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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

CORRECTED REPLY 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

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1177531

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I. CFG'S UNJUST ENRICHMENT CLAIM.

A. The Trial Court Ruled Against CFG Based On A Misinterpretation of the Maryland Judgment. The Court Made No Independent Factual Finding Of A Contract Requiring CFG To Provide Underwriting And Release Prices To Credit Suisse.

The parties disagree about the basis on which the trial court ruled against CFG on the "justification" element of unjust enrichment. CFG contends the trial court erred in interpreting the Maryland judgment to reach the legal conclusion that the CFG-Credit Suisse contract provided justification. The legal error is subject to *de novo* review and reversal. OB, 15-21[1]. The answering brief argues the trial court made a "purely factual determination of the existence of this contract … not dependent upon the determination of the trier of fact in [Maryland]," which the court reviews for clear error. DAB, 3, 17-18, 23-24.

The court's decision on the CFG-Credit Suisse contract rested entirely on a legal interpretation of the Maryland judgment and involved no "independent finding." Ex. A, 91. The single paragraph of the Opinion discussing the CFG-Credit Suisse contract did so only in the context of the Maryland judgment and the Maryland evidence. *Id*., at 91-92. The court wrote, "A judgment was entered in the Maryland Litigation in which the jury found that a contract existed between

[1] Citations in the form of "OB, __" are references to the Opening Brief of Plaintiff Below-Appellants'. Citations in the form of "DAB, __" are references to the Defendants-Appellees' Answering Brief to Appeal of Jack Dwyer and Capital Funding Group, Inc.

CFG and CSFB (among other entities) and that CSFB breached the contract." *Id*. at 91. The only supporting evidence came from the Maryland case. *See id*. nn.279, 280. The answering brief cites only the same single paragraph and the same evidence. It does not identify the supposed "independent finding" or indicate where any such finding might appear in the Opinion. DAB, 13-14. As discussed on pages 4-5 below, any such finding would have been contrary to the evidence and therefore clearly erroneous. Because the court made no independent factual finding, its legal conclusion of "justification" is subject to review *de novo*.

B. The Court's Conclusion Of Justification Precluding Unjust Enrichment Was Error Requiring Reversal.

The trial court's conclusion depends on CFG having a contractual obligation to provide underwriting and release prices to Credit Suisse. Ex. A, 91-92. But the CFG-Credit Suisse contract could not be an adequate legal basis for Silva's enrichment unless CFG's obligation to provide underwriting and release prices was unconditional. Because the obligation was conditioned on CFG receiving the HUD financing, as shown by the evidence in Maryland until excluded by that court, and because the condition was not met: (a) CFG had no obligation to provide underwriting or release prices to Credit Suisse; (b) the mere existence of the contract provided no legal basis justifying Silva's retention of the benefits conferred at Silva's request and for which Silva never paid; and (c) recovery on CFG's unjust enrichment claim would not circumvent basic contract principles.

See CFG's analysis in the Opening Brief to which Silva made no substantive reply. OB, 23-24 (unjust enrichment claim not barred as no right asserted by CFG granted in or measurable by the CFG-Credit Suisse contract and CFG not substituting Silva for Credit Suisse as to Credit Suisse's obligations). These factors also distinguish this case from the cases cited in the answering brief, *Chrysler Corp. v. Airtemp Corp*., 426 A.2d 845, 855 (Del. Super. Ct. 1980) and *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *6 (Del. Ch.).

The trial court's error lies in its interpretation of the Maryland judgment as establishing CFG's obligation was unconditional when, as a matter of law, the Maryland judgment does not support the interpretation. The jury found no unconditional obligation and was precluded from reaching the issue under the court's limiting instructions. *See* OB, 18-19 (cataloguing evidence of the conditional nature of CFG's obligation to perform). The answering brief does not dispute CFG's characterization of the Maryland court's limitations on the evidence or limiting instructions to the jury. *See* DAB, 24 n.5. The brief confines its comments to the context in which the Maryland court made those rulings without disputing their substance or effects. *Id*. The Maryland judgment proved at most a contract for Credit Suisse not to compete. It did not prove a contract in which CFG had the unconditional obligation to provide underwriting or release prices to Credit Suisse. For these reasons the contract as found in Maryland could not provide an

adequate legal basis for Silva's retention of benefits. The court's misinterpretation of the judgment led it to conclude, contrary to law, that justification precluded unjust enrichment.

Any independent finding that CFG's obligation was unconditional – an issue the trial court did not address or decide outside its interpretation of the Maryland judgment – would have been clearly erroneous and would not support the judgment. *Bank of New York Mellon Trust Co. v. Liberty Mutual Corp*., 29 A.3d 225, 236 (Del. 2011). Until the trial court made the Maryland judgment part of the record in this case Silva had no evidence to support the justification argument. Silva did not introduce evidence of the CFG-Credit Suisse contract during the trial even though the evidence used in the Maryland trial was available.[2] Silva moved to reopen and supplement the record based on the Maryland judgment being new evidence previously not available and argued the jury's verdict "defeats [CFG's] claim for unjust enrichment in this action." DAB, at B292; *see also* B292-93 and

[2] A mere five (5) lines in Silva's 197-page post-trial brief mentioned justification on the ground CFG provided underwriting to Credit Suisse for the CMBS. Defendants' Answering Post-Trial Brief, p. 105. Silva cited only three short passages from Dwyer's testimony that did not mention – let alone purport to describe – the contract involved in the Maryland case. *Id*., at n.413. At oral argument the trial court asked, "[D]o I have to worry about whether it was done directly for CSFB?" *See* B185:23-24. CFG's counsel answered, correctly, "Well, there's certainly no evidence of any separate contract between Dwyer and Credit Suisse or any mention that it's going to be paid for by Credit Suisse other than this four-party partnership agreement." *Id*., B186:3-7. Silva now attempts to portray counsel's statement as "inaccurate" and a "misstatement," but does not back up the claim with any citation or evidence. DAB, 20 and n.4. Equally misleading is Silva's citation to oral argument "that there was 'no contention by anybody in the Maryland case' that Credit Suisse hired CFG to underwrite the CMBS." *Id*., n.4, citing B192:18-24. The transcript shows counsel referred to "updated underwriting" requested by Silva personally and not "something that was hired by Credit Suisse to do." *Id.*

B296-97. Only by granting the motion could the trial court reach the issue. The evidence in the Maryland record showed without contradiction that Credit Suisse had no right to underwriting or release prices unless CFG had already been retained for the HUD financing. *See* OB, 18-19. No basis for finding an unconditional obligation appears.

The answering brief labors in vain to find support for an unconditional obligation. Silva cited Dwyer's Maryland testimony as stating "that the contract with Credit Suisse to perform the underwriting work was 'completely different' from any contract asserted in this case." DAB, 21, citing B252-53. Dwyer said no such thing. Rather, Dwyer's use of the phrase "completely different" referred to differences between *CFG's claims in Delaware* and its *claims in Maryland*, not to the CFG-Credit Suisse contract. *Id.* Silva's misreading does not constitute substantial evidence to support an argument CFG had an unconditional obligation.

The answering brief also quoted one phrase from legal argument in CFG's opposition to a motion to stay the Maryland trial, that Credit Suisse's promise not to compete was "not contingent on Silva having promised to retain CFG to perform the Beverly Refinancing." DAB, 21, citing B218. The unconditional obligation of *Credit Suisse* not to compete does not establish that *CFG* had an unconditional obligation to provide underwriting or release prices. Additionally, the unsworn pretrial arguments of Maryland counsel on a procedural issue are not evidence, and

cannot support the Delaware judgment.

The answering brief's citation to the Restatement's example of fictional parties A, B, and C does not advance its argument. DAB, 19, citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 25, cmt. b. In the example, A has a contract with C. A's performance of the A-C contract confers a benefit on B. If B pays C for the benefit received, B is not unjustly enriched by A's performance even though C does not pay A under the A-C contract. *Id*.

The typical case under Section 25 involves subcontractor A, property owner B, and defaulting contractor C. *Id*. The example does not fit this case. Here, Silva (B) was to pay CFG (A) separately for the underwriting and release prices by giving CFG the HUD financing. CFG's contract with Credit Suisse (C) did not call for Credit Suisse to pay for underwriting or release prices. Silva's payment to Credit Suisse did not include payment for CFG's underwriting or release prices even though Silva asked for and received those benefits. Silva's payment to CFG was to be in addition to his payment to Credit Suisse.[3]

Silva's failure to pursue HUD financing through CFG allowed Silva to retain the benefits conferred by CFG without paying anyone for them. Restitution through unjust enrichment follows the parties' allocation of risk in which Silva

[3] The Court should not be distracted by Silva's references to $30 million paid to Credit Suisse. *See* e.g. DAB, 20. CFG's experts valued the benefits conferred on Silva from the underwriting and release prices at more than $112 million. Plaintiffs' Opening Post-Trial Brief, at 107 et seq. The court found Silva's investment "has increased substantially" since the closing. Ex. A, 38. FSI valued its $353.5 million investment at $1.084 billion as of December 31, 2011. *Id*.

paid Credit Suisse and separately should have paid CFG but did not. Unlike the A/B/C example, this case presents the classic scenario for unjust enrichment.

Discussion in the answering brief of the consideration passing from Credit Suisse to CFG through the covenant not to compete does not advance Silva's argument. DAB, 20-21. CFG does not contend the contract failed for lack of consideration or seek to hold Silva liable for Credit Suisse's contract obligation. The answering brief cited Dwyer's Maryland testimony for the proposition that Credit Suisse, not Silva, "'promised to provide the permanent takeout loan through HUD to CFG.'" DAB, 12, citing B244-45. Dwyer testified that Credit Suisse had no obligation to pay for underwriting or release prices, it was Silva who promised the HUD financing, and Credit Suisse agreed not to compete with CFG for the refinancing. B244-45. Under no factual scenario could Credit Suisse engage CFG for HUD financing.

The answering brief notes CFG and Credit Suisse made their contract before Silva "was anticipated to acquire Beverly." DAB, 22. That the CFG-Credit Suisse contract predated Silva's involvement supports the conditional nature of CFG's covenant to provide underwriting and release prices. CFG and Credit Suisse coupled the CMBS and HUD financing as a package to be attractive to equity investors. They agreed CFG would provide underwriting and release prices for the CMBS only if the investor (borrower) agreed to both components of the financing

package, not just the CMBS component. Silva knew from the outset Credit Suisse and CFG provided the financing as a package with CFG participating to provide underwriting and release prices for the CMBS based on the borrower's commitment to use HUD financing provided by CFG. The court's decision cited the same package in the earlier Mariner transaction. CFG "participated … to assure investors that the deal had a long-term financing solution," underwrote the Mariner facilities, and "was employed to perform the refinancing." Ex. A, 9. The court found Silva reached an understanding with Dwyer promising that CFG would be awarded the HUD financing. Ex. A, 78. Silva never corrected CFG's understanding, such as by voicing objection to the CFG commitment letter (A166-76), negotiating its terms, or retracting his promise of HUD financing because the letter was unacceptable (AR9) or Silva was no longer committed to HUD financing. The court found Silva "knowingly took advantage of Dwyer's efforts" and "may have encouraged Dwyer to perform the underwriting work," but primarily to "obtain the CMBS loans provided by Credit Suisse." Ex. A, 78, 81, 88.

C. CFG Did Not Act Officiously In Performing The Underwriting Or Determining The Release Prices.

The trial court drew a careful distinction between the work CFG performed on the underwriting and release prices and the other, "broader" work CFG did on the Beverly transaction, reaching different conclusions as to the two. Ex. A, 92.

The court analyzed the underwriting and release prices exclusively in the context of the CFG-Credit Suisse contract and found neither had been done officiously in CFG's own interest. *Id*. Only the "broader" work, the "services [CFG] provided *beyond*" the underwriting and release prices, were found to have been done officiously. *Id*. (emphasis added). The court did not need to distinguish between the underwriting and release price work and the "broader" work if, as Silva contends, the court concluded everything CFG did was officious.

The evidence supported the court's conclusion that CFG did not provide underwriting or release prices officiously. CFG devoted "several months of work" to the underwriting and release prices. Ex. A, 35; *see* AR17-19 (record citations to CFG's extensive efforts). Documentary evidence cited in the Opinion showed Silva and his lieutenants requested the underwriting and release prices. Exh. A, 35, citing JX 620, 621, 624, 627, and 629. "In one email, Ribar [a Silva lieutenant] specifically requested, 'what is our timing looking like on the HUD release prices?'" *Id*., citing JX 627, JX 629. Dwyer testified Silva asked him to "'[f]inish underwriting the HUD mortgages and make sure you get as much debt as possible so it would diminish the amount of equity that was required on the deal.'" AR14.

The court found Silva and Dwyer reached an unconditional understanding that CFG would be awarded the HUD financing. Ex. A, 78. The court also found "[t]he underwriting work that CFG performed was necessary to obtaining both the

CMBS loans and the HUD financing." *Id*., at 81. In the months before the closing Dwyer held an honest but mistaken belief Silva had agreed to HUD financing on the terms of CFG's commitment letter. Ex. A, 80. There was no evidence Silva communicated any objection to CFG providing HUD financing even though several opportunities existed. Silva did not object to or reject CFG's work because he needed it for the CMBS. Silva's many requests, Dwyer's honest mistake, and Silva's failure to reject the benefits negated "officiousness" and left Silva open to CFG's unjust enrichment claim. *Metcap Securities LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, *9-10 (Del. Ch.), *aff'd*, 977 A.2d 899 (Del. 2009). *PharmAthene, Inc. v. SIGA Technologies, Inc.*, 2011 WL 4390726, *28 (Del. Ch.). Only the court's misinterpretation of the Maryland judgment as providing justification prevented an award in CFG's favor.

The answering brief's only argument against the trial court's bright line distinction reduces to an invitation for this Court to erase the line and make a contrary finding on the basis of "chronology, semantics, [and] logic." DAB, 26-27. The invitation should be declined as contrary to fundamental principles of appellate review. This Court cannot contradict the trial court's conclusion that CFG was not officious as to the underwriting or release prices just to suit Silva's appellate argument.

D. Collateral Estoppel and Judicial Estoppel Are Inapplicable.

Silva seeks affirmance on the alternate grounds of collateral and judicial estoppel. The trial court made no ruling on either issue though Silva raised both below. DAB 24.

Collateral estoppel and issue preclusion do not apply. The law requires, among other factors: "(1) the issue sought to be precluded must be identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; [and] (3) determination of the issue must have been a critical and necessary part of the decision." *Thacker v. City of Hyattsville*, 762 A.2d 172, 183 (Md. Ct. Spec. App. 2000). Silva seeks to preclude CFG from litigating the fourth element of unjust enrichment, dealing with justification. *Otto v. Gore*, 45 A.3d 120, 138 (Del. 2012). The answering brief admits that "the Maryland jury did not determine the legal claims and defenses in this case." DAB 23. This concession rules out application of collateral estoppel on each of the three factors mentioned in *Thacker*.

Silva tries to avoid these authorities by recasting the issue as limited to CFG's contract with Credit Suisse. DAB 24-25. The effort fails. The Maryland jury decided only that Credit Suisse had a contractual obligation not to compete with CFG for the HUD financing. The Maryland court's evidentiary rulings and limiting instructions prevented the jury from deciding whether CFG had an

unconditional duty to provide underwriting or release prices to address the justification element of unjust enrichment. *Otto, supra*. The scope and limitations of CFG's contractual obligations were not issues in Maryland, and under the Maryland court's rulings CFG had no full or fair opportunity to litigate either.

Neither does judicial estoppel apply. It would have to be shown that CFG's position in Delaware contradicted a position it took in Maryland, and that the Maryland court adopted the contrary position in a judicial ruling. *Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859-60 (Del. 2008). There is no contradiction between arguing in Maryland that Credit Suisse had a contract not to compete and arguing in Delaware that the contract conditioned CFG's covenant to provide underwriting and release prices on CFG providing the HUD financing. CFG did not induce the Maryland court to adopt a position inconsistent with a position advocated in this case, and the Maryland court made no ruling on the current issue. These factors make judicial estoppel unavailable. *Motorola Inc.*, 958 A.2d at 860; *La Grange Communities, LLC v. Cornell Glasgow, LLC*, 74 A.3d 653 (TABLE), 2013 WL 4816813, at *5 (Del.).

II. CFG'S FRAUD CLAIM.

A. The Trial Court Committed Legal Error In Ruling That Silva's Intent To Be Bound Only By A Written Agreement Was Not Fraudulent.

This Court reviews *de novo* the trial court's formulation and application of legal principles. *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011). Attempting to avoid *de novo* review, the answering brief misstates CFG's position by arguing CFG does "not dispute the promissory fraud legal standard used by the lower court." DAB, 27. On the contrary, the court's legal error on the intent element of promissory fraud constitutes the basis of CFG's argument for reversal. OB, 26-29.

The Opinion posed the issue whether Silva's "exploitation" of CFG, consisting of his promise of the HUD financing to CFG "all the while" believing the promise did not have to be performed because only a written contract bound him, qualified as fraud. Ex. A, 95 ("The question is whether this exploitation amounted to fraud."). The court answered, contrary to the law of promissory fraud, that Silva's intent was not fraudulent. Ex. A, 99; RESTATEMENT (SECOND) OF TORTS, § 530(1) (1977).

The answering brief also misstates the record regarding Silva's promise. DAB, 29-30, and n.7. The court's finding appears on page 78 of the Opinion. It begins: "At trial, Silva testified he reached an understanding with Dwyer that CFG

would be awarded the HUD financing – all things being equal." A78, and AR2; AR5 – AR6. The answering brief stops with that sentence and argues the court just recited the evidence but made no finding. DAB, 30 and n.7. But the court wrote more in the same paragraph: (a) "More likely than not, Silva did not expressly communicate that condition ["all things being equal"] to Dwyer;" (b) "Silva believed that a contract could not be formed without a written agreement;" and (c) "more likely than not, Silva knowingly took advantage of Dwyer's efforts." Ex. A, 78 Reading the entire paragraph, rather than just the first sentence, makes it clear the court found Silva made an unequivocal, unconditional promise that CFG had the HUD financing.[4]

The answering brief cites the court's language, "Silva tentatively promised to obtain HUD financing through CFG." DAB, 28, 29, and 30; Ex A, 99. The word "tentatively" describes Silva's culpable state of mind when communicating the promise to Dwyer. The court's findings quoted in the previous paragraph show that objectively Silva and Dwyer reached an understanding, without condition, that CFG had the HUD financing. Ex. A, 78. Subjectively for Silva the promise remained tentative, as no written contract for HUD financing existed. Without that written contract, Silva felt he could renege or renegotiate. Ex. A, 95 ("…all the

[4] The answering brief cites to Dwyer's testimony that it was Grunstein and Lerner, "not Silva and the other Appellees," who "initially" agreed CFG would complete the HUD financing. DAB, 29, citing B159-60. Dwyer also testified Silva joined the agreement later so that all four agreed CFG had been retained. AR12.

while believing he had the option to renege or renegotiate the agreements or understandings that he had made"). This constituted a promise made without the present intent to perform. RESTATEMENT (SECOND) OF TORTS, § 530(1). Alternatively the court may have referred to the promise as tentative in the sense not sufficient to form a contract. *Leeds v. First Allied Connecticut Corp*., 521 A.2d 1095, 1102 (Del. Ch.) ("provisional and tentative" agreements reached during negotiations not enforceable *ex contractu*); DAB, 28-29, 30, n.6.[5] The finding no contract came into being is not challenged on this appeal. The issue on appeal concerns enforcement of Silva's promise *ex delicto*, not *ex contractu*. No contract is required.

Finally, there is no issue under *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063 (Del. Ch.). Tracking *Winner*, the answering brief cites Silva's initial lack of knowledge of HUD financing, concerns he developed about HUD financing as the acquisition process progressed, and his having HUD financing under consideration in May 2006 after the transaction closed. Ex. A, 99. Silva "was inexperienced with HUD financing and could not have formed at the outset a definitive position as to whether to pursue that course." *Id*. "Thus, Silva never had the intention not to perform his promise when he made

[5] The answering brief tries to explain Silva's state of mind as consistent with case law expressing skepticism of complicated transactions made by oral agreements. DAB, 30 n.6. The explanation is hollow. Silva's testimony drew a distinction between an "understanding in discussions" which Silva considered nonbinding and written agreements which Silva considered binding. B152.

it." *Id*. Silva's intent was fraudulent whether or not he changed his mind about HUD financing. When Silva promised the HUD financing to CFG he did not intend to perform his oral understanding but instead intended to be bound only by a written contract if made later. Silva's intent not to be bound by his oral understanding never changed. When, after the closing, Silva refused to have CFG proceed with HUD financing, there being no written contract, he acted on the same intent as it had existed unchanged since the day he made his promise. The principle stated in *Winner* and the court's language about changes in Silva's views on HUD financing therefore do not apply.

B. Substantive Differences Between Justifiable Reliance For Promissory Fraud And Reasonable Reliance For Promissory Estoppel Require Separate Findings. In Conflating The Two In A Single Finding The Trial Court Committed Legal Error.

Substantive differences exist between the "reliance" elements of promissory fraud and promissory estoppel based on substantive differences in the claims. Promissory fraud protects the promisee from the promisor's "intentional perversion of the truth" through misrepresentation. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1208 n.16 (Del. 1993). Section 544 of the Restatement (Second) of Torts sets forth a specific test for justifiable reliance for promissory fraud. *Id*., § 544; OB, pp. 30-31 (materiality of the promise and promisee's reasons to believe the promise would be carried out). Promissory estoppel is different. It protects the promisee only as necessary to

prevent injustice despite the promisee's failure to make a contract with the promisor. *Lord v. Souter*, 748 A.2d 393, 398 (Del. 2000). *Ramone v. Lang*, 2006 WL 905347, at *14 (Del. Ch.). Reasonable reliance for promissory estoppel requires proof "the promisee reasonably relied on the promise and took action to his detriment." *SIGA Technologies, Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 348 (Del. 2013).

The court's findings on the reliance element of promissory estoppel did not address the factors specified in Section 544, *supra*, for the reliance element of promissory fraud. CFG's opening brief compared the promissory estoppel findings to the test for reliance for promissory fraud under Section 544. OB, 31-32. The comparison showed the court decided none of the factors under Section 544, particularly materiality and CFG's reasons to believe Silva would perform his promise, in its promissory estoppel discussion. *Id*. The answering brief made no comparison of its own, but merely repeated what the court found on promissory estoppel. DAB, 33. The opening brief also showed the court in other parts of its decision made findings in CFG's favor on the factors under Section 544. OB, 32-33. Again, the answering brief offered no analysis of its own.

Against these arguments the answering brief offers little more than a string of cases holding the reliance element of promissory fraud may be expressed as either "reasonable reliance" or "justifiable reliance." DAB, 31-32, citing *Reserves*

Dev. LLC v. Chrystal Props., LLC, 986 A.2d 362, 368 (Del. 2009) ("claim for misrepresentation"); *Haase v. Grant*, 2008 WL 372471, at *2 n.16 (Del. Ch.) ("elements of common law fraud"); *Vichi v. Koninklijke Philips Electronics, N.V.*, 85 A.3d 725, 777 (Del. Ch.) ("a valid deceit claim"); and *Debakey Corp. v. Raytheon Service Co*., 2000 WL 1273317, at *22, *25 (Del. Ch.) ("fraudulent inducement claim").

Silva cites only one case discussing a fraud claim and promissory estoppel together. *Black Horse Capital, L.P. v. Xstelos Holdings, Inc.*, 2014 WL 5025926, at **21-22 (Del. Ch.). The case involved fraudulent inducement, not promissory fraud subject to Section 544. *Id*., at *21. The court held an integration clause barred claims for fraudulent inducement and promissory estoppel. The case did not hold the reliance elements for the two claims were substantively the same. *Id*., at **21-22. The integration clause negated both reliance elements notwithstanding their substantive differences. *Id.*[6]

Silva does not dispute the substantive differences in the reliance elements of

[6] The answering brief cites a footnote in a Connecticut trial court opinion for the proposition the reliance elements of promissory fraud and promissory estoppel differ only as to the "perspective" of the promisee or promisor. DAB, 32-33, citing *Omega Engineering, Inc. v. Eastman Kodak Company*, 908 F.Supp. 1084, 1097 n.13 (D. Conn. 1995). The case offers no guidance here. The court's footnote was *dicta*. *Id*. ("only difference … *seems to be* the perspective from which reasonableness is judged") (emphasis added). Regardless, under Delaware law, promissory estoppel assesses reasonableness from the perspectives of the promisor ("reasonable expectation of the promisor to induce action") *and* the promisee ("the promisee reasonably relied") in two different elements. *SIGA Technologies, Inc., supra,* 67 A.3d at 348. The court in *Omega Engineering* did not mention the perspective involving the promisee's reliance in its footnote, and thus could not and did not opine that the promisee's reliance was the same for promissory estoppel and promissory fraud.

promissory estoppel and promissory fraud. None of Silva's cases go beyond the semantic difference in describing the reliance element of fraud – call it either reasonable reliance or justifiable reliance. The court's round-pegged promissory estoppel findings could not be used to fill the square-holed promissory fraud reliance element governed by Section 544. The court's attempt to fit the former into the latter constituted legal error requiring reversal.

Likewise, there is no merit to Silva's argument that CFG failed to preserve the issue by not raising it below. DAB, 31. CFG addressed the promissory fraud and promissory estoppel claims, including their separate reliance elements, in separate sections of its post-trial brief. *See* Plaintiffs' Opening Post-Trial Brief, p. 82 ("reasonable reliance" for promissory fraud) and p. 106 ("justifiable reliance" for promissory fraud citing Section 544). CFG had no reason to anticipate the trial court would conflate the reliance elements of the two claims and therefore no reason (much less a duty) to address the substantive differences in more detail in the post-trial brief.

Equally without merit is Silva's argument that the trial court applied different standards of proof. DAB, 33-34. True, the court's decision recites the "clear and convincing" standard for promissory estoppel and the "preponderance" standard for CFG's other claims. *Id.*, Ex. A, 41, 83-84. The decision therefore shows the trial court decided the reliance element of promissory estoppel under the

"clear and convincing" standard. *Id*., 83-84. When later in the Opinion the court decided the reliance element of promissory fraud "as discussed during consideration of [CFG's] promissory estoppel claim," the court imported the clear and convincing standard for promissory estoppel into the fraud claim governed by the "preponderance" standard. Ex. A, 99. Nothing in the court's decision indicates the court used the same evidence on the fraud claim but reconsidered it under the lower burden of proof.

CONCLUSION

Jack Dwyer and Capital Funding Group, Inc., submit the decision and judgment below should be reversed and vacated on the unjust enrichment and fraud claims. The cause should be remanded to the Court of Chancery with directions to determine the award and relief to which Dwyer and CFG are entitled.

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: January 21, 2015
1177531

CERTIFICATE OF SERVICE

I, Arthur L. Dent, hereby certify that on January 21, 2015, 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)

1177531