95. The court erred in answering in the negative. Silva's oral promise was fraudulent as a matter of law because he did not intend to be bound by it. The court compounded its error in deciding against CFG on "justifiable reliance" by using the test for "reasonable reliance" for promissory estoppel – a different test subject to a stricter burden of proof.

STATEMENT OF FACTS

A. Capital Funding Group, Inc.

Capital Funding Group ("CFG") "arranges loans insured by the United States Department of Housing and Urban Development" ("HUD"). Ex. A at 1. Jack Dwyer ("Dwyer") owns and manages CFG. *Id*. at 9. "Dwyer is an expert on HUD financing and CFG is primarily a financing company." *Id*. at 59. CFG's primary business is financing healthcare facilities through HUD-insured loans and it has substantial experience in doing so.[2] Ex. A at 1, 9.

B. The Mariner Transaction

Availability of HUD-insured financing facilitates acquisition of companies operating healthcare facilities. For example, CFG participated in acquiring Mariner Healthcare, a company that operated 220 nursing homes, in a transaction worth approximately $1 billion. *Id*. at 7-8. Financing to close the acquisition came from Credit Suisse through a $900 million short-term bridge loan funded by

[2] HUD's program is under Section 232 of the National Housing Act. 24 C.F.R. § 232. *See generally* FHA Insured Loans for Long Term Healthcare Facilities: Recent Developments as a Popular Product Evolves to Meet Growing Needs, Health Lawyer, Vol. 23, No. 5 (2011). "All of the loans under Section 232 are made by one of the 92 private lenders currently qualified as FHA lenders under the Multifamily Accelerated Processing Program. After the FHA lender underwrites and closes the loan in accordance with HUD procedures, the loan is endorsed to HUD under the specific Section 232 program and the FHA insures the mortgage loan. If the mortgage loan goes into default, the FHA lender can assign the loan documents to HUD in return for HUD's payment of the insurance claim." *Id.* CFG was at all relevant times one of the 92 approved private lenders and its role here occurred in the context of Section 232.

CMBS sold to investors. *Id*. at 8. The parties orally agreed the CMBS loan would be repaid by long-term loans made by CFG each secured by a single healthcare property and insured by HUD. *Id*. at 9. CFG then underwrote each of the 220 nursing homes in the Mariner portfolio for HUD financing. CFG's underwriting and agreement to lend enabled the buyer/borrower to obtain the CMBS loan as a "bridge-to-HUD." *Id*. CFG's work "ensured that HUD refinancing was a viable exit strategy for the CMBS bridge financing." *Id*. The "long-term financing solution" provided by CFG gave assurance to borrower, lender and investors in the CMBS that the loans could be repaid and facilitated sale of the CMBS needed to fund the CMBS loan used for the Mariner acquisition. *Id.*[3]

C. Steps Taken to Acquire Beverly Enterprises

Dwyer and CFG expected a similar role when Beverly Enterprises became available for acquisition in 2005. *Id*. at 10-11. Dwyer knew Beverly's CEO Bill Floyd. *Id*. at 11. Dwyer teamed with Leonard Grunstein ("Grunstein"), the "architect of the Mariner transaction," and they met with Floyd to convince him they could close an acquisition for Beverly as was done with Mariner. *Id*. at 10-12; A125-57; A261. A Grunstein-affiliated entity made preliminary proposals to acquire Beverly on May 9, 2005, and July 15, 2005. Ex. A at 11-12.

Grunstein and Dwyer turned their attention to financing the Beverly

[3] CFG obtained several HUD approvals for financing to replace the CMBS after the Mariner transaction closed but the refinancing has not closed. Ex. A at 9-10.

acquisition. *Id*. at 12. Credit Suisse through its managing director Richard Lerner solicited and obtained agreement to Credit Suisse's participation in the CMBS bridge loan. *Id*., *see also* A359. At Lerner's recommendation Grunstein and Dwyer agreed to allow Silva to provide the equity required for the transaction through Silva's institutional clients. *Id*. Earlier one such Silva client purchased $150 million of Mariner transaction debt. Ex. A at 10. Dwyer and Grunstein had discussions with Silva about raising the equity in late July and early August 2005, before and after preliminary acquisition proposals and agreements for the CMBS bridge loans including from Credit Suisse. *Id*. at 10-12. Plaintiffs alleged Grunstein, Dwyer, Lerner, and Silva agreed by early August 2005 on allocation of the benefits of the Beverly acquisition: Grunstein and Silva would share in the promoters' interest or what was obtained from the equity provider; Credit Suisse in conjunction with another lender would provide the CMBS loans; and CFG would refinance the CMBS bridge loan through HUD-insured loans. *Id*. at 12. The trial court found Silva "had likely discussed partnering" and "likely said he would use his best efforts" to provide the equity by August 2, 2005. *Id*. at 14-15, 21.

D. Separate Agreement between CFG and Credit Suisse

CFG and Credit Suisse made a separate agreement concerning the CMBS and HUD refinancing before Silva's involvement. Though the agreement became important to the trial court's decision, the evidence concerning its formation and terms was not offered during the trial. After completion of the evidence and

closing arguments, Silva sought to reopen the case based on the judgment in the Maryland case. The court granted the motion, and received evidence from the Maryland case, over CFG's objection even though all of the evidence was available during trial except the jury verdict and judgment.

Evidence in the Maryland case described the agreement between CFG and Credit Suisse. A318-80. CFG and Credit Suisse worked collectively in two transactions before Beverly involving acquisition of long term care companies including Mariner. A320, A334-35, A350-51, A359. Credit Suisse provided short-term bridge-to-HUD loans funded by CMBS using CFG's underwriting based on promises of both the borrower and Credit Suisse that CFG would provide permanent HUD-insured loans to refinance the CMBS. Credit Suisse marketed the CMBS to investors based on the "exit strategy" of CFG's HUD financing.[4] CFG's HUD underwriting and release price information enabled the borrower to obtain the CMBS loan and close the acquisition. *See* A203-59. Not only was it used to

[4] Dwyer explained why it was important that the CMBS bridge loan be set up to support HUD refinancing. "It was the only way they could sell the [CMBS] securities. In the securitization world, you've got, all the time, departments and office buildings you've done, but stand-alone nursing home companies are never done unless there's an exit strategy, and the exit strategy is a HUD-insured loan. That's the only way they can sell it." A335. The marketing materials detailed information about refinancing through CFG's time-consuming underwriting of the properties using CFG's proprietary database and CFG's determination of HUD "release prices." A HUD release price is the amount CFG determined it could finance through a HUD insured loan to pay for the release an individual property from the CMBS first mortgage. *See generally* (CMBS offering circular) at A250-51, A257-58.

structure the CMBS loan, but the HUD exit strategy provided the CMBS borrower, lender and investors assurance their loan could be repaid. *Id*. The Delaware trial court agreed that "[t]he underwriting work that CFG performed [in the later Beverly acquisition] was necessary to obtaining both the CMBS loans and the HUD financing." Ex. A at 81.

But Dwyer had concerns in these transactions about CFG providing HUD underwriting and release prices to Credit Suisse. A326-27. "[B]ig banks like that crush people like me. So I was concerned about providing any type of information with them, to them, my proprietary information that they could use and go into competition with me." A327. To allay Dwyer's concerns, Credit Suisse and CFG reached separate agreements in the transactions: If the borrower retained CFG for HUD financing, Credit Suisse could use CFG's information for the CMBS loan and to sell the CMBS; CFG would provide the HUD financing; and Credit Suisse could not compete for the HUD financing. For the Beverly acquisition, CFG through Dwyer and Credit Suisse through Lerner reprised their earlier agreements "[t]he same as always, which is to keep information confidential, this can only be used for this particular deal, they're not going to compete against me, and it's my [HUD] financing." A359. Credit Suisse "promised that I had the [HUD financing] deal and they promised not to compete against me in the deal." A320.

Dwyer also explained CFG's economic interest and expectation. "I was going to get paid by doing the HUD-insured mortgage." A334-35, A263-65. *See*

also A166-76. The lender for the long-term loans used to repay the CMBS is CFG. Compensation for the HUD underwriting and release prices comes from the HUD loans and flows from the buyer/borrower to CFG as fees and charges for the loans (some of which can be sold for the value of the income stream). *Id.* CFG did not expect or receive remuneration from the CMBS lender, here Credit Suisse. The agreement between CFG and Credit Suisse did not call for any payment from Credit Suisse to CFG. Credit Suisse was to retain, and did retain, all of the loan fees and other payments Credit Suisse received from the borrower. A319-20, A334-35, A350-51, A359. Credit Suisse's agreement not to compete with CFG for HUD financing was to protect CFG's expectation of payment from the borrower when the borrower refinanced the CMBS. It was not remuneration for CFG's underwriting or release prices. *Id.*

E. Silva Had an Understanding with Dwyer in Which Silva Promised the HUD Refinancing for the Beverly Portfolio to CFG

"There is no question that Silva knew that Dwyer's participation in the Beverly deal was to obtain the HUD financing." Ex. A at 78 n.245. Silva "also knew that HUD refinancing was a part of the Mariner model, which he had anticipated following in the Beverly transaction." *Id.*

By his own admission Silva reached an understanding with Dwyer that CFG would be awarded the HUD refinancing; Silva made a promise to Dwyer to that effect. Ex. A at 78, 87.

Regarding intent, however, the court found: "Silva's mindset during this entire period is illuminating. Although he has a law degree, Silva confessed at trial that he did not believe that a contract could be formed unless it was in writing." Ex A at 66. "Silva believed that a contract could not be formed without a written agreement." Ex. A at 78.[5]

From late 2005 through the closing on March 14, 2006, CFG "underwrote nearly 275 [Beverly] facilities to support the CMBS financing and in preparation for the HUD refinancing that the participants anticipated would occur post-closing." Ex. A at 2. The completed underwriting and release prices determined by CFG "showed what the maximum HUD loans could be for each nursing facility." Ex. A at 35. Dwyer testified CFG performed the underwriting and determined the release prices because CFG had "already been retained" by Silva to complete a HUD-insured refinancing of the CMBS after the acquisition closed. A359, A361-63.

CFG provided the underwriting and release prices to Silva's organization. Ex. A at 35; *see also* A177-201. CFG also provided the information to Credit Suisse. This enabled Defendants and Credit Suisse to tailor the CMBS loan to and

[5] The trial court's decision makes numerous findings adverse to Silva's credibility on a range of subjects. Ex. A at pp. 14 ("Silva's email … clearly refutes his testimony"), 21 (Silva admitted to "several false statements"), 22 n.76 ("inaccuracies"), 29 (false statements in writing), 74 n.236 ("Silva's general lack of credibility throughout the trial"), and 97 n.294 (Silva's "evasiveness" in "purposely sidestepping the question" even as to questions asked by the court).

use the HUD exit strategy. A203-218 (release prices); A249-52, A255-57 ($1.2 billion offering circular); A231(power point presentation). Shortly before the closing Dwyer learned Silva might consider refinancing the CMBS loan other than through CFG's HUD-insured loans. A268; *see also* A360-62. Immediately Dwyer demanded that Credit Suisse remove CFG's information from its offering circular and marketing materials. "The reason why you guys are getting this financing done is because of my HUD-insured takeout. I want you to stop using my material, my confidential material. Pull it out. You're not allowed to use it." A268; A360-62. Credit Suisse obtained Silva's assurance he would "be moving forward with the bulk of the HUD applications." *Id*. Only then did Dwyer allow Credit Suisse to use CFG's information. *Id*.; *see also* A202 (email confirmation). CFG's underwriting and release prices were thus used in the CMBS loan, in the offering circular for the CMBS and in other marketing materials to enable Defendants to close the Beverly acquisition. A203-18 (release prices); A249-52, A255-57 ($1.2 billion offering circular); A231 (power point presentation).

F. Silva Denied HUD Refinancing to CFG after the Closing

The trial court found by a preponderance of evidence that Silva "knowingly took advantage of Dwyer's efforts." Ex. A at 78, *see also* Ex. A at 88 ("Silva appears to have taken advantage of the efforts of … CFG"). "Silva may have encouraged Dwyer to perform the underwriting work, but that encouragement was primarily for purposes of obtaining the CMBS loans provided by Credit Suisse,

and less so for purposes of doing the HUD financing." Ex. A at 81 (fn. omitted).

The Beverly acquisition closed on March 14, 2006.[6] Ex. A at 35. Silva did not proceed with HUD refinancing through CFG. Ex. A at 37. Dwyer and Silva met to discuss resolving their differences over HUD refinancing on May 1, 2006, but they did not reach agreement. *Id.*

CFG's work made it possible for Silva's entities to acquire Beverly for $353.5 million. As of December 31, 2011, by defendants' own estimate, the value of defendants' investment had increased to $1.084 billion. Ex. A at 38. Meanwhile, due to Silva's decisions, CFG received nothing for "the substantial time and effort expended" on the work essential to the transaction. Ex. A at 3.

G. The Maryland Judgment on the CFG-Credit Suisse Agreement

It was not until 2009, three years after the closing, that Silva attempted to refinance the CMBS through HUD-insured loans. Ex. A at 37-38. CFG was not involved. Instead, defendants contracted with Column Guaranteed LLC, an affiliate of Credit Suisse, to be the lender. *Id.* at 37.[7]

---

[6] The purchase price was approximately $2.2 billion. The CMBS totaled $1.4 billion. Silva's investor contributed $350 million in equity. A Silva entity contributed $3.5 million in equity. Senior and junior unsecured debt of $350 million and $125 million, respectively, made up the balance. *See e.g*. A227; Ex. A at 31 (equity contributions). The acquisition left Silva in control. Ex. A at 31 (description of ownership and Silva's control by entity).

[7] Refinancing through Column failed in 2011 when Silva refused to agree to "onerous requirements" imposed by HUD. Ex. A. at 37. Silva "was forced to obtain a more expensive bank loan to refinance the CMBS debt." *Id*. at 38.

CFG sued Credit Suisse in Maryland for breach of Credit Suisse's promise not to compete with CFG for the HUD refinancing. The verdict form in the Maryland case asked, "Did Richard Lerner on behalf of Credit Suisse, enter into an enforceable agreement with Jack Dwyer on behalf of [CFG] that Credit Suisse would not compete against [CFG] for the HUD refinancing of the Beverly Portfolio?" A391-93. The jury answered "Yes." *Id.* The jury also answered "Yes" to the verdict interrogatory, "Did Credit Suisse and/or one of its affiliates breach that agreement?" *Id*. The jury assessed damages of $1.75 million for Credit Suisse's breach in 2009-11 of the agreement not to compete and the Maryland court entered judgment on the verdict in that amount in favor of CFG and against Credit Suisse. *Id*.; *see also* A394. *See also* Ex. A at 39.

The Maryland court did not allow the jury to consider Dwyer's evidence relating to an agreement among Dwyer, Lerner, Grunstein and Silva for HUD financing of the CMBS bridge loan through CFG. A384-85. "This Court has ruled previously that any right of CFG to be engaged to perform a HUD refinancing as a result of the alleged partnership agreement is not enforceable here against the Credit Suisse Defendants." A316. The court also gave oral and written instructions requiring the jury to disregard CFG's claims against the Delaware defendants "relating to the Beverly Portfolio refinance" and not speculate on the outcome of the Delaware case. A388-89; A390.

ARGUMENT

I. THE TRIAL COURT'S REJECTION OF CFG'S UNJUST ENRICHMENT CLAIM MUST BE REVERSED. THE COURT'S INTERPRETATION OF THE MARYLAND JUDGMENT AS ESTABLISHING JUSTIFICATION FOR DEFENDANTS' ENRICHMENT AND ITS APPLICATION OF COLLATERAL ESTOPPEL WERE ERRONEOUS AS A MATTER OF LAW.

A. Question Presented

Whether the trial court improperly relied upon and misinterpreted the Maryland judgment as establishing an adequate legal justification for defendants' enrichment from use of CFG's underwriting and release prices, thereby defeating CFG's claim for unjust enrichment? The issues were raised and preserved in briefing on the Motion to Reopen. A397-99; *see also* Ex. A at 89-93.

B. Scope of Review

This court interprets the Maryland judgment *de novo*. The proper interpretation of a written instrument, including a foreign judgment, is a question of law in the trial court and on appeal. *U.S. v. Spallone*, 399 F.3d 415, 424 (2d Cir. 2005) (interpretation of court orders); *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 286 (3d Cir. 1991); accord *GMC Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779-80 (Del. 2012).[8] Trial court determinations on collateral estoppel are reviewed *de novo*. *RBC Capital Markets, LLC v. Educ. Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014).

[8] Defendants conceded in the trial court that interpretation of the Maryland judgment presents a legal issue. A404-05.

C. Merits of the Argument

1. The Maryland Judgment Provided No Basis for A Finding of Justification Barring CFG's Unjust Enrichment Claim.

CFG contended defendants had been unjustly enriched through their use of CFG's underwriting of 275 nursing home properties and determination of HUD release prices to obtain CMBS financing and close the Beverly transaction.

Unjust enrichment is "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." *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988). The elements of unjust enrichment are: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law." *Otto v. Gore*, 45 A.3d 120, 138 (Del. 2012).

The trial court ruled against CFG on the fourth element, absence of justification. "Justification" requires an adequate legal basis for the exchange that produced the enrichment. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. b (2011). The court interpreted the Maryland judgment as establishing a contract between CFG and Credit Suisse that was a legal basis for Silva's enrichment. Ex. A at 91-92. This incorrect interpretation constituted legal error requiring reversal.

Nothing can be gleaned from the "four corners" of the Maryland judgment

beyond a bare result; CFG prevailed on Count I and was awarded $1.75 million. A394. Only by going beyond the judgment's four corners, into the Maryland trial record, can a reviewing court properly determine whether the judgment has any legal significance for CFG's unjust enrichment claim. *Spallone, supra*, 399 F.3d at 424 ("In construing orders and judgments, the entire contents of the instrument and the record should be taken into consideration in ascertaining the intent"); *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 575 (6th Cir. 1948) ("The proper construction of a court's decree … is to be determined by an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish. Its scope is to be determined by what preceded it and what it was intended to execute."). The Maryland trial record demonstrates that the judgment has no such significance.

Early in the Maryland trial, Dwyer explained the agreement for the financing: Credit Suisse would provide a short-term CMBS loan as a bridge to permanent HUD financing provided by CFG. A359. Credit Suisse and CFG expected the acquirer to compensate each separately for what each did as part of the loans each would provide. Accordingly the agreement between Credit Suisse and CFG did not call for Credit Suisse to pay anything for the underwriting and release prices.

CFG's underwriting and release prices had two uses: (1) first in time, to structure the CMBS bridge loan and sell the CMBS that funded the loan; and (2)

later, after the acquisition closed, as part of the application to HUD for permanent HUD financing of the healthcare properties to repay the bridge loan.[9] The agreement permitted CFG to provide the underwriting and release prices to Credit Suisse for the first purpose, in reliance on Credit Suisse's promise not to compete with CFG for the HUD financing. A320, A334-35, A350-51, A359.

CFG and Credit Suisse both expected CFG to be paid for the underwriting and release prices by the buyer/borrower through the HUD financing. *Id*. *See also* Ex. A at 59 n.203. Neither the borrower's payment to Credit Suisse nor Credit Suisse's non-competition agreement was intended as compensation for CFG's underwriting and release price work.

Dwyer also testified in Maryland, without contradiction, that:

- Credit Suisse had no right to use the HUD underwriting or release prices to make the bridge loan or sell the CMBS if Silva had not already retained CFG for the HUD refinancing (A360-61);
- Consistent with the agreement, CFG performed the underwriting and determined the release prices because it had "already been retained" by Silva to complete the refinancing (A361-63);
- Dwyer revoked permission for Credit Suisse to use CFG's

[9] The Delaware trial court so found. "The underwriting work that CFG performed was necessary to obtaining both the CMBS loans [needed to close the Beverly acquisition] and the HUD financing." Ex. A at 81.

information shortly before the CMBS loan closed when he heard Silva might not use HUD financing (*id*.);

- Only assurances that Silva intended to proceed with HUD financing for the bulk of the portfolio induced Dwyer to allow Credit Suisse to use the underwriting and release prices (*id*.);

- Both Credit Suisse and Silva used the information to structure the CMBS loan needed to close the acquisition; (A359; *see also* A203-59) and it was also used to market and sell the CMBS to fund the loan using the HUD exit strategy (*id.*);

- CFG sued in Delaware when Silva did not proceed with HUD refinancing in 2006-07 (A363-66); and

- CFG's unjust enrichment claim in Delaware differed from its claim in Maryland that in 2009 Credit Suisse breached its non-competition agreement when Silva hired Credit Suisse's affiliate for HUD financing. (A365-66).

After Dwyer testified, the Maryland court instructed the jury to: (a) disregard all evidence of CFG's relationship with Silva concerning CFG's underwriting and determination of the release prices (*see, e.g.*, A384-85); and (b) ignore the evidence concerning CFG's claims in the Delaware trial court and "not speculate as to the possible outcome of that case" (A388-90). *See U.S v. 60.22 Acres of Land, More or Less, Situate in Klickitat County, State of Washington*, 638

F.2d 1176, 1178 (9th Cir. 1980) (jury instructions used by reviewing court to determine meaning of judgment). The verdict form followed the limiting instructions, directing the jury to decide only whether Credit Suisse and its affiliates entered into an agreement with Dwyer "that Credit Suisse would not complete against Capital Funding Group, Inc., for HUD refinancing of the Beverly Portfolio." A391.

As the Maryland jury was precluded from considering anything regarding Silva, the Maryland judgment did not decide, and cannot affect, the justification element of CFG's unjust enrichment claim against Silva.[10] The Maryland jury did not actually and necessarily determine that CFG was unconditionally obligated by agreement to provide Credit Suisse and Silva with the underwriting and release prices without being entitled to any payment or compensation from Silva. No such determination was made or is reflected either on the judgment itself or on the verdict form, and the Maryland court's limiting instructions prevented the jury from considering evidence bearing on the issue.

Thus, the Court of Chancery's interpretation of the Maryland judgment was erroneous as a matter of law by importing into the Maryland judgment determinations nowhere reflected on its face, including on issues the Maryland court instructed the jury not to consider and as to which Dwyer gave contrary and

[10] Defendants below conceded that it was "never the role of the Maryland jury" to decide the issue of justification on CFG's unjust enrichment claim in Delaware. A404-05.

uncontradicted evidence during the Maryland trial. Because the trial court's erroneous interpretation drove its analysis and formed the basis of its ruling adverse to CFG's unjust enrichment claim, the decision on the claim constituted legal error requiring reversal.

2. Application Of The Maryland Judgment Against CFG Also Constituted Error Under Collateral Estoppel.

The doctrine of collateral estoppel, relied on by Silva in the trial court, does not alter the analysis or conclusions above. A Delaware court looks to Maryland law to determine the effect of a Maryland judgment. *Pyott v. La. Mun. Emps. Ret. Sys.*, 74 A.3d 612, 615 (Del. 2013). Under Maryland law, collateral estoppel can apply only if "the issue sought to be precluded is identical to one previously litigated," "the issue must have been actually determined in the prior proceeding," and "determination of the issue must have been a critical and necessary part of the decision in the prior proceeding." *Thacker v. City of Hyattsville*, 762 A.2d 172, 183 (Md. Ct. Spec. App. 2000). The court may look beyond the face of the judgment to the trial court record to assess these issues. *Manikhi v. Mass Transit Admin.*, 758 A.2d 95, 113 (Md. 2000). The trial court should have concluded the Maryland court's limiting instructions prevented the jury from making any determination on any issue relevant to justification or any other element of CFG's unjust enrichment claim, let alone as a critical and necessary part of its verdict. The court therefore erred to the extent it relied on collateral estoppel to rule against

CFG's unjust enrichment claim.

The court's error requires reversal because its incorrect interpretation of the Maryland judgment negated the fourth element of unjust enrichment and determined the outcome of the claim against CFG. Ex. A at 91-92. On the other elements – enrichment, impoverishment, and the relationship between the two – the court made findings favorable to CFG and against defendants. CFG "underwrote nearly 275 facilities to support the CMBS financing and in preparation for the HUD refinancing that the participants anticipated would occur post-closing." Ex. A at 2. Completion of the underwriting required "several months of work." Ex. A at 35. "[CFG] continued to work on the underwriting until the closing of the [Beverly] transaction." Ex. A at 59. "Silva testified he reached an understanding with Dwyer that CFG would be awarded the HUD financing" with no conditions attached. Ex. A at 78. "There is no question that Silva knew that Dwyer's participation in the Beverly deal was to obtain the HUD financing." Ex. A at 78 n.245. "[M]ore likely than not, Silva knowingly took advantage of Dwyer's efforts." [11] Ex. A at 78; *see also* p. 88 ("Silva appears to

[11] Absence of justification under the fourth element "usually entails some type of wrongdoing or mistake at the time of the transfer." *Territory of U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 796 (Del. Ch. 2007), *aff'd*, 956 A.2d 32, (Del. 2008) (TABLE). The court's finding supports both (i) wrongdoing by defendants inducing CFG to provide the underwriting and release prices to Credit Suisse when under no obligation to do so and (ii) CFG's mistake in proceeding based on the mistaken belief Silva was proceeding with HUD financing through

have taken advantage of the efforts of . . . CFG"). "Silva may have encouraged Dwyer to perform the underwriting work, but that encouragement was primarily for purposes of obtaining the CMBS loans provided by Credit Suisse, and less so for purposes of doing the HUD financing." Ex. A at 81. The underwriting and release prices were "necessary to obtaining the CMBS loans" and defendants benefited from the work by obtaining the loans and closing the Beverly transaction. Ex. A at 35, 81. "As of December 31, 2011, [defendant] FSI valued the Beverly investment [of $353.5 million] at $1.084 billion, up from an estimated value of approximately $744 million at the beginning of 2007." Ex. A at 38. On the element of absence of a legal remedy, "Dwyer has not proven his contract claim by a preponderance of the evidence." Ex. A at 83. CFG obtained nothing for "the substantial time and effort expended." Ex. A at 3.

CFG addresses two other points to rule them out as issues. First, authorities holding "our law precludes the doctrine of unjust enrichment from being invoked 'to circumvent basic contract principles [recognizing] that a person not a party to [a] contract cannot be held liable to it'" are inapposite. Ex. A at 91-92, citing *MetCap Securities LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *6 (Del. Ch.). Silva was not a party to the agreement between CFG and Credit Suisse. CFG does not seek to extend any obligation of Credit Suisse under the agreement to

---

CFG when permission to use the information could have been refused, because he was not.

Silva. *Cf. Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891-92 (Del. Ch. 2009) ("cannot use a claim for unjust enrichment to extend the obligations of a contract to [others] who are not parties to the contract"). Silva's liability rests on unjust enrichment outside the agreement between CFG and Credit Suisse. Unlike *MetCap* and similar cases, Silva would have been enriched unjustly even had Credit Suisse performed its agreement not to compete. Silva would have closed the acquisition based in part on CFG's underwriting and release prices even if Credit Suisse turned down the HUD financing in 2009. Moreover, no right claimed by CFG against Silva was granted in or measurable by CFG's agreement with Credit Suisse. *Cf. Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979) (no recovery for unjust enrichment where "the contract is the measure of plaintiffs' right").

Second, the trial court's decision cannot be upheld under its finding that CFG acted "officiously" *other than* in relation to the underwriting and release prices. Ex. A at 92 (Dwyer/CFG acted "officiously and in his own self-interest for those services he provided beyond those which CFG was contractually obligated to provide to" Credit Suisse). The court did not find CFG acted officiously regarding the underwriting or release prices. Ex. A at 90-92; *see also* Ex. A at 59-60 ("[CFG's] efforts went beyond what one would reasonably expect from a salesperson trying to close the deal."). The benefits conferred on Silva through CFG's underwriting and release prices, not through other actions found officious,

form the basis for an unjust enrichment recovery. The court decided CFG had no right to recover for the benefits based on an erroneous interpretation of the Maryland judgment and not because CFG acted as volunteer or through self-interest in taking other actions.

II. THE TRIAL COURT'S REJECTION OF CFG'S FRAUD CLAIM MUST BE REVERSED BECAUSE THE COURT MISAPPLIED THE LAW OF PROMISSORY FRAUD TO THE FACTS AS FOUND BY THE COURT.

A. Question Presented

Whether the trial court reached incorrect conclusions concerning the elements of promissory fraud on the facts found in the court's decision? The issue was raised and preserved in the post-trial briefs. (A274-91; A304-313)

B. Scope of Review

"We review the Court of Chancery's conclusions of law *de novo* …" *DV Realty Advisors LLC v. Policemen's Annuity and Ben. Fund of Chicago*, 75 A.3d 101, 108 (Del. 2013). "What constitutes fraud is a question of law for the court." *Griffin v. Star Painting Co.*, 74 A. 1072 (Del. 1910).

C. Merits of the Argument

1. Silva's Oral Promise To Award The HUD Financing To CFG Was Fraudulent Because Silva Considered Himself Bound Only By A Written Contract And Not By His Promise.

The trial court found "that [Silva] reached an understanding with Dwyer that CFG would be awarded the HUD financing." Ex. A at 78. Was Silva's promise of HUD financing fraudulent given his confessed belief he could be bound only by a written contract? The court framed the issue as follows:

> Silva, believing that a contract could not be formed absent a written agreement, was content to lead Grunstein and Dwyer along because he needed them—all the while believing that he had the option to

> renege or renegotiate the agreements or understandings that he had made with them. The question is whether this exploitation amounted to fraud. Ex. A at 95.

The court decided Silva's promise was not fraudulent under those circumstances. Ex. A at 99. In so ruling, the court interpreted promissory fraud too narrowly and so committed legal error.

For promissory fraud, "[a] representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention." RESTATEMENT (SECOND) OF TORTS § 530(1) (1977); *see also NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 27 (Del. Ch. 2009) ("[b]lack letter law"), and *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 499 (Del. 1982) (relying on the Restatement (Second) definition of fraud). "Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such an intention is fraudulent and actionable in deceit … This is true whether or not the promise is enforceable as a contract." RESTATEMENT (SECOND) OF TORTS § 530, cmt. c.

Silva's promise to Dwyer qualified as fraudulent under these authorities and the court's conclusion to the contrary constituted legal error. A person who makes an oral promise believing himself bound only by a written contract does not intend to perform the promise. At most he intends to be bound to perform a post-promise written contract on the same subject if and when made. His oral promise therefore constitutes a misrepresentation of his present intent to be bound only be a written

contract, making the promise fraudulent as a matter of law. Applied here Silva never believed his oral promise would be the basis on which CFG would be awarded the HUD financing. Instead, Silva believed CFG could obtain the HUD financing only under a later written contract which Silva thought he could reject entirely or negotiate on any terms according to his own interests despite the earlier promise.[12] Silva's belief contradicted the law of fraud, which enforces promises not embodied in written contracts, and from his law degree Silva is held to have known as much. Silva's belief contrary to law proves he made his promise to Dwyer without the intent to perform, making the promise fraudulent under the law.

The trial court may have been sidetracked by *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch.) ("[If] a speaker intended when she made a promise to perform it, but sometime later reneges, no action for fraud arises"). Ex. A at 94-95. The court's decision cited Silva's inexperience with HUD financing as meaning he "could not have formed at the outset a definitive position as to whether to pursue that course." The court also cited Silva's testimony "that he developed concerns about HUD financing as the acquisition process progressed" and his discussions of HUD financing after the closing. Ex. A at 99. The court concluded from these factors that "Silva never had

[12] Written agreements were drafted regarding the relationship of Dwyer, CFG, Silva, and Grunstein, including regarding HUD refinancing. Ex. A, pp. 25-29; *see e.g.* A158-65 ("Contribution Agreement") and A166-76 (CFG "Commitment Letter"). Silva never signed. *Id.*, Ex. A.

the intention not to perform his promise when he made it." *Id*.

Winner and the law of post-promise reneging are not on point. The fraud did not involve Silva's understanding of HUD financing when he made the oral promise. It involved instead Silva's intent to be bound only by a written contract. The fraudulent intent never changed. Silva promised HUD financing to CFG "all the while believing that he had the option to renege or renegotiate the agreements or understandings he had made." Ex. A at 95. Growing sophistication with HUD financing or concerns developed as the transaction progressed could not alter the falsity of Silva's promise when made and could not relieve him from liability for fraud because they did not lead Silva to perform his false promise.

2. The Court Committed Legal Error In Attempting To Repurpose Its Findings On Reasonable Reliance For Promissory Estoppel To Decide Justifiable Reliance For Promissory Fraud.

The court also rejected CFG's promissory fraud claim on the element of justifiable reliance. In full the court determined: "Dwyer's fraud claim also fails because, as discussed during consideration of Dwyer's promissory estoppel claim, his actions were not taken in justifiable reliance on Silva's representations. Accordingly, Dwyer's fraud claim fails." Ex. A at 99. The court made no independent findings on justifiable reliance. *Id.*

The court used the wrong legal standard for justifiable reliance by recycling the findings it made on the promissory estoppel claim. Promissory estoppel

involves "reasonable reliance." *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000). "Justifiable reliance" for promissory fraud is a term of art. "The recipient of a fraudulent misrepresentation of intention is justified in relying upon it if the existence of the intention is material and the recipient has reason to believe that it will be carried out." RESTATEMENT (SECOND) OF TORTS § 544 (1977). Comment c to Section 544 explains: "In order for reliance upon a statement of intention to be justifiable, the recipient of the statement must be justified in his expectation that the intention will be carried out." *Id.* at cmt. c. Nothing in the case law indicates reasonable reliance for promissory estoppel depends on the two factors specific to justifiable reliance for promissory fraud under Restatement (Second) Section 544.

The standards for reliance differ because promissory estoppel and promissory fraud protect different legal interests. "Promissory estoppel involves 'informal promises for which there was no bargained-for exchange.'" *Ramone v. Lang*, 2006 WL 905347, at *14 (Del. Ch.). Promissory estoppel "is a fundamentally narrow doctrine" that "hazards unfairness" and "courts must be chary about invoking the doctrine lightly, lest the normal failure of parties to reach a binding contract be penalized by an imprecise judicial cost-shifting exercise." *Id*. On the other hand the law defines fraud as "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208, n.16 (Del. 1993).

Fraud claims vindicate social policy underpinning tort law and "are not concerned about the need for 'predictability about the cost of contractual relationships.'" *Lazar v. Superior Court*, 12 Cal.4th 631, 646 (Cal. 1996). Unlike reasonable reliance for promissory estoppel, justifiable reliance for promissory fraud addresses whether deceit had its intended wrongful effect.

Different burdens of proof also apply: clear and convincing evidence for promissory estoppel and a preponderance of the evidence for fraud. *Lord*, *supra*, 748 A.2d at 399 (promissory estoppel); *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 2045857, at *5 (Del. Ch.), *aff'd*, 62 A.3d 1223 (Del. 2013) (TABLE) (fraud). "Clear and convincing evidence is a stricter standard of proof than proof by a preponderance of the evidence, which merely requires proof that something is more likely than not. To establish proof by clear and convincing evidence means to prove something that is highly probable, reasonably certain, and free from serious doubt." Del. Civil Pattern Jury Instructions § 4.3 (2000). In borrowing the findings from promissory estoppel the court does not indicate that it considered the lesser burden of proof applicable to justifiable reliance.

As expected from these substantive legal differences the particular findings the court made for reasonable reliance did not address the standard for justifiable reliance. Under Section 544 the court must evaluate materiality and facts showing the recipient of the false promise had "reason to believe that it will be carried out." RESTATEMENT (SECOND) OF TORTS § 544 (1977). The court's findings were:

"Dwyer was a sophisticated party represented by able lawyers;" Dwyer documented the $10 million deposit loan before the promise; Dwyer's conversation with Silva "left for future resolution so many terms;" "the 'mere expression of future intention . . . does not constitute a sufficiently definite promise to justify reasonable reliance thereon;'" and "Dwyer was taking a chance that he and Silva would not be able to reach a deal." Ex. A at 88 (by reference to Ex. A at 99). None of the findings addressed either materiality or the presence or absence of factors that led Dwyer to believe Silva would perform his promise.[13]

Other findings show CFG proved justifiable reliance under Section 544. For materiality, "[t]here is no question that Silva knew that Dwyer's participation in the Beverly deal was to obtain the HUD financing." Ex. A at 78 n.245; RESTATEMENT (SECOND) OF TORTS § 538(2) (materiality for justifiable reliance established if "the maker of the misrepresentation knows . . . that its recipient regards . . . the matter as important in determining his choice of action.") The court also found several circumstances that support Dwyer's belief that Silva would perform his promise. "The underwriting work that CFG performed was necessary to obtaining both the CMBS loans and the HUD financing." Ex. A at 81. The CMBS financing was "critical" and "necessary to close on the

[13] Defendants did not mention any of these points in arguing against justifiable reliance in their post-trial briefing. They argued instead that CFG performed the underwriting work based on its relationship with Credit Suisse and not based on Silva's promise. A299. Point I above shows the argument has no merit.

transaction." Ex. A at 81-82. Silva encouraged Dwyer to perform the underwriting work "primarily for purposes of obtaining the CMBS loans" and to a lesser extent "for purposes of doing the HUD financing." Ex. A at 81. Silva, Dwyer, Grunstein and Lerner all "expected that Dwyer would be compensated through HUD financing or the receipt of a multiple of the loan deposit . . . for his significant contributions to the Beverly acquisition." Ex. A at 59 n. 203. Silva did not communicate any condition to his promise. Ex. A at 78. Neither did Silva or his lawyers make "an unequivocal statement that a written executed contract was a condition precedent to an agreement." Ex. A at 46. These findings meet the test for justifiable reliance because they show not only that Silva's promise was material but also that Dwyer had reason to believe Silva's promise would be carried out.

CONCLUSION

For the foregoing reasons, Jack Dwyer and Capital Funding Group, Inc. submit that the Court of Chancery erred and the decision and judgment below should be reversed and vacated as to the unjust enrichment and fraud claims. The cause should be remanded and the Court of Chancery should be directed to determine and award the relief to which Dwyer and CFG are entitled for unjust enrichment and fraud.

POTTER ANDERSON & CORROON LLP

By: */s/ Arthur L. Dent*
Arthur L. Dent (# 2491)
Ryan T. Costa (# 5325)
Hercules Plaza, 6th Floor
1313 North Market Street
P. O. Box 951
Wilmington, DE 19899

Attorneys for Plaintiffs Below-Appellants Jack Dwyer and Capital Funding Group, Inc.

OF COUNSEL:

FENIGSTEIN & KAUFMAN
Ron S. Kaufman
1900 Avenue of the Stars
Suite 2300
Los Angeles, CA 90067-4314

Dated: November 20, 2014
1172858

CERTIFICATE OF SERVICE

I, Arthur L. Dent, hereby certify that on November 20, 2014, the foregoing document was served electronically via *LexisNexis File & Serve* upon the following counsel of record:

Bruce E. Jameson, Esquire
PRICKETT JONES& Elliott, P.A.
1310 North King Street
Wilmington, DE 19801

Kurt M. Heyman, Esquire
PROCTOR HEYMAN LLP
300 Delaware Ave., Suite 200
Wilmington, Delaware 19801

/s/ Arthur L. Dent
Arthur L. Dent (No. 2491)

1172858