IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEONARD GRUNSTEIN, JACK DWYER, and CAPITAL FUNDING GROUP, INC. Plaintiffs-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-Appellees.	)	No. 572, 2014 (Appeal from Court of Chancery, C.A. No. 3932-VCN)

DEFENDANTS-APPELLEES' ANSWERING BRIEF TO APPEAL OF JACK DWYER AND CAPITAL FUNDING GROUP, INC.

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NATURE OF PROCEEDINGS

The Court of Chancery issued a 112-page Memorandum Opinion (the "Opinion" or "Op.") on September 5, 2014[1] granting Judgment for Defendants-Appellees and rejecting all of Plaintiffs-Appellants Jack Dwyer ("Dwyer") and Capital Funding Group, Inc.'s ("CFG") (collectively "Dwyer/CFG") claims. Dwyer/CFG's case arises out of a transaction in which certain of the Defendants-Appellees acquired and took private Beverly Enterprises, Inc. ("Beverly") in 2006. Despite the lack of any written agreement between Dwyer/CFG and Appellees regarding compensation from the Beverly transaction, Dwyer/CFG asserted the right to receive over $144 million based on theories of breaches of an oral partnership agreement and separate oral contract with Dwyer/CFG, promissory estoppel, promissory fraud, and unjust enrichment. The court below ruled against Dwyer/CFG on all of their causes of action. Dwyer/CFG appeal only the rulings on unjust enrichment and promissory fraud.

Years after the filing of this action, CFG brought a separate lawsuit against Credit Suisse First Boston ("CSFB" or "Credit Suisse") and affiliated entities in Maryland state court (the "Maryland Litigation"), alleging that Dwyer/CFG performed pursuant to a contract between CFG and CSFB the same underwriting

[1] The Opinion is attached as Exhibit A to Dwyer/CFG's Opening Brief ("DOB"), filed on November 20, 2014.

work on the Beverly transaction that is the subject of their unjust enrichment count in this case. CFG prevailed at trial on its claims for breach of that oral agreement with CSFB, and the jury awarded CFG $1.75 million in damages for that breach. The jury also awarded CFG $10.4 million for unjust enrichment of CSFB. The Maryland trial court subsequently ruled that unjust enrichment, which the court ruled was based on the same underwriting work required by the contract, was improper when there was an enforceable contract, citing *County Commissioners of Caroline County v. J. Roland DaShielle & Sons, Inc.*, 747 A.2d 600 (Md. 2000), and therefore limited the Maryland judgment to $1.75 million. CFG appealed solely the ruling that limiting their recovery to contract-based damages ($1.75 million) arguing that it is entitled to elect the unjust enrichment remedy ($10.4 million) instead. Credit Suisse did not cross-appeal. The Maryland appeal has been argued and is under submission.

The other plaintiff-below, Leonard Grunstein ("Grunstein"), filed a separate appeal (No. 569, 2014) on the unjust enrichment count only. Appellees filed an Answering Brief on December 9, 2014. If the Court determines to hold oral argument on the Grunstein and Dwyer/CFG appeals, Appellees intend to move the Court to hear both appeals in one consolidated hearing or in consecutive hearings on the same day.

SUMMARY OF ARGUMENT

1. Appellees deny the allegations of this paragraph. Those allegations are substantively incorrect and mischaracterize the Court of Chancery's holding. Dwyer/CFG do not challenge the legal rule applied by the lower court. Op. at 89. Dwyer/CFG also do not contest (DOB at 23-24) the lower court's legal conclusion that "'[Delaware] 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 for it.'" *Id.* at 91-92 (quoting *MetCap Sec. LLC v. Pearl Senior Care, Inc.* ("*MetCap I*"), 2007 WL 1498989, at *6 (Del. Ch. May 16, 2007)). Because the court below correctly formulated the legal rule, this Court should afford substantial defernce to the factual determination below that Dwyer/CFG's underwriting work, for which they sought an unjust enrichment award, was covered by a contract. *See Cede & Co. v. Technicolor, Inc.* ("*Technicolor*"), 634 A.2d 345, 360 (Del. 1993).

The Maryland jury's determination of the existence of a contract between CFG and CSFB covering Dwyer/CFG's underwriting work on Beverly is consistent with the Court of Chancery's independent factual determination that Dwyer/CFG's work on the Beverly transaction was performed "pursuant to a contract with CSFB and was compensated through that relationship." Op. at 91. The determination of those facts is entitled to substantial deference from this

Court. *See Technicolor*, 634 A.2d at 360. In addition, as a matter of law, Dwyer/CFG are bound by principles of collateral and judicial estoppel to the Maryland jury's determinations, which are final, under Delaware and Maryland law, unless and until reversed. *See Defillipo v. Quarles*, 2010 WL 702310, at *3 (Del. Super. Ct. Feb. 26, 2010) (judgment final so long as it is "sufficiently firm to be afforded conclusive effect") (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982)); *Campbell v. Lake Hallowell Homeowner's Ass'n*, 852 A.2d 1029, 1039 (Md. Ct. Spec. App. 2004) (adopting majority rule that "a pending appeal does not affect the finality of a judgment").

Dwyer/CFG's unjust enrichment claim also fails for the independent reason that Dwyer acted officiously in connection with all of his work on the Beverly transaction. The court below already determined that Dwyer/CFG's work was officious with respect to non-underwriting activities, and there is no appeal on that issue. Op. at 92 ("Dwyer also acted officiously and in his own self-interest for those services he provided beyond those which CFG was contractually obligated to provide to CSFB.") The Court of Chancery has specifically determined that "Dwyer began voluntarily working on the [Beverly] project before" Appellee Ron Silva ("Silva") "became involved[,]" "Dwyer worked with CSFB" on the Beverly transactions just as he had on earlier transactions, and that Dwyer "sought to advance his relationship with CSFB as well as to eventually earn fees from a HUD

refinancing in the Beverly transaction." Op. at 92 The trial court's factual conclusion was that "[Dwyer's] work was thus a gratuity to build goodwill and position himself as a party with intimate knowledge of the transaction in order to complete a HUD refinancing when, and if, such a need arose." *Id.* at 92-93. These factual findings are proof of officious, self-interested justifications for both the underwriting and non-underwriting work. *See MetCap Secs. LLC v. Pearl Senior Care, Inc.* ("*MetCap II*"), 2009 WL 513756, at *5 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (Del. 2009).

The lower court's factual findings supporting its conclusion that Dwyer/CFG officiously worked on the Beverly transaction are not subject to de novo review on appeal. *See* DOB at 2. Instead, those factual determinations, which would apply to both the underwriting and non-underwriting work, are entitled to substantial deference on appeal. *See, e.g., Del. Bay Surgical Servs., P.C. v. Swier*, 900 A.2d 646, 650 (Del. 2006) ("Determining the intent of the parties is question of fact"); *Technicolor*, 634 A.2d at 360.

2. Appellees deny the allegations of this paragraph because they are substantively incorrect and mischaracterize the Court of Chancery's holdings and factual findings. The lower court properly applied the "justifiable reliance" standard articulated by the Delaware Supreme Court in *Hauspie v. Stonington Partners, Inc.*, 945 A.2d 584, 586 (Del. 2008). Op. at 94. It found that

Dwyer/CFG's "actions were not taken in justifiable reliance upon Silva's representations." Op. at 99. Substantial evidence in the factual record supports that conclusion. Because the court below formulated the correct legal standard, this Court should only review for clear error the factual determination that Dwyer/CFG did not act in justifiable reliance upon Silva's representations. *See Technicolor*, 634 A.2d at 360.

The independently dispositive factual determination that Silva "never had the intention not to perform his promise when he made it" (Op. at 99) also can be reviewed only for clear error. *See, e.g.*, *Del. Bay Surgical Servs., P.C.*, 900 A.2d at 650 ("intent of the parties is question of fact"); *Technicolor*, 634 A.2d at 360. In addition, the trial court found that Silva made only a "tentative[ ] promise[ ] to obtain HUD financing through CFG if Beverly (or FSI) decided to pursue HUD financing . . . ." Op. at 99. CFG/Dwyer does not even address that independently dispositive factual finding.

STATEMENT OF FACTS

A. Transaction Background

Dwyer owns several very successful companies providing "financial services to clients in the long-term health care industry." Op. at 9. CFG is one of Dwyer's businesses, focused on structuring financing through the United States Department of Housing and Urban Development ("HUD") programs. *Id.*[2]

Prior to the Beverly transaction, Dwyer worked with Grunstein on financing the acquisitions of other nursing home companies, including Integrated Health Services and Mariner Healthcare ("Mariner"). Op. at 7. Grunstein's client Rubin Schron provided equity for both transactions and CSFB provided debt financing through commercial mortgage backed securities ("CMBS"). *Id.* at 8. Richard Lerner ("Lerner"), a personal friend of Dwyer, represented CSFB in both transactions. *Id.*

The relationship between Dwyer/CFG and Lerner/CSFB is the primary focus of the Maryland Litigation filed by CFG against Credit Suisse and affiliates after this case had been pending for a year and a half. *See* discussion *infra* at 11-13. CFG alleged in Maryland that CFG and CSFB entered into a non-compete agreement sometime before the commencement of the Mariner transaction in 2004.

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[2] There is no distinction between CFG's and Dwyer's claims in this case. *See generally* Op. at 6-7.

Op. at 9. In exchange for CSFB not competing with CFG to provide HUD financing, CFG agreed to perform underwriting services in connection with CMBS financings. *Id.* CFG provided underwriting work in connection with the Mariner acquisition pursuant to this agreement. *Id.* at 9-10.

In early 2005, Dwyer learned that a hostile offer had been made to Beverly, a publicly-held nursing home company. Op. at 11. Dwyer contacted Grunstein about exploring the possibility of acquiring Beverly. *Id.* at 10-11. Over the course of several months, Grunstein and Dwyer had "several meetings" and "numerous phone conversations" with Beverly's CEO during which they persuaded him that they could consummate the acquisition of Beverly. *Id.*

During this period, Appellees had no involvement in the Beverly acquisition, but Grunstein and Dwyer/CFG continued to work on the potential deal. Dwyer/CFG began meeting with HUD officials and performing some preliminary underwriting work in an effort to arrange HUD financing for the transaction. Op. at 10-11. Grunstein worked on obtaining the debt and equity financing. *Id.* at 11. On May 9, 2005, through his shell company, SBEV Holdings LLC ("SBEV"), Grunstein submitted a preliminary proposal to acquire Beverly. *Id.* at 11, 13; B001-28.

The Court of Chancery found that soon after Silva became involved in the collaboration with Grunstein, Dwyer, and Lerner about the possible acquisition of

Beverly, Grunstein's shell entities North American Senior Care ("NASC") and SBEV entered into a merger agreement (the "Merger Agreement") to acquire Beverly without a real equity source, and relied on Silva to find an equity source. Op. 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 for various legal relationships among them that were not accepted, and Silva's equity source finally committed, leading to the execution of a Third Amendment to the Merger Agreement in late November 2005. *Id.* at 17-19, 23-26, 28-32.

Before the Third Amendment, CFG sent a written offer to Grunstein's shell SBEV (addressed to Silva and Grunstein at Grunstein's address), setting out the terms of CFG's proposal for a HUD refinancing of the Beverly acquisition. Op. at 28-29; A166-A176. The proposed written contract with SBEV by its own terms would become effective "only upon receipt by Capital Funding on or before October 20, 2005, of a copy of [the] letter with [SBEV's] acceptance evidenced thereon." A170. No one but Dwyer ever signed his proposal, and by its own terms it therefore never became effective. Op. at 29, 79-81. In November 2005, under the terms of the Third Amendment, the right to acquire Beverly was transferred from entities controlled by Grunstein to entities controlled by Silva, which

contracted with CSFB to provide CMBS financing for the acquisition. *Id.* at 31. Dwyer/CFG continued to provide underwriting work to Lerner/CSFB as required by their contract. *Id.* at 91. Appellee Drumm Investors, LLC ("Drumm") ultimately paid CSFB approximately $30 million for the CMBS. *See* Op. at 39; B044, B084; B165.

The Opinion sets out in detail the relevant facts relating to Dwyer/CFG's unsuccessful attempts to reach agreement about the HUD refinancing and their role in the Beverly transaction, but concludes that Dwyer/CFG's underwriting work was performed "pursuant to a contract with CSFB and was compensated through that relationship." Op. at 91. As here, Dwyer/CFG argued below that his compensable work was not limited to his contract performance with CSFB, but the Court of Chancery concluded that such work was officious, and a "gratuity to build good will" in order to be in the best position to perform a HUD refinancing. *Id.* at 92-93. Notably, Dwyer/CFG do not challenge the lower court's factual determination that any non-underwriting work was performed officiously.[3]

[3] Dwyer/CFG attributed no monetary value to any such non-underwriting work at trial and failed to prove that Appellees used any non-underwriting work. B150 B163 (Trial Tr. [Bavis]) at 1827:13-1828:20 (Dwyer/CFG's expert testified he was "not ascribing one dollar to the non-underwriting contributions of Dwyer and CFG"); *see* B297-98.

Following the closing of the Beverly acquisition in 2006, Silva and Dwyer communicated again about a potential HUD refinancing of the acquisition. Silva expressly informed Dwyer in writing on May 1, 2006 that he was "'considering all financing and specifically HUD for a portion of the [Beverly] portfolio.'" Op. at 37 (quoting B142-44); *see also* B147; B146; B154, B156-57, B161. Silva and Dwyer met in person two days later, "[n]o agreement was reached during that meeting[,]" but "because of Dwyer's complaints about not being compensated for his underwriting work in relation to the Beverly deal, Silva asked that Dwyer send him an invoice for his expenses." Op. at 37. Dwyer responded later that month with a proposal that, among other things, "values CFG's services rendered in developing a potential HUD exit for the Beverly portfolio at $695,000." *Id.* at 38. Silva never agreed to that proposal. *Id.* at 29, 79-80.

B. The Maryland Litigation

Years after initiation of this lawsuit, Drumm began the process of attempting a HUD refinancing of the Beverly acquisition and retained an affiliate of Credit Suisse, Column Guaranteed LLC. Op. at 38. CFG subsequently filed the Maryland Litigation against Credit Suisse and several affiliate entities, alleging that the Maryland defendants breached the non-compete agreement by soliciting and accepting the HUD work. The HUD refinancing was eventually abandoned

(*id.*), and Drumm eventually paid the Credit Suisse affiliate $1.75 million in break up fees for its work on the project (B266).

The Maryland Litigation proceeded to a jury trial in July 2013, seven months after completion of the trial below. CFG successfully argued in Maryland that CFG performed underwriting work in exchange for CSFB's promise not to compete for a subsequent HUD refinancing of the Beverly debt. Dwyer testified that the reason he "helped Credit Suisse lend 2 billion dollars to . . . an entity that purchased Beverly" was because CSFB "promised to provide the permanent take-out loan through HUD" to CFG. B244-45. In return for CFG's underwriting work on the initial Beverly financing, CFG argued that CSFB "promised not to compete" against CFG for the HUD refinancing. B245. In opening and closing statements and during argument on several motions, CFG's counsel reiterated that the underwriting services were specifically performed by CFG for CSFB in consideration for CSFB's agreement not to compete for the HUD refinancing work on the Beverly transaction. B231-41; B269-76. CFG sought "benefit of the bargain" damages of $91 million for profits it would have received if it had *successfully* performed the HUD refinancing for Drumm. B309-12.

The Maryland jury found that CSFB had breached the non-compete contract but awarded only $1.75 million for breach of that contract, the exact amount Credit Suisse's affiliate received in breakup fees for the *failed* HUD refinancing. B266;

B283-85, B280-81. The jury also found for CFG on an unjust enrichment claim for which it awarded $10.4 million. B281. The Credit Suisse defendants in the Maryland Litigation argued in post-trial motions that CFG could receive only the breach of contract award and could not elect the $10.4 million unjust enrichment award. They based that argument on the established principle that the existence of an enforceable contract precludes recovery in unjust enrichment for the performance of services required by that contract. *See, e.g.*, *Janusz v. Gilliam*, 947 A.2d 560, 567-568 (Md. 2008). The trial court decided against CFG and limited the Maryland judgment to the $1.75 million for breach of contract. B287. That damages issue has been argued on appeal and is under submission in Maryland. No party in Maryland has appealed the jury's finding that a contract existed between Credit Suisse and CFG.

C. The Court Of Chancery's Findings With Respect To Dwyer/CFG's Unjust Enrichment Claim

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

> Much of Dwyer's claim may be disposed of because the work he completed to further this transaction was performed pursuant to a contract with CSFB and was compensated through that relationship. A judgment was entered in the Maryland Litigation in which the jury found that a contract existed between CFG and CSFB (among other entities) and that CSFB breached that contract. Part of CFG's obligation under this agreement was to perform the underwriting work on the Beverly

> portfolio to prepare release prices which were part of its bargained for exchange with CSFB. Said another way, 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. The contract between CFG and CSFB precludes Dwyer from claiming unjust enrichment for services performed pursuant to that relationship. The underwriting work was performed pursuant to a contractual obligation and the breach of that contract was in fact remedied in another jurisdiction.

Op. at 91-92 (internal quotations and citations omitted).

The court added:

> Dwyer also 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]. Grunstein and Dwyer began voluntarily working on the project before Silva became involved. Dwyer worked with CSFB on the earlier Mariner transaction, and he sought to advance his relationship with CSFB as well as to eventually earn fees from a HUD refinancing in the Beverly transaction. His work was thus a gratuity to build goodwill and position himself as a party with intimate knowledge of the transaction in order to complete a HUD refinancing when, and if, such a need arose.
>
> * * *
>
> Silva has thus not been unjustly enriched by the actions of Grunstein and Dwyer because they acted officiously and provided their services in pursuit of their own self-interest. Either could have and indeed attempted to secure consideration for the work he provided. They elected to pursue the business relationship without adequately protecting their preparatory efforts, but by

> making such a choice they cannot later claim unjust enrichment for such voluntarily provided services.

Id. at 92-93 (internal citations omitted).

D. The Court Of Chancery's Findings As To Dwyer/CFG's Promissory Fraud Claim

The lower court found the following facts regarding Dwyer/CFG's promissory fraud claim:

> As for Dwyer, the Court has already concluded that Silva tentatively promised to obtain HUD financing through CFG if Beverly (or FSI) decided to pursue HUD financing. Silva was still considering doing HUD financing as of May 2006, when he spoke with Dwyer about financing a portion of the Beverly portfolio through HUD. The Court also credits Silva's testimony that he developed concerns about HUD financing as the acquisition process progressed. That is consistent with the fact that Silva was inexperienced with HUD financing and could not have formed at the outset a definitive position as to whether to pursue that course. Thus, Silva never had the intention not to perform his promise when he made it. 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 upon Silva's representations.

Op. at 99.

On the question of reliance, the court also found:

> Applying the Delaware standard, however, a reasonable person in Dwyer's position would not have concluded that Silva intended to be bound by the terms of the CFG commitment letter.

> To begin, there is no evidence in the record that those terms were ever seriously negotiated. Especially for a deal of this size, a reasonable negotiator in an equal bargaining position would have expected some haggling over the terms. . . . Although Dwyer and Silva likely had some preliminary discussions about HUD financing terms in late September or early October, Silva was then unfamiliar with the HUD process, and probably did not have any idea what constituted reasonable and customary fees.
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> * * *
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> Dwyer may have honestly believed that Silva had agreed to do HUD financing on the terms in the commitment letter, but that belief was not reasonable under the circumstances. A reasonable person would have believed (as Silva did) that the commitment letter was an "offer" to contract and that the failure to respond to an offer as explicitly set forth in the proposal was an implicit rejection.
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> * * *
>
> Also fatal to Dwyer's promissory estoppel claim is that Dwyer's reliance on Silva's promise was unreasonable under the circumstances. Dwyer was a sophisticated party represented by able lawyers. He had previously documented his agreement to loan the $10 million deposit. Moreover, because Dwyer's and Silva's conversations left for future resolution so many terms it would have been manifestly unreasonable for Dwyer to have relied upon such an indefinite promise. Moreover, the mere expression of future intention does not constitute a sufficiently definite promise to justify reasonable reliance thereon. In this case, Dwyer was taking a chance that he and Silva would not be able to reach a deal.

Op. at 78-80, 88 (internal quotations and citations omitted).

ARGUMENT

I. The Court Of Chancery Properly Found That Appellees Were Not Unjustly Enriched By Dwyer/CFG's Work On The Beverly Transaction.

A. Question Presented

Whether the trial court's determination that Appellees were not unjustly enriched by Dwyer/CFG's underwriting work on the Beverly transaction is supported by substantial evidence?

B. Scope of Review

Dwyer/CFG do not challenge the legal rule regarding unjust enrichment articulated by the Court of Chancery, but instead take issue with the resolution of factual issues. 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.

Dwyer/CFG and the court below both articulate the identical formulation of the elements of unjust enrichment. *Compare* DOB at 16 *with* Op. at 89. Dwyer/CFG do not dispute the legal principle applied by the lower court: "[Delaware] 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." Op. at 91-92 (internal quotations omitted); *see*

generally DOB at 16-21. The lower court's invocation of this rule is not based on any particular legal interpretation of the CFG-CSFB contract, but rather on the purely factual determination of the existence of this contract, consistent with but not dependent upon the determination of the trier of fact in the Maryland Litigation.

The Court of Chancery's factual findings that the CFG-CSFB contract covered the underwriting work performed by Dwyer/CFG also is not disputed by Dwyer/CFG on appeal. *See generally* DOB at 16-21. The trial court did not base that factual ruling on collateral estoppel or judicial estoppel (*see* Op. at 91-92), although the application of both doctrines were argued by Appellees (B289-93, B299-304). In reviewing a finding of fact, such as the Court of Chancery's determination that Dwyer/CFG acted pursuant to their contract with Credit Suisse, 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 v. Bouvier*, 287 A.2d 671, 672 (Del. 1972). 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)).

C. Merits Of The Argument

1. The Existence Of The CFG-CSFB Contract Is Sufficient To Establish An Adequate Legal Basis For Appellees' Enrichment Even If CSFB Was Not Contractually Obligated To Pay Money To CFG For Its Underwriting Work.

The existence of the CFG-CSFB contract covering CFG's underwriting work precludes any unjust enrichment recovery here. Delaware law does not allow Dwyer/CFG to recover against Appellees based on unjust enrichment when Dwyer/CFG had a contract with CSFB requiring the same work that is the basis for their claim against Appellees. *See Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 855 (Del. Super. Ct. 1980) ("in the absence of a showing that Chrysler is unable to recover for these services from Fedders under the Agreement[,] Chrysler is not entitled to pursue this claim against [non-party] Airtemp based on quantum meruit, implied contract or restitution"); *MetCap I*, 2007 WL 1498989, at *6 (MetCap's unjust enrichment claim against certain Appellees for work performed pursuant to contract with NASC failed because the work was covered by contract with NASC). RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT SECTION 25, cited by Appellees below, illustrates this point: "[W]hen A confers a benefit on B as the performance of A's contract with C . . . [t]here is . . . no unjust enrichment if B has paid the contract price to C" because, for an unjust enrichment claim to exist, "B must stand to obtain a valuable benefit at A's expense without paying anyone for it

. . . ." RESTATEMENT § 25 cmt. b. Drumm paid CSFB approximately $30 million for the CMBS, including the underwriting work. *See* B044, B084, B165. Dwyer/CFG's attempt to address these points (DOB at 23-24) focuses on the inapposite and unchallenged differences between the contracts alleged in this case and in the Maryland Litigation and misses the crucial point: the consideration for CFG's contract with CSFB cannot be the basis for unjust enrichment here because CFG had a contract with CSFB and now has a judgment for that work and Appellees paid CSFB for services that included that work.

At post-trial argument, the Court of Chancery specifically questioned whether it "ha[d] to worry about whether [the underwriting work] was done also directly for CSFB?" B185-86. Dwyer/CFG's counsel responded: "there's certainly no evidence of any separate contract between Dwyer and Credit Suisse." B186. That statement was convenient, but inaccurate,[4] and at odds with CFG's subsequent position at the trial in Maryland, and now also with the Maryland verdict and judgment. *See* B190-91, B279-80; B252-53; B283-85; B286-87.

[4] Counsel subsequently attempted to correct his misstatement by representing that the Maryland case "involve[s] a confidentiality and non-circumvention agreement between CFG and Credit Suisse." B187. But that effort was followed by a reiteration of counsel's prior misstatement that there was "no contention by anybody in the Maryland case" that Credit Suisse hired CFG to underwrite the CMBS. B192.

Whether the CFG-CSFB contract itself called for CFG's underwriting work to be directly compensated by a money payment from CSFB or some other consideration (DOB at 17) is irrelevant. Consideration, not monetary compensation, is necessary to form a contract. *See First Mortg. Co. of Pa. v. Fed. Leasing Corp.*, 456 A.2d 794, 795-96 (Del. 1982) ("It is well settled that consideration for a contract can consist of either a benefit to the promisor or a detriment to the promisee.") Regardless of the form of compensation to be received by CFG, Dwyer/CFG performed the underwriting work for CSFB pursuant to that contract, and Appellees paid CSFB for that work. *See* B283-85, B279-80; B287, B044; B084; B165. Those facts by themselves are enough to establish an adequate legal basis and defeat Dwyer/CFG's unjust enrichment claim.

Dwyer/CFG's characterization of the CFG-CSFB agreement as contingent on "Silva retain[ing] CFG to provide the HUD financing" (DOB at 2-3; *see also id.* at 9, 18), is inconsistent with their prior position in the Maryland Litigation and unchallenged rulings by the lower court here. CFG directly admitted in the Maryland Litigation that the CFG-CSFB agreement was "not contingent on Silva having promised to retain CFG to perform the Beverly Refinancing." B218. Dwyer also testified in Maryland that the contract with Credit Suisse to perform the underwriting work was "completely different" from any contract asserted in this case. B252-53. The lower court here found no separate contractual agreement

between Appellees and Dwyer/CFG for HUD financing (Op. at 76-83), and that determination is not challenged on appeal. Dwyer/CFG's "contingency" theory (DOB at 7, 9) also is inconsistent with CFG's argument in Maryland (and the Court of Chancery's factual finding (Op. at 81-83)) that in connection with the Beverly acquisition and before any Appellee was anticipated to acquire Beverly, CFG and CSFB agreed to reprise their earlier agreements rather than establish a new agreement. B232.

The assertion that "CFG and CSFB both expected CFG to be paid for the underwriting and release prices by the buyer/borrower through the HUD financing" (DOB at 18) does not change this analysis. Indeed, that admission reinforces the conclusion that CFG and CSFB arranged for the underwriting work and release prices amongst themselves, starting before any of the Appellees became involved in the Beverly deal. The admission also supports Appellees' additional argument, preserved below (B174-76), that CFG/Dwyer provided the underwriting work for their own benefit (in order to obtain a HUD refinancing contract from the ultimate purchaser of Beverly) or for the benefit of Grunstein and/or his entities, which were originally slated to acquire Beverly. As to compensation for non-underwriting work performed by Dwyer/CFG, the Court of Chancery held that any such work was performed officiously. Op. at 93. Dwyer/CFG have not appealed that determination. *See* DOB at 15. Unlike their

supposed "partner" Grunstein, Dwyer/CFG do not appeal the lower court's rejection of their unjust enrichment claim based on any alleged "request" or "mistake."

2. The Fact That The Maryland Jury Did Not Determine The Legal Claims And Defenses In This Case Is Of No Consequence—Those Claims Were Decided By The Court Of Chancery Based On Its Independent Determinations That There Was A Contract Between CFG And CSFB, And That CFG's Work Was Performed Officiously As To Defendants.

The trial court below did not "interpret" the Maryland verdict (DOB at 19-20), rather it decided, like the jury in Maryland, that there was such a contract. Op. at 91-92. The court did not rely on any finding or determination by the Maryland jury regarding how that contract impacted Dwyer/CFG's unjust enrichment claim against Silva. Instead, the Court of Chancery independently determined that the underwriting work was done by Dwyer/CFG pursuant to a contract with CSFB, and therefore such work cannot provide the basis for a separate unjust enrichment claim against Appellees. *Id.* at 91. To the extent Dwyer/CFG performed work beyond the scope of that contract, it did so voluntarily "to build goodwill and position himself as a party with intimate knowledge of the transaction in order to complete a HUD refinancing when, and if, such a need arose." *Id.* at 92-93. Dwyer/CFG's assertion that the Vice Chancellor "interpreted" the Maryland judgment but that the "judgment did not decide, and cannot affect" the justification

analysis in this action (DOB at 16, 20) misstates the lower court's holding and misapplies the law. The lower court identified the existence of the contract and it correctly found that the Maryland judgment in favor of CFG on the contract with CSFB precludes unjust enrichment recovery from Appellees in this case. Op. at 91-92.[5]

3. As A Matter Of Law, The Maryland Verdict And Judgment Collaterally And Judicially Estop Dwyer/CFG From Denying The Existence Of The CFG-CSFB Contract.

Although the lower court did not reach the collateral and judicial estoppel issues raised by Appellees, those purely legal issues were preserved (*see* B299-304), and are alternative legal bases to affirm. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

Collateral estoppel applies because the issues of the existence of the contract with CSFB and the consideration given in connection with that contract were

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[5] The Maryland court's evidentiary rulings have no impact on this case, but nonetheless are mischaracterized by Dwyer/CFG (DOB at 14). Dwyer testified at the Maryland trial, without objection from Credit Suisse, about the Delaware litigation. B251-56. CFG's counsel in Maryland later objected to Credit Suisse presenting evidence related to the Delaware claims, specifically, a December 16, 2005 draft email from Grunstein to Silva suggesting Silva should "finalize" an agreement with Dwyer/CFG. B296; *see also* B195-210 (Joint Pretrial Statement, Maryland case) Tab B (Defendants' Ex. List) (describing Defendants' Ex. 20); B067 (Dec.16, 2005 Grunstein email), B068-72 (Dec. 16, 2005 Grunstein email). Only after CFG's attorney objected to Credit Suisse's proposed use of Grunstein's December 16, 2005 email did the Maryland court instruct the jury to disregard Dwyer's testimony about the Delaware litigation.

decided in Maryland, where CFG had a full and fair opportunity to litigate those precise issues. *See Standard Fire Ins., Co. v. Berrett*, 901 A.2d 1072, 1083 (Md. 2006) (quoting *Colandrea v. Wilde Lake Cmty. Ass'n., Inc.*, 761 A.2d 899, 909 (Md. 2000)). Those determinations regarding the CFG-CSFB contract were "critical and necessary part[s]" of the Maryland verdict and judgment because the jury could not have awarded damages for breach without finding that an enforceable contract existed. *Thacker v. City of Hyattsville*, 762 A.2d 172, 183 (Md. Ct. Spec. App. 2000); *see MPC, Inc. v. Kenny*, 367 A.2d 486, 490 (Md. 1977) (collateral estoppel binding as to "determination[s] necessarily implicit in the prior judgment"). Accordingly, the Maryland jury's determinations regarding the CFG-CSFB contract, including the necessary finding that CFG's consideration for that contract took the form of underwriting the CMBS, are binding on Dwyer/CFG in this case under the doctrine of collateral estoppel.

Judicial estoppel applies because CFG succeeded in persuading the Maryland jury to adopt its position that CFG had a binding contract with CSFB and that the underwriting work was done as consideration for that contract. Those findings contradict elements of CFG's unjust enrichment claim here. *See generally Capaldi v. Richards*, 2006 WL 3742603, at *2 (Del. Ch. Dec. 8, 2006) (judicial estoppel). It is not necessary to demonstrate an "unfair advantage" or an "unfair detriment" to establish judicial estoppel. *Capaldi*, 2006 WL 37425603, at *2.

The pending appeal in Maryland has no effect on collateral or judicial estoppel in this case because the Maryland judgment is final for estoppel purposes unless and until reversed. *See Defillipo*, 2010 WL 702310, at *3; *Campbell*, 852 A.2d at 1039. In any event, the existence *vel non* of the CFG-CSFB contract has not been appealed by any party in the Maryland Litigation, or for that matter in this case either.

4. The Unjust Enrichment Ruling May Be Upheld Based On The Alternative Ground Of The Trial Court's Factual Findings That Dwyer/CFG Acted In Their Own Self Interest.

The trial court's specific factual findings (Op. at 92) support the conclusion that Dwyer/CFG acted officiously not only with respect to the non-underwriting work, but also with respect to the underwriting work. The Court of Chancery has specifically determined that "Dwyer began voluntarily working on the [Beverly] project before Silva became involved[,]" "Dwyer worked with CSFB" on the Beverly transactions just as it had on earlier transactions, and that Dwyer "sought to advance his relationship with CSFB as well as to eventually earn fees from a HUD refinancing in the Beverly transaction." Op. at 92. Those findings of Dwyer's motivation and intent are not limited, as a matter of chronology, semantics, or logic, to Dwyer/CFG's non-underwriting work. Although the lower court did not need to determine that those findings support the conclusion that Dwyer/CFG's underwriting work was provided officiously (because the court

already had determined that the underwriting work was covered by the CFG-CSFB contract (*id.* at 91-92)), it is clear that Dwyer/CFG's self-motivation compelled the underwriting work just as it compelled the non-underwriting work (*id.* at 92). The trial court's ultimate factual conclusion applies equally to the underwriting work: "[Dwyer's] work was thus a gratuity to build goodwill and position himself as a party with intimate knowledge of the transaction in order to complete a HUD refinancing when, and if, such a need arose." *Id.* at 92-93; *see* DOB at 24-25.

II. The Court Of Chancery Properly Found That There Was No Promissory Fraud Because There Was No Fraudulent Intent And Dwyer Did Not Reasonably Rely On Any Promise.

A. Question Presented

Whether the trial court's determinations that Silva did not have fraudulent intent, or that there was no sufficiently definite promise, or that Dwyer/CFG did not justifiably rely, are supported by substantial evidence?

B. Scope of Review

Dwyer/CFG do not dispute the promissory fraud legal standard used by the lower court. *See* Op. at 93-94. They agree that an essential element of promissory fraud is actual intent to not perform at the time of making the promise. *Compare* Op. at 94 *with* DOB at 27. Having reached "a correct formulation" of the law at issue, as Dwyer/CFG admit, 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; *DV Realty Advisors LLC v. Policemen's Annuity and Ben. Fund of Chicago*, 75 A.3d 101 (Del. Supr. Aug. 26, 2013). In addition, the trial court's determination of Silva's intent is a factual determination subject to deferential review. *See, e.g.*, *Del. Bay Surgical Servs., P.C.*, 900 A.2d at 650; *Technicolor*, 634 A.2d at 360.

C. Merits of the Argument

1. The Court Of Chancery's Finding That There Was No Fraudulent Intent Or Promise Is Supported By Substantial Evidence.

The court below found that "Silva tentatively promised to obtain HUD financing through CFG if Beverly (or FSI) decided to pursue HUD financing" but later "developed concerns about HUD financing as the acquisition process progressed." The trier of fact additionally determined that "Silva was inexperienced with HUD financing[,]" and "could not have formed at the outset a definitive position as to whether to pursue" HUD financing. As a result, "Silva never had the intention not to perform his promise when he made it." Op. at 99. Dwyer/CFG's promissory fraud claim failed because of these (and other) factual determinations by the trial court.

The evidence is clear that Silva never formed a contract with Dwyer/CFG, orally or in writing, to refinance the Beverly portfolio through HUD. Op. at 76-83.

Silva also never unequivocally promised to refinance the Beverly portfolio through HUD. The Court of Chancery found instead that "Silva *tentatively* promised to obtain HUD financing through CFG *if* Beverly (or FSI) decided to pursue HUD financing." *Id.* at 99 (emphases added).

Dwyer testified that it was Grunstein and Lerner, not Silva and the other Appellees, who initially agreed to use CFG to complete a HUD refinancing of Beverly. B159-60. In October 2005, Dwyer sent to SBEV, care of Grunstein and Silva, CFG's contract proposal, which expressly stated that it would only become effective upon full execution by October 20, 2005. Op. at 28-29; A166-A176; B029-40. Silva had no authority to execute that offer on behalf of Grunstein's entity SBEV, did not agree to or with the terms described in the letter, and rejected the offer by not returning a countersigned copy to Dwyer by October 20, 2005. Op. at 28-29; *see Eaton v. Eaton*, 2005 WL 3529110, at *6 n.38 (Del. Ch. Dec. 19, 2005). Seven months later, in May of 2006, Silva emailed Dwyer that the acquired Beverly company "was starting to do . . . research on HUD financing alternatives" and was "considering all financing and specifically HUD for a portion of the portfolio." B147; B146, *see also* B154.

Rather than admit that the Court of Chancery determined an issue of fact, Dwyer/CFG argue that the court's interpretation of Silva's testimony regarding the general enforceability of oral contracts required the court, as a matter of law, to

find that Silva made an oral promise to CFG that Silva did not intend to perform. DOB at 26-29. That convoluted argument does not identify a legal ruling subject to de novo review, is premised on a distortion of Silva's testimony,[6] and is substantively incorrect. Dwyer/CFG essentially argue (*id.* at 26-27) that if Silva did not consider an oral contract to be binding, he could not have intended to use HUD financing when he "tentatively promised to obtain HUD financing through CFG if Beverly (or FSI) decided to pursue HUD financing" (Op. at 99).[7] As a matter of logic, that does not follow, and the trial court rejected that precise argument. The trial court made a factual finding, subject to substantial deference (*Technicolor*, 634 A.2d at 360), that "Silva never had the intention not to perform his promise when he made it" (Op. at 99) based on evidence that Silva was

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[6] Silva testified that if agreements are "not put in writing," the parties "don't understand the terms and conditions in which the parties are agreeing to" (B152). That view is consistent with and supported by the law, which is skeptical of the creation of rights in large, complex transactions by oral agreements. *See* Op. at 5, 88-90 (discussing *Stein v. Gelfand*, 476 F. Supp. 2d 427, 431-32 (S.D.N.Y. 2007)), and 77 (quoting *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1102 (Del. Ch. 1986) (considering "'the formality and completeness of the document (if there is a document) that is asserted as culminating and concluding the negotiations'" when determining if there was an enforceable oral partnership agreement)).

[7] Dwyer/CFG incorrectly argue that the Court of Chancery "found 'that Silva reached an understanding with Dwyer that CFG would be awarded the HUD financing.'" DOB at 27 (quoting Op. at 78). In fact, the Opinion merely recites that "Silva testified that he reached an understanding with Dwyer that CFG would be awarded the HUD financing—all things being equal." Op. at 78. The court below unequivocally found that Silva's promise was "tentative[ ]" and contingent on Beverly or FSI deciding to pursue HUD. *Id.* at 99.

considering retaining CFG to complete a HUD financing as late as May 2006 (*id.*), even taking into account Silva's testimony about the enforceability of oral agreements (*id.* at 66). The trial court was not "sidetracked" by *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch. Dec. 23, 2008) (DOB at 28-29), but correctly held that "an 'unfulfilled promise of future performance' is insufficient" to support promissory fraud (Op. at 94 (quoting *Winner Acceptance Corp.*, 2008 WL 5352063, at *7)).

2. The Court Of Chancery Properly Determined That Dwyer/CFG Did Not Reasonably Rely On Any Promise From Appellees.

Dwyer/CFG raise for the first time on appeal a contrived distinction between "justifiable reliance" and "reasonable reliance." DOB at 29-30. Because it was not raised below, that argument was not preserved for appeal. *See N. River Ins. Co. v. Mine Safety Appliances Co.*, 2014 WL 5784588, at *10 (Del. Nov. 6, 2014) ("'We adhere to the well-settled rule that a party may not attack a judgment on a theory he failed to advance before the trial judge.'") (quoting *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013)).

Dwyer/CFG's argument also fails on the merits. The suggested distinction between "reasonable reliance" and "justifiable reliance" does not exist in Delaware law. *See Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 368 (Del.

2009) ("Reasonable reliance is equivalent to justifiable reliance."); *Haase v. Grant*, 2008 WL 372471, at *2 n.16 (Del. Ch. Feb. 7, 2008) ("Delaware courts use 'justifiable' interchangeably with 'reasonable.'"). A wealth of Delaware authority has analyzed fraud claims under both "justifiable reliance" and "reasonable reliance" tests without indicating that any substantive difference exists between the two. *See, e.g.*, *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A. 3d 725, 777 (Del. Ch. 2014) (Delaware law "require[s] that a plaintiff's reliance be reasonable or justifiable in order for the plaintiff to have a viable claim" for fraud); *Debakey Corp. v. Raytheon Serv. Co.*, 2000 WL 1273317, at *25 (Del. Ch. Aug. 25, 2000). The same facts that establish reliance (or lack thereof) under a promissory estoppel theory may also be used under a fraud theory. *See, e.g.*, *Black Horse Capital, LP v. Xstelos Holdings, Inc.*, 2014 WL 5025926, at **21-22 (Del. Ch. Sept. 30, 2014) (plaintiffs "have not stated a claim for fraud or promissory estoppel" because "[b]ased on the record . . . it is not reasonably conceivable that [p]laintiffs could prove the existence of a critical element of the applicable tests—namely, justifiable or reasonable reliance").

Even in other jurisdictions that do recognize a distinction between reliance under promissory estoppel and reliance under fraud, the difference is merely one of perspective, rather than substance. *See generally Omega Eng'g, Inc. v. Eastman Kodak Co.*, 908 F. Supp. 1084, 1097 n.13 (D. Conn. 1995) (citing RESTATEMENT

(SECOND) OF TORTS SECTION 544 and observing that that section instructs that "reasonableness" in the fraud context should be determined "from the perspective of the promisee"). However, whether reliance is evaluated from the perspective of the purported promisor (Silva) or from the perspective of the purported promisees (Dwyer/CFG), the answer as determined by the trier of fact is the same:

> Dwyer was a sophisticated party represented by able lawyers. He had previously documented his agreement to loan the $10 million deposit. Moreover, because Dwyer's and Silva's conversations "left for future resolution so many terms" it would have been "manifestly unreasonable" for Dwyer to have relied upon such an indefinite promise. Moreover, the "mere expression of future intention . . . does not constitute a sufficiently definite promise to justify reasonable reliance thereon." In this case, Dwyer was taking a chance that he and Silva would not be able to reach a deal.

Op. at 88 (internal citations omitted); *see also id.* at 78-80. The evidence supporting the trial court's factual finding that reliance was unreasonable for promissory estoppel easily supports the same finding for promissory fraud.

Dwyer/CFG's mistaken suggestion that the Court of Chancery improperly applied a "clear and convincing" instead of a "preponderance of the evidence" standard to their promissory fraud claims is refuted by the Opinion's express statement that "[p]laintiffs have the burden to prove their claims by a preponderance of the evidence, except that they bear a higher burden for certain of their equitable claims . . . ." Op. at 41. As to each claim subject to the clear and

convincing standard, including promissory estoppel but not fraud, the court indicated it was using that standard. *See* Op. at 83-84 (promissory estoppel), 100 (mistake in contract formation). Thus, nothing in the lower court's use of the legally interchangeable descriptions of justifiable and reasonable reliance suggests that Dwyer/CFG's promissory fraud claims were subjected to the same heightened standard of review as the promissory estoppel claim.

CONCLUSION

Dwyer/CFG repeatedly mischaracterize their appeal as raising legal issues, when Dwyer/CFG really only disagree with the lower court's well-supported factual findings. Hoping to take advantage of its preferred standard of review, Dwyer/CFG create imagined legal errors and argue about rulings never made by the lower court. At the same time, Dwyer/CFG ignore other factual findings that independently negate their claims. The Judgment below should be affirmed.

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CERTIFICATE OF SERVICE

I, Bruce E. Jameson, hereby certify on this 19th day of December, 2014, that I caused the attached Defendants-Appellees' Answering Brief to be served via eFiling through LexisNexis File and Serve upon counsel for Plaintiff-Appellant as follows:

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