IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEONARD GRUNSTEIN, JACK DWYER, and CAPITAL FUNDING GROUP, INC.,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 3932-VCN**
RONALD E. SILVA; PEARL SENIOR CARE, LLC; PSC SUB, LLC; GEARY PROPERTY HOLDINGS, LLC; FILLMORE CAPITAL PARTNERS, LLC; FILLMORE STRATEGIC INVESTORS, L.L.C.; DRUMM INVESTORS LLC; and FILLMORE STRATEGIC MANAGEMENT, LLC,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: October 21, 2010
Date Submitted: January 31, 2011

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NOBLE, Vice Chancellor

I. INTRODUCTION

In this action, the plaintiffs seek damages, imposition of a constructive trust, and an accounting in connection with the breach of an alleged oral partnership agreement to carry out the $2.2 billion acquisition of a company providing healthcare to the elderly. The original merger agreement governing the acquisition was negotiated mainly by one of the alleged partners and signed on behalf of entities created by him. The merger agreement was eventually amended, however, to assign the rights of those entities to entities created by one of the other alleged partners. That partner has disclaimed the existence of an oral agreement governing the allocation of the benefits of the acquisition, and he has also disclaimed any obligation to another alleged former partner who advances a claim under an alleged contract to provide financing for the properties acquired in the transaction in lieu of a claim for an equal share in the alleged partnership.

This memorandum opinion addresses the defendants' motion for summary judgment and the plaintiffs' motion to strike certain exhibits attached to the defendants' motion.

II. BACKGROUND

A. *The Parties*

The Plaintiffs are Leonard Grunstein ("Grunstein"), Jack Dwyer ("Dwyer"), and Capital Funding Group, Inc. ("CFG"), a corporation owned by Dwyer.

Defendant Ronald E. Silva ("Silva") controls Defendant Fillmore Capital Partners, LLC ("Fillmore")[1] and is alleged to control Defendants Pearl Senior Care, LLC ("Pearl"), PSC Sub, LLC ("PSC Sub"), and Geary Property Holdings, LLC ("Geary"), all of which are Delaware limited liability companies.[2] Silva formed Defendant Drumm Investors, LLC ("Drumm"), also a Delaware limited liability company.[3]

Defendant Fillmore Strategic Investors, L.L.C. ("FSI") is a Delaware limited liability company 99% owned by the Washington State Investment Board ("WSIB") and 1% owned by Defendant Fillmore Strategic Management, LLC ("FSM"), a Delaware limited liability company controlled by Silva and owned by Silva and his wife.[4] Silva allegedly controls FSI through FSM, which was and is the managing member of FSI.[5] FSI owns Pearl, PSC Sub, Geary and Drumm, and it is the managing member of Drumm.[6]

B. *The Facts*

The Court has addressed this acquisition effort previously.[7] The Court's summary of the facts here places the Plaintiffs' factual allegations regarding the

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[1] Answer ¶ 12.
[2] Amended Verified Complaint (the "Complaint" or "Compl.") ¶¶ 6-8, 12.
[3] Answer ¶ 10
[4] Compl. ¶ 9.
[5] *Id.* at ¶ 11.
[6] Answer ¶¶ 10, 13.
[7] *See Grunstein v. Silva,* 2009 WL 4698541, at *1-*4 (Del.Ch. Dec. 8, 2009). Those interested in gaining an even fuller understanding of the facts surrounding this transaction as a whole

existence of a partnership and a contract to provide HUD Insured Financing in the context of the evolution of the deal in which Beverly Enterprises, Inc. ("Beverly"), was eventually acquired by Pearl (the "Beverly Acquisition").

1. Formation of the alleged partnership

During January 2005, Grunstein, who had then recently completed a transaction to acquire Mariner Health Care, Inc ("Mariner"), and Dwyer, who had provided HUD Insured Financing to support the Mariner acquisition, allegedly formed a partnership to acquire Beverly, a large provider of healthcare and rehabilitative services to the elderly that owned approximately 345 nursing home facilities throughout the United States.[8]

Richard Lerner ("Lerner"), who had been involved with the Mariner transaction on behalf of Credit Suisse/First Boston ("Credit Suisse"), allegedly spoke with Grunstein and Dwyer about the possibility of acquiring Beverly throughout the first half of 2005.[9] Allegedly, and at Lerner's suggestion, Grunstein and Dwyer invited Silva to join the partnership in July or early August based on his

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should see *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *1-*3 (Del. Ch. May 16, 2007) ("*MetCap I*") and *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *1-*2 (Del. Ch. Feb. 27, 2009) ("*MetCap II*"), *aff'd*, 977 A.2d 899 (Del. 2009) (TABLE) (together, the "*MetCap* Litigation"). *See also Grunstein v. Silva*, No. 07 Civ. 3712 (RMB) (S.D.N.Y.); *MetCap Securities LLC v. Pearl Senior Care, Inc.*, No. 06 CV 2336 (S.D.N.Y.) (the "New York actions").

[8] Compl. ¶¶ 14-15; Grunstein Aff. ¶ 4.

[9] Dwyer Aff. ¶ 9; Compl. ¶ 15.

ability to bring institutional equity to the table.[10] Whether Grunstein, Dwyer, Lerner (on behalf of Credit Suisse), and Silva (or some of them) formed an oral partnership at that time for the purpose of acquiring Beverly is the central issue of these proceedings.

In his deposition, Grunstein testified that he met with Silva and Lerner in either Grunstein's or Lerner's office in July or August 2005, and that they may have called Dwyer during the meeting.[11] Plaintiffs' position is that at that meeting, Lerner, on behalf of Credit Suisse, and Silva entered Grunstein and Dwyer's partnership for the purpose of accomplishing the Beverly Acquisition.[12]

According to Grunstein, the agreement formed "a very simple partnership. Equal partners. Not that hard."[13] As he understood the agreement, they were partners in "whatever any of us got out of the deal,"[14] and it extended to any entity of any of the partners involved in the transaction.[15] Further, he testified that all

[10] Dwyer Aff. ¶ 9. Silva's company, Fillmore, had allegedly purchased some of the mezzanine loans involved in the Mariner transaction from Credit Suisse. Grunstein Aff. ¶ 9.
[11] Grunstein Dep. (Feb. 25, 2008) 108.
[12] *Id.* at 63, 108; Dwyer Dep. (Feb. 12, 2008) 23, 27.
[13] Grunstein Dep. 108.
[14] *Id.* at 94; *see also id.* at 91.
[15] *Id.* at 205-6. Thus, for example, Grunstein testified that the deal included real estate asset management and other fees Silva eventually in connection with the deal. *Id.* at 219. Legal fees paid to Grunstein's law firm, Troutman Sanders, for work on the transaction were not part of the deal, however: "I made that clear before. I reviewed all of the fees that were part of the understanding of the parties and legal fees were not among them." *Id.* at 206.

four would be equally responsible for the partnership's expenses if the deal fell apart.[16]

Grunstein also explained the roles each partner was to play in the partnership. Grunstein was responsible for the raising the financing for the partnership, which he had already accomplished as they discussed forming the partnership, and Silva was to secure institutional equity.[17] Grunstein's position is that initially he and Silva were to contribute equal amounts of cash to the deal, but that Silva later said Grunstein would not have to make such contributions. Lerner testified that Grunstein's role would also be to "run the transaction from a strategy point of view the way he did the Mariner transaction."[18] Otherwise, Silva told Grunstein to "sit back and relax, he [Silva] would take care of everything. Maybe from time to time he would call me to shepherd some of the legal that had to be done . . . . According to Ron, I should just sit back and collect checks."[19]

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[16] *Id.* at 313.

[17] *Id.* at 91. Originally, Rubin Schron ("Schron"), who had provided equity for the Mariner transaction, expressed interest in providing equity for the Beverly acquisition, but by August 2005 he had changed his mind and it became necessary to find another equity source. Grunstein Aff. ¶ 6. Grunstein emphasized that even if Silva was unable to secure the equity for the partnership, the two were still partners: ". . . I said to him, 'Ron, why are you concerned? We will succeed with this transaction and you will have a 25% interest if we did it all together and a 50% interest if it was just you and me." Grunstein Dep. 91.

[18] Lerner Dep. (Oct. 15, 2007) 29.

[19] Grunstein Dep. 279-80.

Dwyer's role was to arrange the HUD Insured Financing for the company that would acquire Beverly.[20] Dwyer testified that he was initially a full partner, but that he had the option to convert his partnership interest to a fee arrangement if, as allegedly agreed, Dwyer and CFG actually provided the HUD financing for the transaction.[21] According to Dwyer, this was required because HUD rules do not allow one to be on both the lender and ownership sides of a transaction.[22] Dwyer alleges that he negotiated the compensation he would receive for his service in lieu of his partnership share—2.5% of the amount of HUD financing ultimately provided—with Grunstein and Lerner, and possibly Silva, early in the transaction, and that Silva specifically agreed to the terms well before October 13, 2005.[23] In addition, Dwyer testified that he was entitled under the partnership agreement to a "Pre-paid Fee" as an advance on his fee for providing HUD Insured Financing and as consideration for a loan to the partnership.[24] The Pre-Paid Fee could be either $10 million or $3.5 million, depending on the amount he lent, and Dwyer understood that the fee would have to be paid even if CFG did not ultimately provide HUD Insured Financing for the partnership.[25] Dwyer testified that

[20] *Id.* at 100; Grunstein Aff. ¶ 10.
[21] Dwyer Dep. 37.
[22] *Id.* at 10.
[23] Dwyer Aff. ¶ 10.
[24] *Id.* at ¶ 21.
[25] Dwyer Dep. 33, 134.

eventually he came to understand, "since I was responsible for 3.5 million, that that was the amount."[26]

Credit Suisse was to supply a bridge loan for the transaction.[27] Grunstein testified that, like Dwyer, Credit Suisse had the option to convert its partnership interest into a fee arrangement,[28] and alleges that Lerner made this election on behalf of Credit Suisse almost immediately after the partnership was formed.[29] Grunstein alleges that Credit Suisse did receive its agreed-upon fee and, therefore, "never reverted to an equal partnership arrangement."[30]

In their Complaint, Plaintiffs alleged the terms of their oral partnership agreement as follows: (1) the equity and benefits of the Beverly Acquisition would belong equally to Grunstein, Dwyer, and Silva; (2) the transaction would be carried out to maximize their joint equity and benefits; (3) the transaction would be structured and the business operated in accordance with the model Grunstein had developed during the acquisition of Mariner, another chain of nursing homes (the "Mariner Model"); (4) Grunstein would be involved in the management of the enterprise; and (5) the acquirers would refinance the nursing facilities they acquired using HUD financing obtained from CFG, and would pay CFG a fee (the

[26] *Id.* at 132.
[27] *Id.* at 38.
[28] Grunstein Dep. 100-01.
[29] Grunstein Aff. ¶ 7(C).
[30] *Id.*

"Acquisition Fee," or "Pre-Paid Fee")[31] ultimately determined to be $3.5 million, to be paid regardless of whether CFG actually supplied HUD financing for the acquisition)[32] when the acquisition closed and also 2.5% of the amount ultimately financed by the company that acquired Beverly (against which the Acquisition Fee would be credited).[33]

2. The Merger Agreement and the First Amendment

Three special purpose entities, North American Senior Care, Inc. ("NASC"), NASC Acquisition Corp. ("NASC Acquisition"), and SBEV Property Holdings LLC ("SBEV") were created by Grunstein to facilitate the acquisition.[34] On August 16, 2005, these entities (together, the "Original Acquirers") entered an agreement with Beverly under which Beverly would be acquired for approximately $2.2 billion (the "Merger Agreement"). Under the Merger Agreement, the Original Acquirers had to provide Beverly with a $7 million deposit, and CFG supplied this amount.[35] Grunstein claims the Merger Agreement as a result of his negotiations and work.[36]

[31] Plaintiffs refer to the fee as an "Acquisition Fee" in the Complaint, but as a "Pre-Paid Fee" in their briefing and in certain portions of their depositions and affidavits.
[32] Compl. ¶ 29.
[33] *Id.* at ¶¶ 18, 27.
[34] *Id.* at ¶ 19.
[35] *Id.* Amounts advanced by CFG for this purpose are the "Deposit Loan."
[36] Grunstein Aff. ¶ 14.

After Beverly received a superior competing offer, the Original Acquirers agreed to an amendment of the Merger Agreement (the "First Amendment") under which they would supply a $53 million letter of credit and secure a $350 equity commitment letter by September 22, 2005.[37] Failure to meet the deadline would result in forfeiture of the $7 million deposit.[38]

Silva allegedly agreed, both orally and in writing, to raise the required equity. He and Fillmore approached potential investors PSP Investments ("PSP") and WSIB, entities with which Silva had previously dealt.[39] In his presentation to PSP and WSIB, Silva allegedly represented that the Beverly Acquisition would be structured according to Grunstein's Mariner Model and that the "same team that was instrumental in acquiring Mariner was also going to be involved in acquiring and managing Beverly."[40] Silva allegedly represented to PSP that Grunstein was a "partner" in the acquisition.[41]

Dwyer then caused CFG to perform the underwriting for the acquisition and to provide its written commitment for $1.43 billion of permanent HUD financing to be used to refinance the healthcare facilities acquired in the transaction.[42] CFG continued to perform underwriting services and helped to structure the loans used

[37] Compl. ¶¶ 21-22.
[38] *Id.* at ¶¶ 21-22.
[39] *Id.* at ¶ 21.
[40] *Id.* at ¶ 25.
[41] *Id.* at ¶ 26.
[42] *Id.* at ¶¶ 27-28; PX 61.

to complete the transaction.[43] CFG has been repaid its expenses, but it has not been paid a fee for performing these services.[44]

3. The Second Amendment

The Original Acquirers failed to secure the $350 million equity commitment and the $53 million letter of credit by the deadline, thus risking forfeiture of the $7 million deposit. They therefore negotiated a second amendment to the Merger Agreement (the "Second Amendment"), signed September 22 2005, which increased the Deposit Loan from $7 million to $10 million.[45] CFG provided the additional funds.[46] The amendment also provided Beverly a commitment letter indicating that Fillmore would provide the Original Acquirers with $350 million in funding.

Soon after, a draft "Contribution Agreement" was prepared, but never signed. The document purports to set forth the material terms of an agreement to share expenses, profits, and losses from the Beverly Acquisition, including a commitment that Silva and Fillmore would contribute funds to the partnership and reimburse CFG the amount it had advanced for the increased deposit.[47] Silva and Fillmore then reimbursed CFG for the additional deposit it had made, and

[43] *Id.* at 34.
[44] Dwyer Aff. ¶ 14.2; Compl. ¶ 55.
[45] Compl. ¶ 33; Grunstein Aff. ¶ 23
[46] Compl. ¶ 33.
[47] *Id.* at ¶ 32.

Grunstein allegedly paid Troutman Sanders $1.5 million in legal fees for work done for the Original Acquirers in connection with the Beverly Acquisition.[48]

After the Second Amendment, Silva continued to seek funding from WSIB. Plaintiffs allege that, unbeknownst to them, Silva sent a revised investment recommendation to WSIB on November 4, 2005 that "falsely" represented that Silva's company, Fillmore, had put up the $10 million deposit and that Fillmore had entered the Merger Agreement.[49]

4. The Third Amendment and Closing

On November 17, 2006, with the knowledge of Grunstein and Dwyer, Silva formed Pearl, PSC Sub, and Geary (the "New Acquirers") to complete the Beverly Acquisition in place of the Original Acquirers.[50] Grunstein states that the change in the acquiring entities was made at his suggestion to address certain concerns of WSIB, but that the change was "in form only, and not in substance . . . ."[51] The same day, Silva formed FSI to take the place of Fillmore in providing the equity portion of the financing, and WSIB approved an investment of $350 million in

[48] *Id.* at ¶ 33.
[49] *Id.* at ¶ 36.
[50] *Id.* at ¶ 37.
[51] Grunstein Aff. ¶¶ 30-31. The Original Acquirers were connected to Schron, who had provided funding for the Mariner transaction; Grunstein asserts that Silva explained that WSIB wanted it made clear that the Beverly Acquisition was not connected with the Mariner acquisition before it agreed to make its investment. *Id.*

FSI.[52] The following day, FSI issued a commitment letter, signed by Silva, which satisfied the necessary condition of the Second Amendment.[53]

On November 20, 2005, a third amendment to the Merger Agreement (the "Third Amendment") was signed. The Third Amendment changed certain terms of the transaction with Beverly and assigned the rights and obligations of the Original Acquirers to the New Acquirers.[54] Silva signed the amendment on behalf of Pearl and PSC Sub.

The Plaintiffs assert that they consented to the substitution of the parties "based on Silva's representations and promises that Grunstein, Dwyer and Silva were still partners, and that the agreements between Plaintiffs and Silva would be carried out by Silva's companies."[55] Grunstein testified, for example, that Silva told him that WSIB would prefer it if Silva were the managing partner of the partnership, but that Silva would have a contract drawn up that would preserve the substance of the initial partnership agreement but which would name Grunstein, depending on the entity used, a limited partner.[56] These documents were never delivered to Grunstein.[57] Plaintiffs also allege that, following the Third

[52] Compl. ¶¶ 38-39.
[53] *Id.* at ¶ 41-42.
[54] *Id.* at ¶ 43.
[55] *Id.*
[56] *Id.* at 461-2.
[57] *Id.* at 462.

Amendment, Silva continued to represent that Grunstein had a partnership interest in the deal by way of a carried interest in Beverly.[58]

Both Grunstein and Dwyer allegedly continued to do work related to the Beverly Acquisition following the Third Amendment. Grunstein allegedly lobbied on behalf of the partnership in Connecticut and Massachusetts, "shepherded all of the structural issues," and made sure the transaction closed.[59] Dwyer and CFG continued to provide, allegedly at Defendants' request, underwriting services in preparation for refinancing the properties to be acquired in the Beverly Acquisition as late as March 2006.[60]

The Beverly Acquisition closed on March 14, 2006. The stock of Beverly is now owned by Pearl, which is in turn owned by Drumm.[61]

C. *Procedural History*

The Plaintiffs allege that Defendants have retained the benefits of the Beverly Acquisition for themselves in violation of the alleged Partnership Agreement. As the related *MetCap* Litigation—which involved an action by MetCap Securities LLC and NASC against Pearl, PSC Sub, Geary, and Beverly

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[58] Compl. ¶¶ 45-48.
[59] Grunstein Dep. 279-80; Grunstein Aff. ¶ 45.
[60] Compl. ¶¶ 49-50. According to the Defendants, the decision of whether to refinance the properties acquired in the deal using HUD financing had not been made at least as late February 29, 2008. Silva Dep. (Feb. 29, 2008) 151.
[61] Answer ¶ 54.

Enterprises, Inc.—progressed, and after the related New York actions were dismissed, Plaintiffs filed this action.

On December 8, 2009, the Court granted Defendants' motion to dismiss Counts II and IX, which presented claims for breach of fiduciary duty and tortious interference. Plaintiffs voluntarily withdrew Count VI, which asserted a claim for negligent misrepresentation, and the Court dismissed it without prejudice.

Pending now are Defendants' motion for summary judgment and Plaintiffs' motion to strike certain exhibits attached to the motion for summary judgment.

III. CONTENTIONS

A. *The Motion to Strike*

By their motion to strike, Plaintiffs ask the Court to strike one exhibit under Delaware Rule of Evidence 408 as an offer in compromise. Defendants' answer that the document is not a settlement offer, and that, regardless, they are offering it for a permissible purpose, namely, to disprove a claim unrelated to the purported settlement negotiations. Plaintiffs also seek to preclude Defendants from offering certain exhibits because they lack an adequate foundation to support a finding that they are relevant. Defendants respond that the documents are facially relevant to the issues for which they are offered as proof.

B. *The Motion for Summary Judgment*

Defendants contend that they are entitled to summary judgment on all remaining counts of the Complaint. As a threshold matter, they argue that all of Grunstein's claims are barred by *res judicata*. Grunstein responds that Defendants waived the defense of *res judicata* by acquiescing in this action while the *MetCap* litigation was still pending, and that, even if the defense was not waived, Grunstein is not in privity with the *MetCap* plaintiffs and, therefore, is not bound by the ruling in *MetCap*.

Next, Defendants contend that the undisputed evidence shows that no enforceable contracts or promises existed among the parties, that Dwyer and CFG released any claim they may have had for the Acquisition Fee, that Plaintiffs are not entitled to quantum meruit recovery for unjust enrichment, and that the doctrine of unclean hands precludes Grunstein's recovery for unjust enrichment and promissory estoppel. Plaintiffs dispute these contentions.

IV. DISCUSSION

A. *Plaintiffs' Motion to Strike*

1. Motion to strike DX 48 under D.R.E. 408

Defense Exhibit 48 is a letter from CFG to Silva dated May 17, 2006 and signed by Dwyer.[62] According to the letter, its purpose was "to document [Silva's]

[62] This letter is attached to the motion for summary judgment as DX 48.

acknowledgement of the obligation which Fillmore and its investors . . . owes [sic] to Capital Funding and our agreement as to how Fillmore and its investors will satisfy that obligation."[63] Plaintiffs contend that DX 48 represents an offer in compromise and is thus inadmissible under Delaware Rule of Evidence 408. Defendants argue that DX 48 does not represent an attempt to settle Dwyer's contract claims, and that, even if it were such an attempt, the document is admissible for a purpose other than to disprove liability for Dwyer's contract claims.

Under D.R.E 408, evidence of an offer in compromise is inadmissible if offered for the purpose of proving or disproving liability with regard to the claim that is the subject of the settlement discussion. Such evidence may be admissible, however, if offered for another purpose.[64]

The letter Dwyer sent to Silva does not explicitly offer to settle a claim, and Plaintiffs offer only Dwyer's affidavit in support of the contention that the letter represents an offer in compromise. The letter was sent two months after the Beverly Acquisition closed, apparently when Defendants were still determining which source of HUD funding, if any, they would use to refinance the facilities

[63] *Id.*
[64] D.R.E. 408; *see also Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1286 (Del. Ch. 2004), *aff'd*, 867 A.2d 903 (Del. 2005).

acquired in the transaction.[65] The letter does not refer to any breach of an earlier agreement between Dwyer and Silva; instead, it lays out the terms of an agreement that Dwyer apparently understood he had reached with Silva and how they would satisfy their obligations going forward. Thus, DX 48 does not appear to represent an offer in compromise; further Defendants are not offering the letter to disprove liability for the claims Plaintiffs say it was meant to settle but, instead, to disprove Plaintiffs' allegations of a general partnership agreement. Thus, the Court will deny the motion to strike DX 48 at this stage; Plaintiffs may renew the motion in the event that Defendants offer the exhibit for purposes related to Dwyer's and CFG's contract claims.

2. Motion to strike DX 4, 7, 13, 15, 16, 17, 18, 19, 24, 25, 26, 30, 42, 43, and 44 as lacking proper foundation

Plaintiffs have also moved to strike certain documentary evidence attached as exhibits to Defendants' motion for summary judgment on the basis that there is no adequate foundation for their relevance. Plaintiffs do not challenge the authenticity of the documents; instead, they contend the documents—unsigned drafts of written partnership agreements—are not relevant to the arguments Defendants offer them to support,[66] namely, that the written proposals were made,

[65] *See* Silva Dep. 151.
[66] Pls.' Reply Br. in Supp. of their Mot. to Strike, at 1 n.1.

and that the fact that none of the proposed drafts was signed indicates that no enforceable partnership agreement exists among Grunstein, Dwyer and Silva.[67]

Plaintiffs argue that, by themselves, unsigned drafts of an agreement cannot prove that an agreement was never reached. This is surely accurate. Delaware Rule of Evidence 402 does not require, however, that evidence definitively prove the proposition for which it is offered. Instead, it merely requires that evidence have some probative value.[68] The documents in question are at least marginally probative of whether the parties ever agreed on the terms of a partnership agreement, or, at the very least, of whether such an agreement had been reached by the date each document, respectively, was written. Thus, the Court denies the motion to strike DX 4, 7, 13, 15, 16, 17, 18, 19, 24, 25, 26, 30, 42, 43, and 44.

B. *Defendants' Motion for Summary Judgment*

1. Standard of Review

Summary judgment may be granted pursuant to Court of Chancery Rule 56 if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When the evidence shows no genuine issues of material fact in dispute, the nonmoving party has the burden

[67] Defs.' Opp'n to the Mot. to Strike at 1.
[68] D.R.E. 401, 402.

of demonstrating that there are genuine issues of material fact that require resolution at trial.[69]

2. *Res judicata*

Defendants argue that all of Grunstein's claims are barred by *res judicata*.[70] Under the doctrine of *res judicata*, a claim is barred if, in an earlier action:

> (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.[71]

In *Maldonado v. Flynn*, the Delaware Supreme Court endorsed the transactional view of *res judicata*, "which permits the doctrine to be invoked to bar litigation between the same parties if the claims in the later litigation arose from the same

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[69] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

[70] The Plaintiffs argue that the Defendants have waived the defense of *res judicata* by acquiescing in this action while *MetCap* was pending. The Restatement (Second) of Judgments § 26(1) provides that *res judicata* is inapplicable where "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim or the defendant has acquiesced" in the second action. Nonetheless, waiver of the *res judicata* defense must be "clear and unequivocal." *Glaser v. Norris*, 1992 WL 14960, at *16 (Del. Ch. Jan. 6, 1992). Plaintiffs contend that Defendants acquiesced in defending the two actions by failing to raise the defense of *res judicata* in either *MetCap* or in the motion to dismiss the New York *Grunstein* action. See *Danner v. Hertz Corp.*, 1985 WL 552292, at *1 (Del. Super. Jan. 15, 1985) ("Defendant could have sought to consolidate the actions by moving to dismiss one or the other suit. By failing to do this, defendant has waived the claim of *res judicata.*").

Defendants, however, raised the affirmative defense of *res judicata* in their answer in the *MetCap* case. *See* DX 61 (*MetCap* Answer). This precludes a determination that the Defendants clearly and unequivocally waived their right to assert the defense.

[71] *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006) (citing *Bailey v. City of Wilmington,* 766 A.2d 477, 481 (Del. 2001)).

transaction that formed the basis of the prior adjudication."[72] Further, Delaware's public policy against claim splitting, which is an aspect of *res judicata*, may bar a subsequent claim if a plaintiff "was able to present it, in its entirety, in the prior forum . . . ."[73]

Here, the Court is not confronted with a situation in which a plaintiff has filed a second action against defendants they previously sued regarding the same transaction. Instead, Defendants argue that Grunstein's claims here are barred because he is in privity with MetCap, the plaintiff in the *MetCap* litigation, which, the parties agree, arose out of the same transaction as the dispute now before the Court. Defendants argue that Grunstein is in privity with MetCap because he controls it as a closely-held entity, he was actively involved in the MetCap litigation, and the same counsel represented MetCap as now represents Grunstein.[74] Grunstein does not serve as an officer or director of MetCap, but he owns approximately 40% of that entity.[75]

Two parties are in privity for purposes of *res judicata* where the "relationship between two or more persons is such that a judgment involving one of them may justly be conclusive on the others, although those others were not

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[72] *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980) (citing Restatement (Second) of Judgments § 61, cmts. (a), (b), and (c)).
[73] *Id.* at 383.
[74] OB at 20-21.
[75] Pls.' Answering Br. in Opp'n to Defs.' Mot. for Summ. J. at 28 ("AB"); Grunstein Aff. ¶ 45.

party to the lawsuit. A critical factor for the privity analysis is whether the interests of a party to the first suit and the party in question in the second suit are aligned."[76]

In *Levinhar v. MDG Medical*, cited by Defendants, the Court applied *res judicata* to bar a subsequent action regarding a single transaction where the plaintiffs had not been parties to the prior action, but had, in effect, explicitly agreed that their interests were aligned with those of, and would be represented by, the plaintiffs in the prior action.[77] Further, the Court found that the claims of the later action "could and should have been asserted" in the prior action because, although they were based on different theories, they essentially requested the same relief.[78]

Here, there are no plaintiffs in common between this action and the *MetCap* litigation, and, with Grunstein as only a minority owner, and not an officer or director of MetCap, Defendants have not established that MetCap's and Grunstein's interests are so closely aligned that it would be fair to preclude his claims here under *res judicata*.[79] Further, Grunstein has not impermissibly split

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[76] *Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *8 (Del. Ch. Nov. 24, 2009).
[77] 2009 WL 4263211, at *8.
[78] *Id.* at *8, *10.
[79] Defendants cite *In re Teltronics Services, Inc.*, for the proposition that owning as little as 15% of a close corporation is sufficient to establish privity between the shareholder and the corporation, but the decision in that case turned not only on the fact that the shareholder owned a substantial percentage of the company's stock, but also that he was the company's "founder, president, [and] chairman of the board . . . ." 762 F.2d 185, 190 (2d Cir. 1985).

Orloff v. Schulman is also distinguishable because in that case, the Court found privity based on the facts that the only plaintiff in the subsequent action who was not involved in the prior

his claims. Grunstein's claims for a partnership or carried interest in the Beverly Acquisition differ dramatically, in terms of both theory and the relief sought, from MetCap's claims for a $20 million fee in the *MetCap* Litigation. The Court is not convinced that Grunstein "could and should" have joined the *MetCap* Litigation in his individual capacity and asserted present claims at that time. Because the plaintiffs, factual issues, and legal claims in this action differ from those litigated in *MetCap*, Grunstein's claims here are not barred by *res judicata*.

3. Unclean Hands

Defendants contend that Grunstein is barred from recovering under Counts III (promissory estoppel) and VIII (unjust enrichment) by the doctrine of unclean hands. They assert that Grunstein failed to obtain a written waiver of a conflict of interest when he, a New York lawyer and a member of the law firm that

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action was the son of another plaintiff and the causes of action in both lawsuits were identical. 2005 WL 3272355, at *9 (Del. Ch. Nov. 23, 2005) ("The claims and disagreements identified by the various members of the family are so similar that the court cannot conclude that the claims raised by Madeline Orloff in the New York action and those alleged by George Orloff in this case are anything other than functionally one legal right."). This action and *MetCap* do not share the same identity of parties or claims as the two cases discussed in *Orloff*.

Finally, *Orange Bowl Corp. v. Jones*, cited by Defendants, did not reach the issue of whether the controlling shareholder of a close corporation was in privity with the corporation for purposes of *res judicata*; instead, the Court's analysis of privity in that case concerned collateral estoppel. 1986 WL 13095, at *3 (Del. Super. Oct. 16, 1986). Further, the Court found privity in that context where the defendants, "own[ed] all the outstanding shares of J & K stock and, as its officers and directors, exercised control over its day to day affairs. There is thus no factual or legal dispute that a sufficient commonality of interest exists between the Joneses and J & K for the bar of collateral estoppel to apply." *Id.* at *3 n.1. *See also* Restatement (Second) of Judgments § 59(3) (1982) ("If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation or the holder of ownership in it is conclusive upon the other of them *as to issues determined therein* . . . .") (emphasis added).

represented Defendants, asserted an interest in the transaction. Defendants argue that this failure constitutes a violation of New York rules of ethics.[80]

A Delaware trial court may not discipline a lawyer for alleged violations of either Delaware's Rules of Professional Conduct or of other states' ethical rules. In Delaware, only the Delaware Supreme Court "has the power and responsibility to govern the Bar, and in pursuance of that authority to enforce the Rules for disciplinary purposes" unless "the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice."[81] Here, all parties were well aware of Grunstein's status as a partner at Troutman Sanders and that he was performing legal services in connection with the transaction. Further, Defendants were represented by independent counsel with regard to their direct relationship with Grunstein.[82] Defendants, in short, have not identified any particular harm that they suffered as a result of the alleged ethical violation. Thus, the questions of whether Grunstein has violated the State of New York's rules of ethics and, if so, whether such a violation bars his recovery under his equitable causes of action are not for this Court to resolve.

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[80] *See* 22 N.Y. Comp. Codes R. & Regs. § 1200.0, Rule 1.8(a).
[81] *Appeal of Infotechnology, Inc.*, 582 A.2d 215, 216-17 (Del. 1990) (explaining that the Supreme Court's jurisdiction is "sole and exclusive").
[82] *See Grunstein*, 2010 WL 1531618, at *2.

4. Count I: Breach of the Alleged Partnership Agreement

Defendants contend that Plaintiffs have not adequately alleged the existence of a partnership agreement between Grunstein and Silva. Specifically, they contend that Plaintiffs do not allege a common obligation to share losses among the partners and that Plaintiffs' affidavits concerning the terms of the alleged partnership agreement should be disregarded because they contradict Grunstein's deposition regarding the terms of the partnership. They also contend that multiple unsigned drafts of written partnership agreement demonstrate that no definitive partnership agreement, whether written or oral, had been reached.

Under the Delaware Revised Uniform Partnership Act ("DRUPA"), a partnership is formed when two or more persons either (i) operate a for-profit business as co-owners or (ii) "carry on any purpose or activity not for profit if the persons intend to form a partnership."[83] "In Delaware, there is no singularly dispositive consideration that determines whether or not a partnership existed between two parties."[84] Instead, "[t]he creation of a partnership is a question of intent."[85] A partnership exists if the parties had a "common obligation to share losses as well as profits."[86] The evidence the Court may consider to determine whether such an obligation existed includes the language of any agreement

[83] 6 *Del. C.* § 15-202(a).
[84] *Ramone v. Lang*, 2006 WL 4762877, at *12 (Del. Ch. Apr. 3, 2006).
[85] *Hynansky v. Vietri*, 2003 WL 21976031, at *5 (Del. Ch. Aug. 7, 2003).
[86] *Ramone*, 2006 WL 905347, at *12.

between the parties, and the parties' acts, dealings, conduct, and admissions.[87] Where a suit is "between the parties as partners, stricter proof is required of the existence of a partnership than where the action is by a third person. . . ."[88] As with any other contract, a partnership agreement is enforceable only if it contains all material terms.[89]

Plaintiffs have alleged that an enforceable partnership agreement existed among Silva, Grunstein, Dwyer, and Credit Suisse until Credit Suisse exercised its option to take a fee arrangement in lieu of its partnership interest. Further, they allege that Dwyer retained to the option to choose between a partnership interest and fees that CFG would earn because of the HUD Insured Financing. Their allegations suggest that the parties intended to share both profits and losses related to the Beverly Acquisition: both Dwyer and Grunstein testified that there was an agreement that the partners would equally split anything received by any of them, or by any entity one of them involved in the transaction,[90] subject to certain exceptions,[91] and both alleged that losses would be shared equally as well.[92] The specific terms of the partnership agreement are alleged to have changed throughout

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[87] *Id.*
[88] *Id.*
[89] *Id.* at *10.
[90] Grunstein Dep. 94-95; Dwyer Dep. 36-37; Dwyer Aff. ¶ 14.2.
[91] For example, the benefits to be distributed among the partners are alleged not to include legal fees received by Grunstein (Grunstein Dep. 206) or the Pre-Paid Fee to be paid to Dwyer. Dwyer Dep. 33, 134.
[92] Grunstein Aff. at ¶ 7(D); Dwyer Dep. 109.

the course of the deal—for example, Grunstein alleges that his interest in the partnership converted to a carried interest after the Third Amendment—but such fluidity is perhaps not incompatible with the changing nature of the Beverly acquisition itself.

Defendants argue that Plaintiffs' allegations are, nonetheless, too vague to support a claim that a partnership was formed under Delaware law. The two main arguments that Defendants use to attack Plaintiffs claims are (i) that various draft agreements that might have set forth the rights and obligations of the parties in writing contemplated business relationships other than a general partnership and, in any case, were never signed; and (ii) Plaintiffs' affidavits contradict their deposition testimony and should be disregarded.

First, Defendants contend that the various unsigned draft agreements circulated among the parties disprove the existence of a partnership agreement. These documents show that the parties contemplated forming corporations and limited liability companies.[93] Although Defendants are correct in observing that a clear intention to form an entity other than a general partnership may strongly suggest that the parties did not earlier form a partnership,[94] that factor is not dispositive, and may not, alone, entitle Defendants to summary judgment on this count. Similarly, the fact that the parties exchanged draft agreements does not

[93] *See* DX 4, DX 7, DX 8, DX 13, DX 16, DX 18.
[94] *See Ramone*, 2006 WL 4762877, at *13.

indicate as a matter of law that the parties never reached a different agreement. Unlike in *Ramone*, cited by Defendants, where it was "undisputed that the terms and structure of [the parties'] relationship . . . never were formalized in any document or definitive oral agreement,"[95] Plaintiffs allege in this case that a definitive oral agreement *was* reached initially, and that since later documents were never adopted, the initial agreement controls.[96] The Court may at some point have occasion to evaluate the credibility of Plaintiffs' explanations for the draft agreements as well as other facts that may pose challenges to their arguments, but the case has not yet reached that stage.

Second, Defendants contend that Plaintiffs' affidavits, which set forth the alleged partnership agreement in considerably more detail than do Plaintiffs' deposition testimony, should be disregarded because they conflict with that testimony. "Under the sham affidavit doctrine, the Court may strike or disregard an affidavit that is submitted in opposition to a motion for summary judgment where the affidavit contradicts the affiant's prior sworn testimony."[97] Here, however, Plaintiffs did, in fact, testify to most of the terms identified by Defendants as absent from Plaintiffs' deposition testimony.[98] Otherwise, the

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[95] *Id.* at *12.
[96] *See, e.g.*, Grunstein Dep. 98-99 (describing one draft agreement as a rejected proposal by Silva to vary the terms of the partnership agreement).
[97] *Thou v. Motiva Enters., LLC*, 2009 WL 1515602, at *5 (Del. Super. May 29, 2009).
[98] *Compare* Defs.' Reply Br. in Supp. of Mot. for Summ. J. at 18 *with* Grunstein Dep. 100 (Dwyer held a partnership interest, but his partnership interest would convert to a fee

additional terms expand on, but do not expressly conflict with, the Plaintiffs' deposition testimony, except that, as Defendants observe, Grunstein testified on deposition that the terms of the agreement were reached in single conversation, and Dwyer's affidavit indicates they were reached over the course of several conversations.[99]

To the extent that Defendants dispute Plaintiffs' characterizations of the parties' actions they raise issues of material fact that must be decided at trial. Accordingly, the Court denies the motion for summary judgment with regard to Count I.

5. Count III: Promissory Estoppel

Defendants argue that they are entitled to dismissal of Plaintiffs' promissory estoppel claims because the undisputed facts show that (i) there was no definite agreement between the parties, (ii) Plaintiffs could not have justifiably relied upon the promises they have alleged, and (iii) justice does not require the enforcement of the alleged promises.

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arrangement if he provide HUD Insured Financing; Lerner was also a partner until he converted his interest to a fee arrangement.), 206 (legal fees not included in the partnership), 313 (expenses to be shared equally if deal fell apart).

[99] *See* Dwyer Aff. ¶ 14; Grunstein Dep. 108. Although the Court will not disregard Plaintiffs' affidavits under the sham affidavit doctrine, it is clear that Plaintiffs have previously presented multiple (and in certain cases, seemingly contradictory) versions of the facts. The Plaintiffs' ability to reconcile the various positions they have advanced may affect the vitality of their claims going forward.

First, Defendants argue that Plaintiffs' promissory estoppel claim is deficient because no definite agreement existed among the parties that the Court may now enforce. Defendants contend that promissory estoppel is primarily used as a substitute for some requirement of contract law, the absence of which prevents a finding that a contract was formed. They argue that this is not such a situation, but is instead an instance in which the parties failed to agree on essential terms of the alleged agreement. As the Court explained while denying the motion to dismiss this claim, however, promissory estoppel no longer functions solely as a substitute for contract principles. Although promissory estoppel is often invoked as a substitute for consideration or to avoid the statute of frauds,[100] the principal question in Delaware promissory estoppel cases is "whether injustice could be avoided only by enforcement of the promise."[101]

Here, Plaintiffs have alleged that they were induced to act by specific promises Silva made to them.[102] Whether the alleged promises were made, and

[100] *See, e.g.*, *Borsih v. Graham*, 655 A.2d 831, 834-35 (Del. Super. 1994).
[101] *Grunstein*, 2009 WL 4698541, at *7.
[102] *See, e.g.*, Grunstein Dep. 461-2 (testifying that Grunstein agreed to assign the Original Acquirers' interests to Silva's companies in reliance on Silva's representations that Grunstein would have the "exact same rights" under the new deal); Dwyer Aff. ¶ 24 (explaining that he understood Silva to have asked him to cause CFG to proceed with work on HUD Insured Financing after the Second Amendment), ¶¶ 28-31 (asserting that Silva asked Dwyer to proceed with its work on HUD Insured Financing through the first quarter of 2006).

whether Plaintiffs were justified in relying upon them, are disputed factual questions that the Court may not resolve on a motion for summary judgment.[103]

Second, Defendants argue that the Court should determine, based on the undisputed facts, that enforcement of the alleged promises is not required to avoid injustice. They contend that reliance damages, and not expectation damages, are the only appropriate remedy in promissory estoppel cases, and that because Plaintiffs have been repaid all their expenses, they cannot prove additional reliance damages under this claim. Defendants also argue that restructuring a $2.2 billion transaction by enforcing an oral promise would have an unsettling effect on Delaware corporate and transactional practice.

Defendants' implication that only reliance damages are available in a promissory estoppel claim is incorrect: "If the facts of a case so merit, a plaintiff may recover its expectation interest from a recovery of damages in a promissory estoppel case."[104] Further, awarding damages under this claim would not, as Defendants argue, "restructure" the Beverly Acquisition;[105] if Plaintiffs were to prevail on this claim, it would be because they were able to prove that Defendants

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[103] *Grunstein*, 2009 WL 4698541, at *12 ("The Complaint, however, facially alleges sufficient facts to justify reasonable reliance in this case-even among sophisticated parties . . . .").
[104] *RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2001 WL 984689, at *15 (Del. Ch. Aug. 22, 2001); *but see Olson v. Halvorsen*, 2009 WL 1317148 at *12 (Del. Ch. May 13, 2009) (explaining that awarding expectation damages in promissory estoppel cases "is clearly the exception rather than the rule.")
[105] OB at 39.

made specific promises to Plaintiffs that were outside the Merger Agreement, that Plaintiffs acted in reasonable reliance on those promises, and that a failure to enforce the promise would result in an unjust distribution of the benefits of the Beverly transaction. Whether Plaintiffs can prove these elements, and if so, whether the facts of the case merit awarding expectations damages are disputed questions of material fact that the Court may not resolve at this stage. Accordingly, the Court denies the motion for summary judgment as to Count III.

6. Count IV: Breach of Contract regarding the carried interest in the Beverly Acquisition

Grunstein contends that, even if the Court determines that there was no general partnership agreement among Dwyer, Silva, and him, he and Silva had a separate agreement to split the carried interest in the Beverly Acquisition evenly between them.

Here, Grunstein's deposition testimony contradicts his affidavit.[106] In his deposition, Grunstein denied that he reached an agreement—one that was distinct from the alleged general partnership agreement, that is—to split the carried interest in the Beverly Acquisition:

> Q. So it is your understanding that you were partners with Ron Silva in the carried interest in the Beverly Deal?
> A. I believe it goes farther than that because we never had a chance to agree on everything that he did. We together

[106] *See* text accompanying note 97, *supra*, for a brief discussion of the "sham affidavit" doctrine.

> was supposed to do it. Whatever he got, of course I'm partners with.[107]

This statement is not compatible with the statements in Grunstein's affidavit that he and Silva entered a specific agreement to split Silva's carried interest in the Beverly Acquisition equally.[108] Further, Grunstein testified in his deposition that the agreement under which his interest would converted from a partnership interest to a carried interest would secure him "the exact same rights" he had under the original agreement.[109] This statement, too conflicts with the assertion in Grunstein's affidavit that he and Silva reached a separate agreement to share the carried interest in the Beverly Acquisition. Thus, the Court will disregard Grunstein's affidavit to the extent it asserts the existence of such an agreement.[110] No other evidence supports the existence of an agreement to share carried interest that is distinct from the more general partnership agreement Grunstein has alleged.[111] Thus no disputed issues of material fact exist with regard to this claim, and Defendants are entitled to judgment as a matter of law with regard to it.

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[107] Grunstein Dep. 93.
[108] Grunstein Aff. ¶ 36.
[109] Grunstein Dep. 461-62.
[110] *See Thou*, 2009 WL 1515602, at *5.
[111] This is not to say, however, that the agreement to share carried interest in the transaction was not encompassed by the more general agreement alleged to exist between the parties under Count I. *See* Grunstein Aff. ¶ 35 (explaining that, after the Third Amendment, Silva "assured me that our agreement to share all of the economic benefits as well as out agreement to share managerial responsibility would remain the same.").

Accordingly, the Court grants the motion for summary judgment with respect to Count IV.

7. Count V: Fraud

In the Court's memorandum opinion addressing Defendants' motion to dismiss, it concluded that Plaintiff's fraud allegations were adequately pled, but observed that "Plaintiffs may eventually need to rebut certain facts that appear to undercut the allegation that Silva intended to breach the Partnership Agreement from its inception in order to prevail on this claim at trial."[112] With regard to the allegation that Silva fraudulently induced Grunstein to consent to the Third Amendment, the Court stated, "the Plaintiffs would need to show not only that Silva knowingly (or recklessly) misrepresented that WSIB wanted to modify the proposed structure to make him manager, but also that Grunstein relied on this statement to his detriment."[113] The factual issues that precluded dismissal of Plaintiffs' fraud claim then also preclude granting Defendants summary judgment on it now.

8. Count VII: Dwyer and CFG's Breach of Contract Claims

Defendants argue that Dwyer and CFG have released their claims for the $3.5 million Pre-Paid Fee (or, the Acquisition Fee) and that, even if not released, their claims fail because they are too vague.

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[112] *Grunstein*, 2009 WL 4698541, at *13.
[113] *Id.* at *14.

(i) *The Deposit Loan Release*

Defendants contend that Dwyer and CFG are barred from pursuing their breach of contract claims for the Acquisition Fee by a release that Dwyer acknowledges he signed on December 21, 2005, when Fillmore fully repaid the Deposit Loan.[114] The Release reads, in relevant part, as follows:

> By your signature below, you agree on behalf of yourself, [and] Capital Funding Group, Inc. . . . (the "Releasing Parties"), that upon Fillmore's making of the Payment, each of the Releasing Parties releases and discharges North American Senior Care, Inc., NASC Acquisition Corp., Pearl Senior Care, Inc., PSC Sub, Inc., SBBV Property Holdings LLC, Geary Property Holdings, LLC, Fillmore, [and] Fillmore Strategic Investors, L.L.C., . . . (the Released Parties) from any and all claims, demands, proceedings, causes and actions and liabilities whatsoever, whether known or unknown, which any Releasing Party has or may have against the Released Parties arising out of or relating to the [Deposit] Loan.[115]

Plaintiffs contend that Acquisition Fee is not an obligation "arising out of or relating to" the Deposit Loan, and Dwyer's and CFG's claim to the Acquisition Fee was, therefore, not released by this document; they argue that the Release is at least ambiguous in this regard. These arguments implicate questions of contract interpretation.

The parties disagree as to whether California or Delaware law governs the Release, but the result would be the same under either body of law. Under

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[114] DX 35 (the "Release"); Dwyer Aff. ¶ 27. The Deposit Loan had been assigned to Fillmore and its related entities under the Third Amendment.
[115] DX 35.

Delaware law, when construing a contract, the Court's goal is to give effect to the parties' intentions, which it determines objectively: "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."[116] The Court must give unambiguous language its plain meaning; it must not twist language to create ambiguity where none exists because doing so could "in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."[117] Similarly, under California law, "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation." [118] Further, "'[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.'"[119] Thus, under either Delaware or California law, the Court's analysis begins with the language of the Release, and it ends there as well if the meaning of that language is plain.

The unambiguous language of the Release shows that the parties intended to effect a release by the Dwyer and CFG of "any and all claims . . . arising out of or

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[116] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1195-96 (Del. 1992).
[117] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).
[118] *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 135 Cal. Rptr. 2d 505, 514 (Cal. Ct. App. 2003) (quoting *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.*, 211 Cal. Rptr. 62, 65 (Cal. Ct. App. 1985)).
[119] *Id.* (quoting Cal. Civ. Code, § 1638.).

relating to" the Deposit Loan. Dwyer's deposition testimony explicitly links Acquisition Fee to the Deposit Loan:

> Q. So it is your understanding that the amount of the prepaid fee would be the amount that—amount of your share of the loan or the entire loan amount?
> A. It could have been the entire loan amount.
> * * *
> Q. When you say it could have been, could it have been not the entire loan amount?
> A. Yes, it could have not been also.
> Q. Why do you say that?
> A. Since the loan was repaid, then it was my understanding that since I was responsible for 3.5 million, that that was the amount.[120]

Further, the Commitment Letter, which set forth the terms under which CFG would provide HUD Insured Financing and which CFG sent to Silva, Grunstein, SBEV Property Holding LLC, and Troutman Sanders, described the Deposit Loan as "consideration for Capital Funding loaning . . . the initial BIF deposit."[121]

Because Dwyer indicated both that the amount of the Acquisition Fee was linked to the size of the Deposit Loan and that the fee served as consideration for making that loan, Dwyer's and CFG's claim for the Acquisition Fee is unambiguously encompassed by the language of the Release.

Plaintiffs suggest, however, that, in the event the Court construes the Release in this manner, they will be able to argue that the Release is the product of

[120] Dwyer Dep. 131-32.
[121] DX 16 (the "Commitment Letter").

mistake or fraud or that enforcing the Release may be barred by estoppel or unclean hands.[122] The Court defers consideration of these issues until they are, if ever, properly before it.[123]

(ii) *Dwyer and CFG's remaining breach of contract claims*

The Release does not address Dwyer's and CFG claim to 2.5% of the $1.43 billion in HUD Insured Financing they say Defendants contracted with them to provide. Defendants argue that the alleged contract underlying this claim is too vague to be enforced. They argue that there was never a firm commitment that they would obtain HUD Insured Financing from CFG, and point out that the Commitment Letter, which set forth the terms of the alleged agreement that Plaintiffs now seek to enforce, was never signed.[124]

Nonetheless, Dwyer asserts that Silva and the other alleged partners agreed to pay CFG a fee of 2.5% of the amount financed, and that "the amount of the fees and the timing of payment were discussed with and agreed to by Mr. Silva early in the transaction and prior to CFG's issuance of its 'Commitment Letter' to provide HUD Insured Financing dated October 13, 2005 . . . ."[125] He alleged that on November 18, 2005, Silva told him that "they were going ahead with everything,"

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[122] *See* AB at 52-53.
[123] *See Clariant Corp. v. Harford Mut. Ins. Co.*, ____ A.3d ____, 2011 WL 18351, at *3 (Del. Jan. 5, 2011).
[124] DX 16.
[125] Dwyer Aff. ¶ 10. According to Grunstein, that agreement was reached before August 16, 2005. Grunstein Aff. ¶ 8.

which he understood as an instruction "to have CFG proceed with the HUD Insured Financing on the terms of the October 13, 2005 Commitment Letter . . . ,"[126] and that Silva explicitly told him to proceed with the HUD Insured Financing in early 2006. Dwyer alleged the existence of "an agreement by Mr. Silva, Mr. Grunstein and the companies acquiring Beverly to engage my company, CFG, to do the HUD Insured Financing for a fee of 2.5% of the loan and that defendants would proceed with the HUD Insured Financing after the Beverly Acquisition . . . ."[127] To the extent that Defendants dispute the contours or existence of the alleged contract, the disagreement presents issues of material fact that the Court may not now resolve. Accordingly, the Court denies Defendants' motion for summary judgment with regard to Count VII.

9. Count VIII: Unjust Enrichment

The Defendants next argue that they are entitled to summary judgment on the Plaintiffs' claim for unjust enrichment. "Restitution serves to 'deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses.'"[128] A claim for unjust enrichment must be dismissed where an express contract governs the

[126] Dwyer Aff. ¶ 24.
[127] *Id.* at ¶ 35.
[128] *Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999).

parties' relationship,[129] but the claim may survive when "the when the validity of the contract is in doubt or uncertain."[130]

Here, the Plaintiffs assert the existence of oral contracts governing their relationships, but the existence and validity of those contracts is disputed. Defendants contend that, nonetheless, Plaintiffs may not recover for unjust enrichment because the Plaintiffs' actions were aimed at generating benefits for themselves and not at benefiting the Defendants. To support their argument, the Defendants invoke a New York case, *Stein v. Gelfand*, in which the court granted summary judgment to a defendant where the parties had tried and failed to reach a partnership agreement.[131] The *Stein* court explained that it found "nothing unjust in holding that [plaintiff] is not entitled to have [defendant] compensate him for having made a losing bet by engaging in preparatory activities against the possibility that they would be of value to him."[132] Here, however, the question of whether it would be unjust for Defendants to retain the benefits of Plaintiffs' "time, effort, information, expertise" where Plaintiffs allege that they acted specifically at Defendants' "request and insistence" presents questions of material fact that the

[129] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009)
[130] *Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006).
[131] 476 F. Supp. 2d 427 (S.D.N.Y. 2007).
[132] *Id.* at 435.

Court may not resolve at this stage.[133] Accordingly, the Court denies Defendants' motion for summary judgment with respect to Count VIII.

V. CONCLUSION

For the reasons set forth above, the Court grants Defendants' motion for summary judgment as to Count IV. Defendants' motion is denied in all other respects. Plaintiffs' motion to strike is also denied.

An implementing order will be entered.

[133] AB at 64. Indeed, whether the Defendants actually benefited from the Plaintiffs' actions is also a disputed issue.