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Case Number 569,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Plaintiff Grunstein[1] submits this reply brief in support of his appeal from the dismissal of his claim for unjust enrichment. As demonstrated below, defendants' opposing brief: (i) sets forth an incorrect standard of review; (ii) states erroneously that Grunstein did not preserve certain issues for appeal (particularly with respect to defendant Silva's *requests* of Grunstein to work on the Beverly transaction); (iii) mischaracterizes and/or misrepresents the findings and conclusions in the Opinion below, and in the prior decisions of the Court of Chancery in this case and in the *Metcap* case; and (iv) ignores completely critical facts decided below (*e.g.*, [a] the "understanding" between Grunstein and Silva to share the benefits of Beverly [Opinion at 90]; [b] their "agreement" to change Grunstein's interest in the transaction from a "direct interest" to an "indirect one" [*id.* at 32]; [c] Silva's "exploitation" of Grunstein and the facts that Silva was "content to lead Grunstein … along because he needed him" and "appears to have taken advantage of Grunstein" [*id.* at 95, 88]), as well as the applicable law. Finally, as demonstrated below, defendants' attempt to defend the trial court's judgment based on Grunstein's failure to prove causation and damages and on *res judicata* principles should be rejected.

[1] Capitalized terms not defined herein have the definitions set forth in Grunstein's Opening Brief ("GOB").

ARGUMENT

I. Defendants Mischaracterize The Standard of Review

As stated clearly in his Opening Brief, Grunstein relies solely on the facts as found by the Court of Chancery, the evidence upon which that Court relied and cited in finding those facts, and Silva's admissions – in other words, the undisputed facts. (GOB at 5). Accordingly, even though the Court of Chancery articulated the elements of an unjust enrichment claim correctly (Opinion at 89), the standard of review in determining whether the Court properly applied the law to the undisputed facts is *de novo* review. *See, e.g., McCoy v. State*, 89 A. 3d 477 (Del. 2014) ("The formulation *and application* of legal concepts to undisputed facts is reviewed *de novo*."); *Reddy v. MBKS Co.*, 945 A. 2d 1080, 1085 (Del. 2008).[2]

In arguing for the applicability of a "clearly erroneous" standard of review, defendants claim that Grunstein's "intent" in providing his services was a "finding of fact for which de novo review is not appropriate on appeal." (DAB at 2). As defendants point out, the Court of Chancery did find that Grunstein "acted in his own self-interest … with the hope" that he and Silva "would finalize an agreement." (Opinion at 90-91). Grunstein, however, does not seek to reverse that finding, since that finding is not inconsistent with an intention and expectation to be paid for his

[2] Significantly, defendants urge a *de novo* review of the Court of Chancery's *application* of the correctly formulated and articulated elements of *res judicata*. (*See* Defendants'-Appellees' Answering Brief on Appeal of Leonard Grunstein ["DAB"], at 30.

services, regardless of whether he was successful in reaching a final agreement with Silva. Rather, that finding is perfectly consistent with Grunstein's contention that he did not act officiously. (Significantly, the Court did *not* find that Grunstein *did not* intend to be paid if he was unsuccessful in negotiating an agreement with Silva. Had the lower court made such a finding, Grunstein's intent would have been an issue on appeal.) Accordingly, since Grunstein does not seek to overturn any findings with respect to his "intent" or "motive," the correctness of the Court of Chancery's application of the law to the undisputed facts requires *de novo* review.

Finally, even assuming *arguendo* that the determination by the Court of Chancery that Grunstein acted "officiously" was actually a finding of fact, reversal of the decision and judgment below is still mandated. For the reasons discussed in Grunstein's Opening Brief and in this Reply Brief, that determination, to the extent it was factual in nature, was "clearly erroneous" and/or "not the product of a logical and deductive reasoning process."

II. Grunstein Acted in Response To Silva's Requests

Defendants make several arguments in an effort to refute the undisputed fact that, once Silva entered the picture, Grunstein did substantial work concerning Beverly at Silva's express and implied requests, thereby precluding a finding that he acted officiously. *See Restatement (First) of Restitution*, § 112. As shown below, and contrary to defendants' claims: (i) the Court of Chancery expressly found that

Grunstein acted in response to Silva's requests and/or authorizations; (ii) Grunstein preserved the issue of requests for appeal; (iii) Grunstein's contentions regarding the issue of requests do not violate the Court's discovery order in this case; and (iv) Grunstein's argument concerning Silva's requests is not precluded by, or inconsistent with, the Court of Chancery's decision in the *Metcap* case.

1. The Court of Chancery "Found" That Grunstein Acted at Silva's Request

Defendants claim that "Grunstein inaccurately asserts that the Court below 'found' that Grunstein acted because of Silva's 'requests' (GOB at 25), when the court found precisely the opposite." (DAB at 21). However, the language used by the Court of Chancery, in the section of the opinion entitled "post-trial findings of fact" (Opinion at 7), could not have been clearer:

> Grunstein testified [and Silva admitted (*see* GOB at 12 n.5)] that *at Silva's request* he worked to diffuse the opposition [to the Beverly merger].

(*Id*. at 25) (emphasis added).

> Indeed, just before the closing of the transaction, *Silva sought Grunstein's help* in resolving an emergency caused by the change in the transaction's structure. Not only did Grunstein get involved, but he offered a solution to the problem which was ultimately utilized.

(*Id.* at 34) (emphasis added). In addition to the two findings of express requests by Silva, the Court of Chancery also made findings of implied requests by Silva, although it did not use the words "request." (*See* GOB at 8, 9, 10, 11, 16 and 25).[3]

Defendants apparently contend that Grunstein did not act "because" of Silva's requests, based on the trial Court's finding that Grunstein acted in his "own self interest" and that he "volunteered to push the transaction forward." (DAB at 21-22). However, Grunstein's "self-interest" is perfectly consistent with a desire and intention that he be paid for his services. While the Court below found that Grunstein gambled that he could negotiate a written agreement with Silva, it did not find that Grunstein "volunteered" to do the work for nothing. Accordingly, if, as was the case here, Grunstein did work when Silva requested it, he did not act "officiously."

Defendants also argue that the Court found the "opposite" of the fact that Grunstein acted at Silva's request, because "the Court has not found that Grunstein acted at Silva's insistence." (DAB at 21-22). However, the Court's use of the

[3] In listing Silva's express and implied requests (DAB at 24), defendants omit Silva's implied request that Grunstein negotiate the second amendment to the merger agreement. (GOB at 11). Moreover, defendants inaccurately characterize three of these requests ("first second and fourth items" [Silva's "green light email," Silva's "tacit consent" to Grunstein's submission of the bid which resulted in the first amendment, and Silva's email stating "I am interested in your counsel" [*see* GOB at 9, 10 and 16]), as mere "expressions of interest" by Silva "in proceeding with the Beverly transaction." (DAB at 25). However, the Court of Chancery expressly rejected Silva's testimony that the "green light" email of August 2, 2005 was merely an expression of interest. (Opinion at 13-14). *A fortiori*, Silva's subsequent "tacit consent" to Grunstein's submission of the higher bid, which led to the first amendment (*id.* at 19), and his December 2005 email stating that "I am interested in your counsel," could not have been "mere expressions of interest" either.

word "insistence" after the Court had already expressly found that Grunstein did work in response to Silva's "requests," only underscores Grunstein's contention (GOB at 25-26) that "request" and "insistence" are not the same; and that contrary to defendants' argument (DAB at 22), they are not "interchangeable." The fact that Grunstein performed services in response to Silva's "requests" is perfectly consistent with the fact that he did not act at Silva's "insistence." "Insistence" is more akin to a "demand" than to a "request," and Grunstein's point is that no court has ever found "insistence" (as opposed to a "request") to be necessary to establish unjust enrichment.

2. Grunstein's Argument Based on Silva's Requests Was Preserved Below

Apparently recognizing that the Court of Chancery did find that Grunstein acted at Silva's requests, defendants next claim erroneously that Grunstein did not preserve this issue below. (*See* DAB at 4, 19-20). Indeed, defendants' statement that "Grunstein's opening post trial brief failed to describe any particular request by Silva for Grunstein's services" (DAB at 20), is demonstrably false. Page 35 of Plaintiffs' Opening Post-Trial Brief (C14) stated: "Silva asked Grunstein to help address the opposition [to the Beverly acquisition in Arkansas] which Grunstein did. Grunstein hired and coordinated . . . ." At page 40 of the same brief (C19), plaintiffs stated: "just prior to the closing . . . Silva asked Grunstein to get involved

in an emergency … which threatened to derail the transaction. Grunstein offered a novel solution … which was accepted and the transaction closed."

Moreover, at page 87, note 43, of the same brief (C20), plaintiffs stated that defendants made "continuous requests" of Grunstein, referring back to pages 12-13 of that brief, which specifically described (at page 12) to Silva's "green light" email of August 2. (C12-13). Page 41 of Plaintiffs' Post-Trial Reply Brief stated: "Grunstein did substantial work and made important contributions *after* the Third Amendment at the request of Silva." (C31). Finally, at the post-trial oral argument, counsel for Grunstein stated that "virtually everything he [Grunstein] did after Mr. Silva came into the picture was done at Mr. Silva's request." (B437).[4] At pages 12 and 38 of the transcript of the post-trial argument, Grunstein's counsel again referred to requests by Silva. (C34, 38).

3. Grunstein's Argument Regarding Requests is Not Contrary to the Discovery Order

Defendants' claim that plaintiff Grunstein's request argument is "contrary" to the Chancery Court's prior discovery ruling (DAB at 3) is a gross mischaracterization of that ruling. First, in that ruling, the Court of Chancery expressly stated that "[t]his holding does not limit Grunstein's ability to offer testimonial evidence." *Grunstein v. Silva*, 2012 WL 3870529, *1 (Del. Ch.). *All of*

[4] Defendants refer to this statement as a "non-specific passing reference." (DAB at 20). However, counsel gave "specific" examples of work done by Grunstein at Silva's request. (B437).

the evidence regarding Grunstein's work at Silva's request in connection with diffusing opposition to the merger in Arkansas and in solving a last minute emergency which threatened to derail the closing consisted of testimonial evidence (Opinion at 25, 34).

Second, in that earlier discovery ruling, the Court of Chancery held that any documentary evidence not disclosed by September 14, 2012, "may not be offered as evidence by Grunstein at trial." *Grunstein v. Silva*, 2012 WL 3870529, at *1. To the extent that Grunstein's other examples of Silva's requests are based on documentary evidence, Grunstein clearly complied with the discovery order, since the Court of Chancery considered and relied on those documents in making the finding of implied requests which were based on those documents. If Grunstein had violated the Court of Chancery's order, it would not have considered the evidence upon which it eventually relied. Moreover, defendants have not cited to any objections they made to the introduction of those documents.

4. Defendants Mischaracterize the Holding in the *Metcap* Case

In a further attempt to blunt the powerful impact of Silva's requests for Grunstein's assistance, defendants have mishcaracterized the holding in the *Metcap* case by claiming that the Court of Chancery there "recognized" that "during the period prior to November 21, 2005 when the Third Amendment was signed Grunstein acted for the benefit of NASC/Metcap and not for Appellees," and "any

work done by Metcap or its owners prior to the Third Amendment was done for the benefit of NASC." (DAB at 25-26). While the opinion in *Metcap* cited by defendants does refer to work done by Metcap in connection with the Beverly acquisition, the opinion does *not* state that Grunstein did the work on behalf of Metcap. *Metcap Securities LLC v. Pearl Senior Care*, 2007 WL 1498989 (Del. Ch.). Indeed, a subsequent decision in the *Metcap* litigation makes it clear that Metcap's work on the Beverly transaction was done by its "sole employee [Murray] Forman." *Metcap Securities LLC v. Pearl Senior*, 2009 WL 513756, *2,*8 (Del. Ch.). The Court of Chancery concurred with that finding in this case, stating: "importantly, the relief sought in *Metcap* was based on work performed by Forman" and not by Grunstein. (Opinion at 110).

Furthermore, and once more contrary to defendants' argument (DAB at 12, 23), the Court of Chancery never *held* that Grunstein was in "privity" with Metcap. (Opinion at 108). The issue of privity was never decided. Accordingly, defendants' claim (DAB at 25-26), that the *Metcap* decisions preclude Grunstein from claiming the benefit of Silva's requests made to him before the Third Amendment, are without merit.

III. The Court of Chancery Erred in Dismissing Grunstein's Claim for Unjust Enrichment

As discussed in detail in Grunstein's Opening Brief, the law as applied to the undisputed facts demonstrates that Grunstein had proven his claim for unjust

enrichment, and that the Court of Chancery erred is dismissing that claim. (GOB at 20-30). Defendants' arguments with respect to Silva's requests have already been discussed, and rebutted, earlier. However, defendants have ignored other critical facts and, instead, they have raised prejudicial and irrelevant matters.

For example, the defendants do not attempt to deal with, and do not mention, the following significant facts found by the Court, all of which are highly relevant and support Grunstein's contention that he did not act officiously:

a. Silva admitted to "an oral understanding with Mr. Grunstein that he would share in whatever you [*i.e.*, Silva] or your companies received out of the Beverly transaction" (Tr. 118:6-10 (A135); Opinion at 67);

b. Silva and Grunstein agreed to change Grunstein's direct interest in the transaction to an indirect one (*id.* at 32);

c. "Silva admitted to an understanding to share the carried interest equally with Grunstein" (*id.* at 64);

d. Grunstein received two emails in late December from his partner Brink Dickerson, stating that Silva had confirmed Grunstein's economic interest in the transaction (*id.* at 65-66; A225, A226); and Silva confirmed that he had told Dickerson at the time of the emails that "Grunstein had a 50% interest in the carried interest" (Tr. 133:17-18 (A136); Opinion at 66 n.223);

e. Silva and Grunstein continued to discuss Grunstein's economic interest in the transaction through closing (*id.* at 36); at no time prior to closing did Silva ever deny Grunstein's carried interest (*id.* at 64); and contrary to Silva's testimony, Grunstein never withdrew from the transaction (*id.* at 74, n. 236);

f. The Court of Chancery found that Silva "exploit[ed]" Grunstein, and was content to "lead" him "along" because he "needed" him and "took advantage" of him (*id.* at 88, 95).

Clearly, Grunstein intended to be paid for his services. The Court of Chancery never found that Grunstein ever intended to work for free, or that Silva believed that Grunstein intended to work for free, even if Grunstein were unsuccessful in reaching a final agreement with Silva. The lower Court's findings that Grunstein "acted in his own self-interest"; and that "he and Silva had not completed their negotiations and thus he gambled that he would be able to do so as the transaction progressed" (Opinion at 90-91) -- findings that Grunstein does not dispute on appeal -- do not mean that Grunstein was willing to work for nothing or that he acted officiously.

Defendants obfuscate the true issues on this appeal, by introducing two irrelevant and prejudicial arguments. First, defendants argue that the "determinations of Grunstein's credibility, particularly in light of his admitted [misdemeanor] perjury [plea] . . . must be affirmed on appeal." (DAB at 4). However, as stated in his Opening Brief (GOB at 5), Grunstein does not rely on his own credibility on this

appeal, but only on the facts as found by the Court of Chancery, and on Silva's admissions.

Second, defendants note that they paid Grunstein's firm more than $10 million in fees and costs, including approximately $500,000 for Grunstein's legal time, in connection with Beverly. (DAB at 25 n.1). However, the benefits and/or carried interest that Grunstein and Silva had an agreement and/or understanding to share, as set forth above, were clearly in addition to any fee that Grunstein's firm was to receive. In fact, Silva objected to paying Troutman for Grunstein's legal time from the very outset, precisely because Grunstein had an economic interest in the transaction. (A225-226; Tr. [Silva] 129:8-16; 131:12-133:3 [C2, 4-6]; and the engagement letters sent by Troutman to Silva, including the final version signed by Troutman, contained a provision that Silva would not be charged for Grunstein's time (Tr. [Silva] 130:3–131:4 [C3-4]; JX608 at 3 [C44].[5] Finally, the Court rejected Silva's testimony that Grunstein withdrew from the transaction in order to make sure that Troutman was paid. (Tr. [Silva] 166:5-15 [C7]; Opinion at 74 n.236).

As for the applicable law, defendants completely ignore *Reserve Development LLC v. Severn Savings Bank*, 2007 WL 4054231 at *1 (Del. Ch.), *aff'd,* 961 A.2d 521 (Del. 2007), where an unjust enrichment judgment was rendered in favor of a

[5] There was no evidence as to why defendants paid Troutman for Grunstein's time even though Troutman had agreed that they did not have to do so.

plaintiff, which demonstrated that some of its actions were taken "with at least the implicit authorization" of the defendants.

Grunstein cited *Pharmathene, Inc. v. Siga Techs, Inc.*, 2011 WL 4390726 (Del. Ch.), in the Court of Chancery numerous times throughout his Opening Post-Trial Brief. (C11). There is no requirement that the portions of that decision quoted in Grunstein's Opening Brief on appel must have been quoted below, since Grunstein's argument regarding unjust enrichment was preserved. (*See* GOB at 20; DAB at 27). In *Pharmathene,* the Court of Chancery did state that the relief sought pursuant to the unjust enrichment claim was "subsumed" by the promissory estoppel claim. However, that Court's finding that plaintiff did not act officiously, based on facts far less compelling than those found by the Court of Chancery here, is persuasive and weighs heavily in favor of a similar result in this case. That finding was not based on "written agreements" or "term sheets," none of which were mentioned in that portion of the *Pharmathene* Court's opinion dealing with unjust enrichment. (DAB at 27-28).

Citing the *Restatement (Third) of Restitution and Unjust Enrichment,* § 9, comment f. and Illustration 20 (and the Alabama case which was the basis of that illustration), Grunstein argued that, at the very least, Silva was certainly aware that Grunstein was operating under the mistaken belief that there was an agreement. Nevertheless, Silva worked side by side with Grunstein for seven months, during

which he repeatedly requested Grunstein to do work and benefitted from it. (GOB at 29). (This argument was preserved below and these authorities were furnished to the Court of Chancery. (C32, 35-37).

Contrary to defendants' contention, the Court did not "conclude as a matter of fact that Grunstein was under no mistaken belief." (DAB at 28). While the Court of Chancery did find that it "was *unreasonable* for Grunstein to accept Silva's consent, over time, to general terms, as assent to carry on a business for profit" (Opinion at 73) (a finding that related to the partnership claim only), the Court did not find that Grunstein did not *believe* that he would receive something for his work. On the contrary, and as the Court found, Grunstein believed he would be paid for his efforts, and Grunstein confirmed that belief as late as March 6, 2006, eight days before the closing. (JX613 at FCPEO198980 (C53); Opinion at 36).

Finally, defendants fail to address Grunstein's argument that the Court of Chancery's reasoning would effectively preclude unjust enrichment claims any time the parties attempted to negotiate a firm agreement, regardless of whether they succeeded or failed in that attempt. (GOB at 27-28).

IV. Grunstein Proved Causation and Damages

Defendants erroneously assert that "Grunstein proffered no proof of the quantum of the supposed 'enrichment' enjoyed by Appellees as a result of his work" (DAB at 29). In fact, this proof was summarized in detail at pages 110-118 of

Plaintiffs' Opening Post-Trial Brief (C21-29). (*See also* Post-Trial Arg. Tr. at 41 [C39]). Since the Court of Chancery never reached the issue of damages – although it observed that "Mr. Silva gained great benefit" (Post-Trial Arg. Tr. at 123 [C40]) – there was no reason for Grunstein to cite these pages in his Opening Brief on appeal.

Furthermore, although defendants' sub-heading (DAB at 28) states that Grunstein "failed to prove . . . causation," defendants did not discuss this argument. In any event, the Opinion below is replete with examples of the work done by Grunstein that moved the transaction "forward," thereby demonstrating the benefits received by defendants from Grunstein's work. (Opinion at 67).

Finally, defendants cite twice to the trial testimony of Mr. Bavis, whom they describe as "Grunstein's expert witness." (DAB at 29). However, as defendants know very well, Mr. Bavis was the damage expert witness for plaintiffs Dwyer and Capital Funding *only* (Plaintiff's Opening Post-Trial Brief at 118 [C29]; Tr. 1777 [C9])!

V. ***Res Judicata*** **Does Not Bar Grunstein's Claim**

Defendants' argument for the applicability of *res judicata* begins with the contention that the Court of Chancery determined that "Appellees could not have reasonably believed that the *Metcap* litigation resolved Grunstein's individual claims because of 'significant differences' between the theories and remedies of the two litigations" (*i.e.*, *Metcap* and this action). (DAB at 13). However, the truth is that

the Court held that "Silva could not have reasonably believed that the *Metcap* litigation would have resolved Grunstein's 'individual claims, because in letters sent by Grunstein in March 2006' Silva received an explicit admonition that Grunstein might pursue his personal claims." (Opinion at 111).

The "significant differences" between the theories and remedies in the two cases referred to by the Court of Chancery was only one of the factors which led the Court to conclude that defendants could not show that Grunstein "neglected or failed to assert claims which in fairness should have been asserted in the first [*Metcap*] action." (Opinion 109). Aside from the fact that, as the Court of Chancery explained in detail, the "two actions differ dramatically" (*id.* at 109-10), other factors upon which the Court relied in rejecting the applicability of *res judicata* were that *Metcap* "was based on work by Forman" (*id.* at 110) (contrary to defendants' contention that *Metcap* was based on Grunstein's work [DAB at 13, 25-26]), and that plaintiff Dwyer was not ready to sue when *Metcap* commenced its action. (Opinion at 111-12).

Defendants' claim that "at most Delaware case law supports a 'fairness' check on the 'same transaction' analysis test only when it is *impossible* to bring the second action claims in the first action" (DAB at 33), misstates the law, and was expressly rejected by the Court of Chancery. Quoting from this Court's decision in *La Point v. Amerisource Bergen Corp.*, 970 A.2d 185, 193-194 (Del. 2009), the Court of

Chancery held: "Even if the same transaction formed the basis for both the present and former suits, the Defendants must show that Grunstein 'neglected or failed to assert claims which in fairness should have been asserted in the first action'" (Opinion at 105):

> The Defendants argue that there is no independent "fairness" inquiry under Delaware's res judicata law except to the extent that it was impossible for the plaintiff in the second action to assert the claims in the first action, such as when the claims were not ripe [citation omitted] or when the court in the first action lacked jurisdiction in the second action . . . . The Court disagrees. The fairness test is not so limited. If the fairness inquiry only involved whether the claims could have been brought (i.e., whether it was possible), the Delaware Supreme Court would not have repeatedly expressed the fairness test as to whether the claims, in fairness, *should have* been brought.

(Opinion at 105 n.319) (emphasis in original). The Court of Chancery's holding that defendants failed to meet their burden under the "fairness" test was correct, and *res judicata* is therefore not an alternative ground for affirming the judgment dismissing Grunstein's claim for unjust enrichment.

CONCLUSION

At the oral argument after trial, the Court of Chancery stated:

> "But Mr. Silva gained great benefit. Mr. Grunstein in particular . . . did a lot of work on this. And . . . [he doesn't] have much to show for it, and that strikes me as fundamentally unfair."

(Post-Trial Arg. Tr. at 123 (C40)). Notwithstanding this accurate observation, Grunstein respectfully submits that the Court of Chancery misapplied the law in dismissing Grunstein's claim of unjust enrichment. Accordingly, Grunstein respectfully requests that that decision and judgment should be reversed.

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Dated: December 23, 2014

CERTIFICATE OF SERVICE

Kurt M. Heyman, Esquire, hereby certifies that on December 23, 2014, copies of the foregoing Appellant's Reply Brief were served electronically on the parties listed below as follows:

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