IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

REYBOLD VENTURE GROUP XI-A, LLC, REYBOLD VENTURE GROUP XI-B, LLC, REYBOLD VENTURE GROUP XV, LLC, and REYBOLD CONSTRUCTION CORP.,	)	
Plaintiffs/Counterclaim-Defendants,	)	
v.	)	
	)	C.A. No. 08C-02-481 RRC
ATLANTIC MERIDIAN CROSSING, LLC and MERIDIAN CROSSING FUNDING COMPANY, INC.,	)	
Defendants/Counterclaimants.	)	

Submitted: November 2, 2008
Decided: January 20, 2009

On Plaintiffs' Motion to Dismiss Counterclaims
GRANTED in part; DENIED in part.

On Plaintiffs' Motion to Strike Affirmative Defenses.
GRANTED.

MEMORANDUM OPINION

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Joseph J. Bellew, Esquire, Cozen O'Connor, P.C., Wilmington, Delaware, and Robert W. Hayes, Esquire, and Mia Meloni, Esquire, Cozen O'Connor, P.C., Philadelphia, Pennsylvania (pro hac vice), Attorneys for Defendants.

COOCH, J.

I. Introduction and Procedural History

The primary dispute in this case is whether Plaintiffs (collectively "Reybold") or Defendants (collectively "Atlantic Meridian") are entitled to $1,500,000 in deposits tendered by Atlantic Meridian under contracts for the purchase of two groups of lots within the "Meridian Crossing I and II" residential communities in Bear, Delaware. Reybold, the seller, claims that it is entitled to retain these deposits as liquidated damages because Atlantic Meridian failed to close on the acquisition of the lots, as otherwise purportedly required by the sale agreement. Conversely, Atlantic Meridian, the buyer, asserts that it is entitled to the refund of the deposits because it was excused from closing due to 1) Reybold's breach of the "fiduciary duties" that it owed to Atlantic Meridian as participants in a *de facto* "joint venture," 2) Reybold's breach of the duty of good faith and fair dealing, 3) Reybold's breach of contract, and 4) the failure of the essential purpose of the Agreement of Sale.[1]

Reybold has moved to dismiss Atlantic Meridian's Counterclaim[2] in its entirety and to strike both Defendants' Tenth Affirmative Defense[3] and

[1] Defs. Resp. in Opp'n to Pls. Mot. to Dismiss Countercl., Docket Item ("D.I.") 27 at 1.

[2] Defendants' Counterclaim asserted against all Plaintiffs includes six counts: 1) "Breach of Fiduciary Duty," 2) "Breach of Duty of Good Faith and Fair Dealing," 3) "Breach of Contract," 4) "Failure of Essential Purpose," 5) "Declaratory Judgment," and 6) "Breach of Contract."

part of the First Affirmative Defense.[4] The issue presented by the motions is whether this Court has subject matter jurisdiction to adjudicate 1) Count I of Defendants' Counterclaim[5] (which sounds in part in "breach of fiduciary obligations"), 2) Defendants' Tenth Affirmative Defense, and 3) the pertinent part of the First Affirmative Defense, all of which allege, as a cause of action or as an affirmative defense, breach of fiduciary duty arising from an alleged *de facto* joint venture.

For the reasons discussed below, this Court holds that the Court of Chancery, rather than this Court, has subject matter jurisdiction to adjudicate Count I of Defendants' counterclaim and therefore dismisses that count. The Court also strikes Defendants' Tenth Affirmative Defense and that

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[3] The Tenth Affirmative Defense states, "The Agreements are void and/or unenforceable because Plaintiffs breached their fiduciary obligations to Defendants, their partners in a *de facto* joint venture, by failing to reduce lot prices and misuse of their right of architectural control. Second Am. Answer, Affirmative Defenses and Countercl. of Defs., D.I. 21, ex. A.

[4] The First Affirmative Defense states in its entirety , "Plaintiffs are precluded from declaring Defendants in default of the agreements which are the subject of the Complaint because Plaintiffs breached those agreements, *their fiduciary obligations to Defendants* and/or their duty of good faith and fair dealing, acted to make Defendants' performance impossible or more costly, misused their right of architectural control and/or caused the failure of an essential purpose of the agreements, and therefore the agreements are void and/or unenforceable." Second Am. Answer, Affirmative Defenses and Countercl. of Defs., ex. A (emphasis added).

[5] Counts I-IV state that they "except" Reybold Venture Group "XI-C" and Reybold Venture Group "XI-D" from the counterclaim; however, those entities are not plaintiffs in this action and thus cannot be counterclaim-defendants. Second Am. Answer, Affirmative Defenses and Countercl. of Defs., ex. A at 32.

portion of the First Affirmative Defense that each allege breach of fiduciary duty.

II. CONTENTIONS OF THE PARTIES

Plaintiffs contend that 1) the claim for breach of fiduciary duty stemming from a *de facto* joint venture must be dismissed because that cause of action is within the exclusive jurisdiction of the Court of Chancery, and 2) Defendants' counterclaim, in its "entirety," should be dismissed "because the deficient claims are so pervasive."[6]

Plaintiffs also assert that the affirmative defenses alleging breach of fiduciary duty arising from a *de facto* joint venture should be stricken because breach of fiduciary duty is not an affirmative defense recognized by this Court.

Defendants respond that this Court has jurisdiction to hear a claim based on breach of fiduciary duty and that the Counterclaim sufficiently alleges facts necessary for the finding of a *de facto* joint venture. Second, Defendants contend that Superior Court should retain jurisdiction over Defendants' counterclaim because the counterclaim is "inextricably related to the legal causes of action Reybold asserts, only monetary damages are

[6] Pls.' Mot. to Dismiss Countercl., D.I. 24 at 2. Alternatively, Plaintiffs maintain that they never agreed to form a joint proprietary relationship in which the risks and rewards of a joint enterprise were shared. However, the Court does not reach this issue because of its holding that a claim for breach of fiduciary duty is within the exclusive jurisdiction of the Court of Chancery.

sought, and [Defendants] have a right to jury trial on this [joint venture/breach of fiduciary duty] claim."[7] Defendants also assert that this Court may exercise jurisdiction over its "equitable defenses" (asserted as "affirmative defenses.")

Defendants further contend that the motion to strike affirmative defenses is not properly before this Court because Plaintiffs did not move to strike the defenses within 20 days of service of the pleading.[8] Alternatively, and in the event this Court determines Superior Court has no subject matter jurisdiction over the Counterclaim, Defendants ask that the Court transfer the breach of fiduciary duty claim to the Court of Chancery, pursuant to 10 *Del. C.* § 1902.

III. STANDARD OF REVIEW

When deciding a motion to dismiss, "all factual allegations of the complaint are accepted as true."[9] A complaint will not be dismissed under Superior Court Civil Rule 12(b)(6) "unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted

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[7] Defs. Resp. in Opp'n to Pls. Mot. to Dismiss Countercl., at 2. In addition, at oral argument Defendants contended that their counterclaim for breach of fiduciary duty arising from a *de facto* joint venture could stand alone and warrant a jury trial in this Court, even if, theoretically, Plaintiffs were to withdraw their complaint.

[8] Plaintiffs respond that Superior Court Civil Rule 12(f) permits the Court to strike an affirmative defense on "its own initiative at any time . . . ." Pls.' Reply, D.I. 33 at 2.

[9] *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. 1972), *aff'd* 297 A.2d 37 (Del. 1972).

would the plaintiff be entitled to relief."[10] Therefore, the Court must determine "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[11]

In addition, because this Court's jurisdiction lies in matters of law,[12] as opposed to the Court of Chancery's jurisdiction, which lies in matters of equity,[13] the Superior Court will grant a dismissal "pursuant to Superior Court Civil Rule 12(b)(1) when it lacks jurisdiction over the subject matter" of the complaint.[14] A counterclaim, like a complaint, is a "separate cause[] of action."[15] "The jurisdiction of the subject matter of any controversy in any court must be determined in the first instance by the allegations of the complaint," or, in this case, the counterclaim.[16] The Court must view the

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[10] *Id.*

[11] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[12] Del. Const. Art. IV, § 7; 10 *Del. C.* § 541.

[13] 10 *Del. C.* §§ 341, 342; *McMahon v. New Castle Assoc.*, 532 A.2d 601, 602 (Del. Ch. 1987).

[14] *Smith v. Dep't of Pub. Safety of the State of Del.*, 1999 WL 1225250, at *5 (Del. Super.), *aff'd*, 765 A.2d 953 (Del. 2000) (Table).

[15] *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992); *Am. Home Prod. Corp. v. Norden Lab., Inc.*, 1992 WL 368604, at * 3 (Del. Ch.) (quoting *Pleatmaster, Inc. v. Consolidated Trimming Corp.*, 156 N.Y.S.2d 662, 666 (N.Y. Sup. Ct. 1956) (noting "[a] counterclaim is equivalent to an affirmative action brought by a litigant and the relief requested is of the same nature as the judgment demanded in a complaint.").

[16] *Stidham v. Brooks*, 5 A.2d 522, 524 (Del. 1939).

material factual allegations of the counterclaim as true for purposes of the motion to dismiss.[17]

IV. DISCUSSION

A. Count I of the Counterclaim must be dismissed

Plaintiffs linchpin argument is that the Court of Chancery has exclusive jurisdiction to adjudicate claims of breach of fiduciary duty. However, "Chancery takes jurisdiction over 'fiduciary' relationships because equity, not law, is the source of the right asserted."[18]

In the recent case of *Grace v. Morgan*, this Court was presented with a claim similar to Count I of Defendants' counterclaim. In addition to breach of contract, the plaintiff in *Grace* alleged in this Court a claim for breach of fiduciary duty in connection with a sale of land and construction contract. However, in dismissing the plaintiffs' claim for breach of fiduciary duty for lack of subject matter jurisdiction, but retaining jurisdiction over a separate claim for unjust enrichment, this Court explained, "[u]nlike the claim for breach of fiduciary duty, [the unjust enrichment] claim entails no special trust relationship between the parties, and therefore the nature of the

[17] *Grace v. Morgan*, 2004 WL 26858, at *1 (Del. Super.) (citing *Diebold v. Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586 (Del. 1970)).

[18] *McMahon*, 532 A.2d at 604.

remedy is dispositive."[19] The *Grace* plaintiffs (like the present counterclaimants) did not seek equitable remedies for either the breach of fiduciary duty or unjust enrichment claim; rather, they sought only money damages for both claims. However, the Court in *Grace* held that "[w]hile the nature of the remedy is relevant, the focus of the jurisdictional inquiry regarding a fiduciary claim is whether a special relationship of trust existed between the parties sufficient to establish the fiduciary duty."[20]

In the instant case, Defendants assert in their counterclaim that they seek only money damages and assert that this Court has subject matter jurisdiction over the breach of fiduciary duties arising from a *de facto* joint venture because a "full and complete remedy exists at law."[21] However, this argument was unpersuasive in *Grace* and, similarly, it does not convince this Court. Nor does it follow, as Defendants assert, that the Superior Court must exercise jurisdiction over an equitable cause of action because the counterclaim is "inextricably related" to the legal causes of action asserted by Reybold.

Defendants rely on *USH Ventures v. Global Telesystems Group, Inc.* (discussed at greater length *infra* in connection with Plaintiffs' Motion to

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[19] *Id.* at *3 (noting that unjust enrichment is an equitable cause of action within the jurisdiction of the Court of Chancery, unless the only remedy sought is money damages (unlike breach of fiduciary duty)).

[20] *Id.* (citing H*McMahon,* 532 A.2d at 604-05H).

[21] Defs.' Resp. at 8.

Strike Affirmative Defenses), a 2000 decision of this Court that focused on a breach of a non-disclosure/non-compete agreement, in support of their position that:

> [Defendants are] entitled to a jury trial on its counterclaim and defense of Plaintiffs' alleged breach of fiduciary obligation arising from the parties' joint venture. As Defendants are asserting legal defenses, the Seventh Amendment right to a jury trial attaches. Just as juries can determine whether doctors violate medical standards of care, they can determine whether Plaintiffs breached their duty of loyalty.[22]

However, Delaware case law does not support this contention. Breach of fiduciary duty is an equitable cause of action and the Court of Chancery has exclusive jurisdiction over Count I of Defendants' counterclaim.[23] In *Talley Brothers, Inc. v. Ford Motor Co.*, this Court granted the defendant's motion for summary judgment on the plaintiff's claims for breach of fiduciary duty "on the ground that this Court finds that it lacks subject matter jurisdiction to hear such claims. A breach of fiduciary duty is an equitable cause of action."[24] This Court will not exercise jurisdiction over a purely equitable cause of action exclusively within the jurisdiction of the Court of Chancery merely because it is coupled with an affirmative defense.[25] Therefore, Plaintiffs "Motion to Dismiss Counterclaims" is granted in part and denied

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[22] *Id.* at 2.

[23] *McMahon*, 532 A.2d at 604.

[24] *Talley Bros., Inc. v. Ford Motor Co.*, 1992 WL 240341, at *3 (Del. Super.).

[25] *See Am. Home Prod. Corp. v. Norden Lab., Inc.*, 1992 WL 368604 (Del. Ch.) (holding that while the Court of Chancery would have jurisdiction over the defense of patent invalidity, it did not have jurisdiction to hear a counterclaim for patent invalidity).

in part: Count I of the counterclaim is dismissed, however, Counts II-VI otherwise assert legal claims and are not dismissed.[26]

B. The Tenth Affirmative Defense and part of the First Affirmative Defense must be stricken[27]

Defendants contend that this Court has jurisdiction to adjudicate Atlantic Meridian's affirmative defenses, which Atlantic Meridian appears to equate as "equitable defenses."[28] Defendants quote *dicta* in *USH Ventures* in support of the proposition that some "equitable defenses" have been adopted by the Superior Court as affirmative defenses.[29] While it is true that over the years the Superior Court has adopted various "equitable defenses" as affirmative defenses (some of which are now explicitly set forth in Superior Court Civil Rule 8(c)), this Court holds that it would be "imprudent" to allow

[26] Other than Plaintiffs' broad and unsubstantiated assertion that "[t]he deficient claims are so pervasive throughout the Counterclaims, that the Counterclaims should be dismissed in their entirety," Plaintiffs do not explain how Counts II-IV of the counterclaim are deficient.

[27] As a preliminary matter, this Court notes that Superior Court Civil Rule 12(f) permits the Court to strike an affirmative defense "at any time." Super. Ct. Civ. R. 12(f); *Stinnes Interoil, Inc. v. Petrokey Corp.*, 1983 WL 412258, at *1 (Del. Super.).

[28] According to one authority, "[a]n equitable defense is such a right, which exists solely by virtue of equitable doctrines, and which was originally recognized by courts of equity alone." 4 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 1369 Meaning and Nature of Equitable Defense (5th ed. 1941).

[29] *USH Ventures v. Global Telesystems Group, Inc.*, 796 A.2d 7, 18 (Del. Super. 2000).

"breach of fiduciary duty" as a permissible "affirmative defense" in this case.[30]

In *USH Ventures*, then-Judge Quillen, a former Chancellor and widely recognized as one of Delaware's leading scholars on the Court of Chancery, summarized at some length the evolution of recognized "equitable defenses" in the Superior Court. He urged that Delaware "follow the liberal trend and freely allow equitable defenses at law."[31] He stated:

> The adoption of equitable estoppel in Courts of law was recognized in Delaware. Similarly, the doctrine of recission (both as a cause of action and a defense) has also been recognized at law in Delaware. Chancellor Allen recognized that a law Court may, upon adjudication of a contract dispute, determine, where elements of a claim are proven, that a contract has been rescinded, and enter an order restoring Plaintiff to his original condition by awarding money or other property of which he had been deprived. . . . Other equitable defenses are commonly recognized at law in contract as well as tort. Ripeness and mootness, which were originally equitable in nature, are commonly applied by this Court. Waiver has been, for some time, used at law as a valid defense to contract suits. Likewise, the equitable doctrine of acquiescence has been applied by this Court. Ratification, which was originally an equitable defense, has also been recognized by this Court at law. Also the doctrine of impossibility of performance has been recognized in this State as an action at law. Similarly, unconscionability, whose precepts are equitable in nature, is used as a defense under the UCC and in other contract actions in the Delaware Superior Court.[32]

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[30] *See. Am. Home Prod. Corp.*, 1992 WL 368604, at * 8 (noting that while the Court could hear the defendant's patent invalidity defense, it would be "imprudent" to do so).

[31] *Id.* at 19. *See generally*, William T. Quillen and Michael Hanrahan, *A Short History of the Delaware Court of Chancery, in* COURT OF CHANCERY OF THE STATE OF DELAWARE 1792-1992, 21 (1992); William T. Quillen, A Historical Sketch of the Equity Jurisdiction of Delaware (Apr. 1, 1982) (unpublished LL.M. thesis, University of Virginia) (on file with New Castle County Law Library).

[32] *Id.* at 18-19 (citations omitted).

However, Defendants here are not merely trying to utilize a traditionally recognized "equitable defense" to defeat Plaintiffs' legal claims; rather, Atlantic Meridian has also asserted an equitable cause of action. *USH Ventures* does not suggest that it would be appropriate for the Superior Court to hear a substantive claim for relief grounded in equity simply because it is also cast in terms of an affirmative defense; in fact, the *USH Ventures* Court noted that "certain equitable defenses which are purely equitable in nature (unclean hands, balance of hardships, and laches) may present adoptability problems [in the Superior Court]."[33] Significantly, the *USH* Court, in its thorough consideration of numerous "equitable defenses," did not include or otherwise mention "breach of fiduciary duty" as an equitable *defense*—quite possibly because an allegation of breach of fiduciary duty is essentially a cause of action, not a defense.

This Court observes that the language in a 1993 decision of the Court of Chancery has given this Court some pause in reaching this conclusion. In *Lorch et al. v. Dyson-Kissner-Moran Corp.*, the plaintiffs, who were former officers and directors of the defendant corporation, sought a declaration in the Court of Chancery that they had not breached any fiduciary duty owed to the corporation, and they also sought money damages for the corporation's

[33] *Id.* at 20 (citations omitted).

alleged breach of a recapitalization agreement.[34] The defendant moved to dismiss the complaint on the grounds that the Court of Chancery lacked equity jurisdiction over the plaintiffs' claim for breach of the recapitalization agreement.[35] In denying the defendant's motion to dismiss, the Court of Chancery, in *dicta*, stated:

> [T]he Superior Court could still hear the contract claim notwithstanding that a claim for a breach of a fiduciary duty is within the exclusive jurisdiction of this Court. *A court may decide an issue as a defense even if it would lack jurisdiction over the issue if the issue was raised as an affirmative claim for relief.*[36]

Defendants maintain, based on this language, that the Superior Court has jurisdiction to adjudicate Defendants' equitable defense of breach of fiduciary duty, and, as set forth *supra*, to exercise jurisdiction over Count I of the counterclaim because "Atlantic Meridian's breach of fiduciary duty Counterclaim [is] the flip-side of the same coin."[37] However, *Lorch* cannot be read as permitting a defendant to piggyback an equitable cause of action (even when only monetary damages are sought) otherwise resting exclusively within the jurisdiction of the Court of Chancery into this Court by virtue of the fact that the defendant has alleged the same equitable cause

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[34] *Lorch v. Dyson-Kissner-Moran Corp.*, 1993 WL 271433, at *1 (Del. Ch.).
[35] *Id.*
[36] *Id.* at *2 (citing *Am. Home Prod. Corp.*, 1992 WL 368604) (emphasis added).
[37] Defs. Resp. in Opp'n to Pls. Mot. to Dismiss Countercl. at 8.

of action as an equitable defense. To do so would nullify the time-honored and legislatively established distinction between law and equity.

This conclusion is supported by the Court of Chancery's 1992 holding in *American Home Products Corp. v. Norden Laboratories, Inc.* (a case cited in *Lorch*). In *American Home Products* the defendant had asserted the affirmative defense of patent invalidity and sought to amend its answer to add a counterclaim for patent invalidity.[38] The Court found that, pursuant to 28 *U.S.C.* § 1338(a), the federal courts have exclusive jurisdiction to hear cases relating to patent invalidity. The Court noted, however, that this statute "has never been construed as precluding state courts from determining the validity of a patent as a *defense* in a state court action."[39] However, the Court then drew a bright-line distinction between defenses and counterclaims and, in denying the defendant's motion to amend its answer to assert a counterclaim for patent invalidity, held:

> Because this Court lacks jurisdiction to hear the patent claims asserted in [the defendant's] proposed counterclaim, [the defendant's] motion for leave to amend its answer to assert that counterclaim must be denied.[40]

Moreover, even while recognizing that the Court of Chancery could exercise jurisdiction over the defendant's affirmative defense for patent invalidity, the *American Home Products* Court granted the plaintiff's motion for

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[38] *Am. Home Prod. Corp.*, 1992 WL 368604, at *1.
[39] *Id.* at *3 (emphasis in original).
[40] *Id.* at *6.

separate trial and a stay of discovery on the patent invalidity defense.[41] The *American Home Products* Court recognized, as does this Court, the existence of another court (here, the Court of Chancery) better able to adjudicate the defendant's affirmative defense and that it would be imprudent to exercise jurisdiction:

> Although no statute prevents this Court from deciding [the defendant's] patent invalidity defense[,] it would be imprudent for this Court to hear and decide the complex issues of the patent invalidity when the resolution of American Home's reformation claim in Norden's favor would obviate the necessity for this Court to do so or when the patent invalidity issues may be considerably narrowed or determined by the outcome of the pending . . . action.[42]

In addition, exercising jurisdiction over Defendants' equitable defense would also put this Court in the novel position of instructing a jury on the elements a *de facto* joint venture and breach of fiduciary duty, issues that have historically been adjudicated by the Court of Chancery. Also, if this Court were to allow Defendants to assert breach of fiduciary duty as an affirmative defense, presumably Defendants would be entitled to undertake the same discovery to support that affirmative defense as would have been permitted had this Court allowed Defendants to maintain their counterclaim; it seems to follow that Defendants could potentially file dispositive motion(s) in support of the affirmative defenses (assuming the factual record

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[41] *Id.*
[42] *Id.*

supported such motions(s)), thereby permitting Defendants to seek to achieve through the back door what is not permitted through the front door.

The Court of Chancery regularly determines the existence of joint ventures and related breach of fiduciary duty claims. The Court of Chancery can appropriately address Defendants' claim for breach of fiduciary duty arising from a *de facto* joint venture. Therefore, assuming without deciding whether this Court may exercise jurisdiction over the equitable defenses, this Court finds that it would be imprudent to do so and therefore strikes the equitable defenses.

Thus, this Court dismisses Count I of Defendants' counterclaim and strikes Defendants' Tenth Affirmative Defense and that part of the First Affirmative Defense which states: "their fiduciary obligations to Defendants."[43] Pursuant to 10 *Del. C.* § 1902 Defendants may file a written election to transfer their counterclaim for breach of fiduciary duty to the Court of Chancery within 60 days.[44]

[43] Because this Court concludes that it lacks subject matter jurisdiction over Defendants' counterclaim for breach of fiduciary duty arising from a *de facto* joint venture, this Court need not determine the sufficiency of the pleaded claim of a joint venture.

[44] It may be appropriate for the undersigned judge to be appointed to sit temporarily as Vice Chancellor, pursuant to *Del. Const.* art. IV, § 13(2), if the claim is transferred to the Court of Chancery. *See, e.g., Interim Healthcare, Inc., et al. v. Spherion Corp.*, 2003 WL 22902879, at fn. 1 (Del. Super.).

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Dismiss the Counterclaim and Strike the Affirmative Defenses is **GRANTED** as to Counterclaim Count I, the Tenth Affirmative Defense, and the identified part of the First Affirmative Defense alleging breach of fiduciary duty and **DENIED** as to the remainder of the Counterclaim. Defendants may file a written election to transfer Count I of the counterclaim to the Court of Chancery within 60 days.

IT IS SO ORDERED.

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oc: Prothonotary