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Transaction ID 28407922
Case No. 3932-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWA

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, LLC, DRUMM INVESTORS, LLC, and FILLMORE STRATEGIC MANAGEMENT, LLC,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: July 16, 2009
Date Decided: December 8, 2009

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Bruce E. Jameson, Esquire and Laina M. Herbert, Esquire of Prickett, Jones & Elliott, P.A., Wilmington, Delaware; Joseph F. Donley, Esquire of Dechert LLP, New York, New York; and H. Joseph Escher III, Esquire and D. Christopher Burdett, Esquire of Dechert LLP, San Francisco, California, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

This is an action seeking various remedies in contract, equity, and tort for the alleged breach of an oral partnership agreement to carry out the acquisition of an eldercare and rehabilitative services company. Following an amendment to the merger agreement that replaced the original acquiring entities with companies owned and controlled by only one of the three partners, that partner disclaimed the existence of an oral agreement governing the shared distribution of the acquisition proceeds. Related actions have been brought and dismissed both in this Court[1] and in the Southern District of New York.[2]

In this memorandum opinion, the Court addresses the Defendants' motion to dismiss certain of the Plaintiffs' claims as well as the Defendants' motion to compel supplemental responses to interrogatories and document requests.

II. BACKGROUND

A. *The Parties*

The Plaintiffs are Leonard Grunstein ("Grunstein"), a partner in the law firm of Troutman Sanders LLP ("Troutman Sanders"), Jack Dwyer ("Dwyer"), and

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[1] *MetCap Securities LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (TABLE), 2009 WL 2470336 (Del. Aug. 13, 2009); *MetCap Securities LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989 (Del. Ch. May 16, 2007).

[2] *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.).

Capital Funding Group, Inc. ("CFG"), a Maryland corporation owned and controlled by Dwyer.

Defendant Ronald E. Silva ("Silva") owns and controls Defendants Pearl Senior Care, LLC ("Pearl"), PSC Sub, LLC ("PSC Sub"), Geary Property Holdings, LLC ("Geary"), and Fillmore Capital Partners, LLC ("Fillmore"), all Delaware limited liability companies.

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 100% by Silva and his wife. Silva controls FSI through FSM, which was and is the managing member of FSI. Defendant Drumm Investors LLC ("Drumm") is a Delaware limited liability company formed by Silva and owned and controlled by FSI.

B. *The Partnership is Formed—Perhaps*

The Plaintiffs assert that, in January 2005, Plaintiffs Grunstein and Dwyer orally agreed to form a partnership for the purpose of acquiring Beverly Enterprises, Inc. ("Beverly"), then a publicly-held company that owned and/or

operated approximately 345 nursing homes throughout the United States.[3] Sometime in July or August of that year, Grunstein and Dwyer invited Silva (individually and/or through Fillmore) to participate in the proposed transaction (the "Beverly Acquisition") as an equal partner, an invitation which Silva allegedly accepted.[4] Plaintiffs assert that Grunstein, Dwyer, and Silva (the "Partners") agreed to share profits and losses resulting from the planned acquisition of Beverly and that "each partner would share in all economic benefits received by any of them (or any entities controlled by them) resulting from the Beverly Acquisition."[5] Further, the Partners allegedly agreed that the partnership would additionally extend to any entities that they then owned or controlled, or would own or control in the future, that were employed to carry out, or that benefited from the Beverly Acquisition.

Specifically, the Partners are alleged to have agreed (1) that the equity and benefits would belong equally to Grunstein, Dwyer, and Silva, and that the transaction would be carried out to maximize their joint equity and benefits; (2) that the transaction would be structured and the business operated according to the model developed by Grunstein in the Mariner acquisition (the "Mariner Model")

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[3] Grunstein had previously been the architect of a transaction that resulted in the acquisition of another chain of nursing homes, Mariner Healthcare. Dwyer's company, CFG, is in the business of providing financing to the nursing home industry. Amended Verified Complaint (the "Compl.") ¶ 15.
[4] Compl. ¶ 16.
[5] Compl. ¶ 17.

and that Grunstein would be involved in the management of the enterprise; and (3) that they would refinance the acquired nursing homes using HUD financing obtained through CFG—the entity controlled by Dwyer—and that they would pay CFG a minimum fee upon closing (the "Acquisition Fee," ultimately determined to be $3.5 million), as well as 2.5% of the amount financed.[6] All of these terms (the "Partnership Agreement") were allegedly agreed to orally and were never memorialized in a written document signed by the parties.

C. *The Merger Agreement and First Amendment*

In August 2005, North American Senior Care, Inc. ("NASC"), NASC Acquisition Corp. ("NASC Acquisition"), and SBEV Property Holdings LLC ("SBEV"), three special purpose entities then being used to facilitate the acquisition of Beverly by the Partners, entered into an agreement with Beverly (the "Merger Agreement"), pursuant to which Beverly would be acquired for approximately $2 billion.[7] The Merger Agreement was signed by NASC, NASC Acquisition, and SBEV (the "Original Acquirers") with the consent and approval of each of the Partners, and required the Original Acquirers to pay a $7 million deposit to Beverly, which was advanced by CFG on behalf of the partnership.[8] After another suitor made a superior offer, the Partners provided a counter bid by

[6] Compl. ¶ 18.
[7] Compl. ¶ 19.
[8] *Id.*

way of an amendment to the Merger Agreement (the "First Amendment") by which the Original Acquirers agreed to supply a $53 million letter of credit and an equity commitment letter for $350 million by September 22, 2005. Failure to meet the deadline would result in a forfeiture of the $7 million deposit.[9]

The Partners allegedly agreed that Silva would be responsible for raising the equity portion of the funds needed to acquire Beverly, which Silva agreed to both orally as well as in writing.[10] Silva and Fillmore (which Silva controlled) sought to raise the necessary equity from PSP Investments ("PSP") and WSIB, two entities with which Silva had had prior dealings. In his presentations to PSP and WSIB, Silva allegedly represented that the Beverly Acquisition would be structured according to the Mariner Model and that "the same team that was instrumental in acquiring Mariner was also going to be involved in acquiring and managing Beverly."[11] Silva represented to PSP that Grunstein was a "partner" in the acquisition.[12]

Allegedly relying upon the provision in the Partnership Agreement that CFG would underwrite the portfolio of Beverly nursing homes for HUD financing and would have the opportunity to provide HUD financing for the Beverly portfolio

[9] Compl. ¶ 22.
[10] Compl. ¶ 21.
[11] Compl. ¶ 25.
[12] Compl. ¶ 26.

upon completion of the acquisition, Dwyer caused CFG both to perform the underwriting and to provide its written commitment for $1.43 billion of permanent HUD financing to be used to refinance the acquired healthcare facilities.[13] Upon providing its commitment letter and at Defendants' request, CFG continued its underwriting activity and helped to structure the commercial mortgage backed ("CMBS") loans used to complete the acquisition so that these loans could be taken out by HUD financing to be provided by CFG.[14] Nevertheless, CFG has not received the associated fees for these services.[15] Ultimately, the Defendants did not use CFG to acquire HUD financing, even though Silva had allegedly represented to PSP the Partners' intention to do so.[16]

D. *The Second Amendment*

Silva failed to secure the $350 million equity commitment and $53 million letter of credit by the deadline. In order not to forgo the $7 million deposit, the Partners negotiated a second amendment to the Merger Agreement (the "Second Amendment"), which increased the deposit to $10 million. The additional

[13] Compl. ¶¶ 27-28. In order to comply with HUD lending rules, the Partners allegedly agreed that, if CFG provided the HUD financing, Dwyer would surrender his partnership interest to Grunstein and Silva, but would retain it if HUD financing was not provided by CFG. The Partners also allegedly agreed that, regardless of whether CFG supplied the funding, CFG would be paid the Acquisition Fee upon completion of the merger. Compl. ¶ 29.
[14] Compl. ¶ 34.
[15] Compl. ¶ 55.
[16] Compl. ¶¶ 30, 55.

$3 million for the deposit was advanced by CFG.[17] The Second Amendment also provided Beverly an equity commitment letter signed by Silva on behalf of Fillmore that agreed to provide the Original Acquirers $350 million in funding for the acquisition.[18] The source of this funding needed to be identified by November 18, 2005, or Beverly had the right to terminate the deal and retain the deposit.

Around this same time, the Partners prepared a draft "Contribution Agreement" which set forth the material terms of an agreement to share expenses, profits, and losses from the Beverly Acquisition and provided, *inter alia*, for Silva and Fillmore to contribute funds to the partnership, including reimbursing CFG for the additional amount it had advanced for the deposit under the Second Amendment.[19] The Contribution Agreement also established that CFG would "earn its reasonable and customary fees and be reimbursed for its reasonable costs and expenses" upon the completion of the HUD insured refinancing.[20] The Contribution Agreement was ultimately not signed. At about this same time, Grunstein paid Troutman Sanders $1.5 million in legal fees toward the work done for the Original Acquirers in connection with the Beverly Acquisition.[21]

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[17] Compl. ¶ 33.
[18] Compl. ¶ 31.
[19] Compl. ¶ 32. This was done by wire shortly thereafter. Compl. ¶ 33.
[20] Compl. ¶ 32.
[21] Compl. ¶ 33. Troutman Sanders provided much of the legal work required for the Beverly Acquisition.

Following the Second Amendment, Silva continued trying to induce WSIB to put up the $350 million in equity financing. The 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 into [the] merger agreement."[22]

E. *The Third Amendment and the Closing of the Merger*

For reasons the Plaintiffs have not fully disclosed and assert are irrelevant to the lawsuit, on November 17, 2005, Silva formed and incorporated Pearl, PSC Sub, and Geary to complete the acquisition of Beverly in place of the Original Acquirers.[23] The Plaintiffs simply assert that this was done in order "to carry out the agreement of the partners."[24] That 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 FSI.[25] The following day, FSI issued a commitment letter for $350 million, signed by Silva, which satisfied the necessary condition of the Second Amendment.[26]

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[22] Compl. ¶ 36.
[23] Compl. ¶ 37. Grunstein suggested the rationale in papers filed in one of the New York proceedings. Transmittal Certificate of Laina M. Herbert in Supp. of Defs.' Opening Br. in Supp. of their Mot. to Dismiss the First Am. Compl. ("T.C."), DX 3 (Suppl. Decl. of Leonard Grunstein) ¶ 14.
[24] Compl. ¶ 37.
[25] Compl. ¶¶ 38-39.
[26] Compl. ¶¶ 41-42.

On November 20, 2005, a third amendment to the Merger Agreement (the "Third Amendment") was signed, which changed certain terms of the transaction with Beverly and assigned the rights and obligations of the Original Acquirers to the newly formed entities, Pearl, PSC Sub, and Geary.[27] Silva signed on behalf of Pearl and PSC Sub. The Plaintiffs assert that "[t]he substitution of these parties was based on Silva's representations and promises that Grunstein, Dwyer and Silva were still partners, and that the agreements between the Plaintiffs and Silva would be carried out by Silva's companies."[28]

Silva also represented to Grunstein that WSIB wanted Silva to serve as the manager of the post-acquisition entity in lieu of Grunstein, but that, otherwise, Grunstein had "virtually the same deal."[29] The Plaintiffs contend that, following the signing of the Third Amendment, Silva continued to represent to Grunstein and Troutman Sanders that Grunstein still retained a partnership interest in the deal by way of a carried interest in Beverly.[30] Additionally, as late as March 2006, the Defendants requested—and Dwyer and CFG provided—an updated CFG underwriting in preparation for refinancing the healthcare facilities being acquired in the Beverly Acquisition, which the Plaintiffs assert is further proof that the entity Defendants created after the Partnership Agreement "ratified, approved,

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[27] Compl. ¶ 43.
[28] *Id.*
[29] Compl. ¶ 45 (quoting Grunstein's testimony).
[30] Compl. ¶¶ 45-48.

reaffirmed and assumed the representations, promises and commitments previously made by Defendant Silva" with respect to CFG.[31]

On March 14, 2006, the Defendants completed the Beverly Acquisition. The stock of Beverly is currently owned by Pearl, which in turn is owned by Drumm.

F. *Plaintiffs' Claims against Defendants*

The Plaintiffs aver that "[e]xcept for repaying CFG for the amount it advanced for the Deposit, Defendants have retained all of the economic benefits of the Beverly Acquisition for themselves and to the exclusion of Plaintiffs."[32] In addition, the Defendants have allegedly refused to pay CFG the Acquisition Fee, which was due when the Beverly Acquisition closed, and chose neither to refinance the acquired healthcare facilities with HUD financing obtained from CFG, nor to pay CFG 2.5% of the amount financed, as allegedly required by the Partnership Agreement. Finally, the Plaintiffs claim that the Defendants failed to utilize the Mariner Model in the transaction and have excluded Grunstein from any role in connection with the management of Beverly.

The Plaintiffs assert that all of the Defendant entities are owned or controlled by Silva and are, therefore, bound by the Partnership Agreement

[31] Compl. ¶¶ 49-50.
[32] Compl. ¶ 55.

allegedly consented to by Silva. The Plaintiffs further allege that the Defendants unfairly benefited from their involvement in the Beverly Acquisition:

> Because of the reputation and standing of Plaintiffs Dwyer and Capital Funding within the financial community, the CFG Commitment enhanced the credibility of the Partnership and the Original Acquirers of Beverly and of Defendants in connection with their negotiations with third parties for the acquisition and its funding, and the efforts of Capital Funding and Dwyer benefited Defendants by assisting them in obtaining the loans necessary to fund the merger transaction."[33]

In addition, the Plaintiffs attest that "[t]he underwritings and other information and advice provided to the Defendants by CFG was of substantial value to Defendants" and was used by the Defendants to set release prices for the CMBS financing, to make the CMBS loans HUD-refinanceable, and to obtain credit agency ratings for the CMBS loans so that the Beverly Acquisition could be financed by selling the CMBS loans in the market as commercial mortgage backed securities.[34]

G. *The Nature of the Relief Sought by Grunstein, Dwyer, and CFG*

Because of the Defendants' alleged failure to honor the Partnership Agreement, the Plaintiffs bring suit for breach of contract, for breach of fiduciary duty, and under the doctrines of promissory estoppel, fraud, negligent misrepresentation, and tortious interference with contractual relations and prospective business advantage. The Plaintiffs seek damages in an amount to be

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[33] Compl. ¶ 35.
[34] Compl. ¶ 51.

determined by this Court, as well as an accounting from the Defendants and/or an order directing that all money or property obtained by the Defendants as a consequence of the Beverly acquisition be held in constructive trust.

III. DISCUSSION

A. *Applicable Standard*

The Defendants have moved to dismiss certain of the causes of action raised in the Complaint. A motion to dismiss under Court of Chancery Rule 12(b)(6) for failure to state a claim will not be granted unless it appears with reasonable certainty that "under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."[35] In considering a motion to dismiss, courts are required to assume the truthfulness of all well-pleaded allegations of fact in the complaint, as well as all inferences that can reasonably be drawn in favor of the plaintiff from such facts.[36] Conclusory allegations, however, are not accepted as true without specific supporting factual allegations.[37] In short, if a plaintiff may recover under any reasonably conceivable set of circumstances susceptible to proof under the complaint, the motion must be denied.[38]

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[35] *Diamond State Telephone Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).
[36] *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009).
[37] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. Ch. 1995).
[38] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

The Defendants challenge six of the Plaintiffs' nine causes of action through the pending motion to dismiss, specifically, the Plaintiffs' claims for: (1) breach of fiduciary duty (Count II); (2) promissory estoppel (Count III); (3) fraud (Count V); (4) negligent misrepresentation (Count VI); (5) breach of contract involving Dwyer and CFG (Count VII); and (6) tortious interference (Count IX). The Defendants also move to dismiss all claims asserted against the Defendants other than Silva and Fillmore. These contentions will be addressed seriatim. The Plaintiffs' claims for breach of the partnership agreement (Count I), for breach of contract regarding the carried interest (Count IV), and for unjust enrichment (Count VIII) are not now contested by Defendants.

B. *The Breach of Fiduciary Duty Claim*

In addition to their principal claim for breach of the Partnership Agreement, the Plaintiffs assert that Silva and, by extension, those Defendant entities that Silva controls, have breached the fiduciary duties of good faith, fairness, and loyalty owed to the partnership by: (1) taking for themselves all of the economic benefits from the acquisition of Beverly, which the Partners were to share equally among themselves; (2) failing to provide Plaintiffs with their contractual share of such benefits; and (3) having depleted the funds that should have been distributed to the Plaintiffs, such that they would not be able to pay any judgment for those damages to which Plaintiffs assert they are entitled.

The Defendants argue that the general rule under Delaware law, subject to only narrow exceptions, is that a plaintiff may not "bootstrap" a breach of fiduciary duty claim into a breach of contract claim merely by restating the breach of contract claim as a breach of fiduciary duty.[39] Courts will dismiss the breach of fiduciary claim where the two claims overlap completely and arise from the same underlying conduct or nucleus of operative facts.[40] The Plaintiffs, in response, point to a line of cases in which, they assert, claims for breach of fiduciary duty pleaded in conjunction with breach of contract claims have survived a motion to dismiss when additional facts and remedies distinguished the two causes of action.[41]

The Court concludes that this matter falls outside of the narrow exception to Delaware case law allowing the joint pleading of breach of contract and breach of fiduciary duty claims under the same nucleus of operative facts. Accordingly, the Defendants' motion to dismiss the breach of fiduciary duty claim is granted.

In determining whether a breach of fiduciary duty claim is duplicative of a corresponding breach of contract claim, the principal inquiry by Delaware courts is whether the fiduciary duty in the complaint arises from general fiduciary principles

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[39] *See, e.g.*, *Madison Realty Partners 7, LLC v. AG ISA, LLC*, 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001); *Gale v. Bershad*, 1998 WL 118022, at *5 (Del. Ch. Mar. 4, 1998).

[40] *See, e.g.*, *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842, at *10 (Del. Ch. June 13, 2008); *Madison Realty Partners*, 2001 WL 406268, at *6.

[41] *See, e.g.*, *Schuss*, 2008 WL 2433842, at *9-10; *RJ Assoc., Inc. v. Health Payors' Org. Ltd. P'ship*, 1999 WL 550350, at *9-10 (Del. Ch. July 16, 1999).

or from specific contractual obligations agreed upon by the parties. "Because of the primacy of contract law over fiduciary law, if the duty sought to be enforced arises from the parties' contractual relationship, a contractual claim will preclude a fiduciary claim."[42] This is because a breach of fiduciary duty claim generally only survives where it may be maintained independently of the breach of contract claim. Where those rights arise from a contract that specifically addresses the matter at issue, the court evaluates the parties' conduct within the framework they themselves crafted, instead of imposing more broadly defined equitable duties.

In arguing that the claim ought to survive the motion to dismiss, the Plaintiffs rely most heavily on *Schuss*, and suggest that the facts here are "substantially similar" to those in *Schuss*.[43] In *Schuss*, the plaintiffs alleged that the defendants had violated their partnership agreement by failing to make distributions to the plaintiffs in the full amount due as stipulated in the agreement, and that the defendants had engaged in self-dealing in depleting the funds held by the partnership and shifting losses to the plaintiffs, leaving the partnership with insufficient funds to satisfy the damages owed to the plaintiffs. There, the breach of fiduciary duty claim centering on the latter allegations persisted because the court concluded that "[a]lthough these fiduciary duty claims share a common

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[42] *Solow v. Aspect Resources, LLC*, 2004 WL 2694916, at *4 (Del. Ch. Oct. 19, 2004).
[43] Pls.' Answering Br. in Opp'n to Defs.' Mot. to Dismiss the First Am. Compl. at 14.

nucleus of operative facts with Plaintiffs' breach of contract claim, they depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy."[44]

The Plaintiffs attempt to bring their fiduciary duty claim within the exception delineated in *Schuss* by arguing that it, too, involves additional allegations not relevant to the breach of contract claim. The additional facts pleaded include that "Defendants have received management fees and other monies in connection with the Beverly Acquisition which should have been paid to Plaintiffs" and that "Defendants have depleted themselves of the funds that should have been distributed to Plaintiffs and lack sufficient money and liquid assets to pay a judgment for the damages to which Plaintiffs are entitled."[45] The Plaintiffs also contend that, as in *Schuss*, the remedies they seek of an accounting and a constructive trust for the Defendants' breaches of fiduciary duty are different from the remedies sought in their breach of contract claims.

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[44] *Schuss*, 2008 WL 2433842, at *10. The allegation of additional facts and remedies within the breach of fiduciary duty claim is not dispositive as to whether or not the claim should be allowed to stand. The additional facts merely function as support for the notion that an established fiduciary relationship creates certain rights and obligations that extend beyond the framework of the contract. Thus, Delaware courts have allowed breach of fiduciary duty claims to survive a motion for summary judgment where the contract expressly acknowledged the existence of such duties. *See, e.g.*, *RJ Assoc.*, 1999 WL 550350.

[45] Compl. ¶ 64. The Plaintiffs further assert that these facts are substantially similar to the distinguishing facts in *Schuss*.

The Plaintiffs' reliance on *Schuss*, however, is unavailing because, there, the court allowed the fiduciary duty claim to go forward because the plaintiff had plead distinct harms caused by the defendants that fell outside the scope of their contractual relationship but within their fiduciary relationship.[46] Further, the contractual obligations only implicated one of the defendants while fiduciary duties extended to the remaining defendants. Thus, it could not be said that the fiduciary duty claim asserted in *Schuss* was duplicative of the breach of contract claim.

In contrast, the establishment of any fiduciary relationship between the Plaintiffs and the Defendants comes solely by way of the Partnership Agreement, the alleged breach thereof being the source of at least one of the Plaintiffs' breach of contract claims. Consequently, the breaches of fiduciary duty that the Plaintiffs allege would also constitute breaches of the Partnership Agreement, since the allegations ultimately amount to the failure to allocate profits and equity equally among the Partners.[47] Likewise, the remedies available for the breach of the Partnership Agreement claim would seem to encompass the remedies sought for

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[46] These included the dumping of annual losses on plaintiffs when making the disbursement in order to enhance defendants' residual interest in the fund. *Schuss*, 2008 WL 2433842, at *10.

[47] *See, e.g.*, *Bershad*, 1998 WL 118022, at *5 (holding that breach of fiduciary duty claims should be dismissed where the same facts that underlie a plaintiff's implied contract claim also form the basis of that plaintiff's fiduciary duty claim and if the duty sought to be enforced arises out of the parties' contractual as opposed to their fiduciary relationship); *Blue Chip Cap. Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 832 (Del. Ch. 2006) (same).

the breach of fiduciary duty claim, an accounting and the imposition of a constructive trust.

Indeed, the court in *Schuss* distinguished its holding from prior cases that had dismissed breach of fiduciary duty claims as duplicative of breach of contract claims by noting that those cases had "claims that either were substantially identical, such that the fiduciary duty claim would have been 'superfluous,' or involved remedies that were likely to be equivalent. . . ."[48] Such is the case here. Accordingly, the Plaintiffs' breach of fiduciary duty claim is dismissed.

C. *The Promissory Estoppel Claim*

The Plaintiffs also assert a claim for promissory estoppel. A claim for promissory estoppel requires factual allegations that: (1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) such promise is binding because injustice can be avoided only by enforcement of the promise.[49] The Defendants counter that Plaintiffs' claim for promissory estoppel should fail for any one of the following reasons: (1) because there is a valid written agreement; (2) because the Plaintiffs have not alleged a failure of consideration; and (3) because the Plaintiffs

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[48] *Schuss*, 2008 WL 2433842, at *10.

[49] *Phamathene, Inc. v. Siga Techs., Inc.*, 2008 WL 151855, at *17 (Del. Ch. Jan. 16, 2008); *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000).

have not adequately pleaded reasonable reliance on any promise by the Defendants.

1. Does a Valid Contract Preclude Promissory Estoppel?

Defendants contend that the existence of a valid contract would function to preclude Plaintiff's promissory estoppel claim.[50] Specifically, the Defendants point to the Third Amendment, which assigned the rights and obligations of the Original Acquirers in the Merger Agreement—entities owned or controlled by Grunstein, although not by Dwyer—to Pearl, PSC Sub, and Geary. The Defendants note that the Complaint, itself, asserts that the assignment in the Third Amendment "was 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," but contained no conditions on the Defendants' assumption of the rights and obligations of the Original Acquirers under the Merger Agreement and, further, expressly stated that Pearl Senior, PSC Sub, and Geary were not affiliates or successors of the Original Acquirers.

The Plaintiffs respond that neither they nor Silva are parties to either the Third Amendment or the Merger Agreement. Thus, this contract cannot function to preclude their promissory estoppel claim. Further, neither the Third

[50] *See, e.g.*, *Weiss v. Nw. Broad. Inc.*, 140 F. Supp. 2d 336, 344 (D. Del. 2001) ("Because the court has determined that the [agreement] is a valid contract, [the plaintiff] cannot recover under a theory of promissory estoppel."); *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000); *Lord*, 748 A.2d at 400.

Amendment nor the Merger Agreement was intended to delineate the rights and obligations of the Plaintiffs and the Defendants to one another, but only to describe and allocate the rights and obligations of the acquiring parties—first, the Original Acquirers and, subsequently, Pearl, PSC Sub, and Geary—and Beverly with respect to the Beverly Acquisition. As such, it would seemingly not be expected for side agreements between the Plaintiffs and the Defendants to be included in such a document, even if they were implicitly relied upon in executing the Third Amendment.

The Defendants characterize the Plaintiffs' position as contending that, in order for the Third Amendment to bar the promissory estoppel claim, the provisions of the contract must expressly preclude this claim, which they assert is not the correct standard.[51] If this is Plaintiffs' assertion, they are wrong. Were promissory estoppel able to cure facially integrated written agreements that did not capture all oral promises, there would be little need for parol evidence jurisprudence. Of course, the presence of contracts governing the relationship between two parties may very well preclude promissory estoppel claims for aspects of the negotiations that were not memorialized in writing. However, Defendants

[51] Defs.' Opening Br. in Supp. of their Mot. to Dismiss the First Am. Compl. at 11 (citing *Austost Anstalt Schann v. Net Value Holdings, Inc.*, 2001 WL 908996, at *7 (D. Del. Aug. 10, 2001) ("While plaintiffs have argued that the Agreements do not accurately represent the full and complete agreement between the parties, one thing is abundantly clear—agreements did exist. In light of this finding, the court will dismiss the plaintiffs' estoppel claim.")).

are also incorrect in asserting that they need only show the presence of a contract involving the parties or those entities they own or control to preclude a promissory estoppel claim. The Third Amendment differs from those contracts held to preclude promissory estoppel claims because they directly involved the subsequently-litigating parties and, more importantly, the contours of the agreement at issue in the litigation, which the Third Amendment does not.[52] Thus, the Third Amendment does not function to preclude the Plaintiffs' promissory estoppel claim.[53]

2. Is Plaintiffs' Failure to Assert Lack of Consideration Dispositive?

Second, the Defendants assert that promissory estoppel has the narrow purpose of functioning as a consideration substitute—not as a substitute for reaching an agreement. Yet, the Plaintiffs have not alleged a failure of

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[52] *Cf. Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1033-34 (Del. 2003) (holding that the presence of existing contracts between the parties governing other aspects of their relationship did not make promissory estoppel inapplicable because the relied-upon promises were made in addition to the existing relationship).

[53] Although not specifically addressed by the Defendants, the Contribution Agreement (assuming that it may serve as an enforceable contract) may also be insufficient to preclude an estoppel claim, despite the fact that it involves a relationship among all relevant Plaintiffs and Defendants in the context of their rights and responsibilities in effectuating the Beverly Acquisition. Although the Plaintiffs characterize the Contribution Agreement as an agreement among the Parties "to share expenses, profits and losses from the Beverly Acquisition," a better reading of the agreement might be that it provides for the payment and division of money before completion of the Beverly Acquisition, the division of money should the Beverly transaction fail to be completed, and the guarantee of payment of certain fees for services upon the completion of the acquisition. So read, the Contribution Agreement does not delineate, nor purport to delineate, any rights and obligations of the Plaintiffs and the Defendants as partners, and thus would not serve as a contract sufficient to preclude the Plaintiffs' promissory estoppel claim.

consideration in their Complaint. To the contrary, the Defendants argue, the Plaintiffs have done the opposite: in order to establish a breach of contract claim, they expressly assert "the existence of consideration for the alleged partnership and 'carried interest' agreements alleged in the FAC."[54] However, by contending that the Plaintiffs' assertion of the existence of consideration by way of their breach of contract claim precludes their promissory estoppel claim, the Defendants, in effect, seek to deprive the Plaintiffs of the ability to plead in the alternative. Court of Chancery Rule 8(e)(2) provides in relevant part:

> A party may set forth 2 or more statements of a claim or defense alternately or hypothetically, either in 1 count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as the party has regardless of consistency.

The Plaintiffs rely upon *Ramone v. Lang* for the principle that "[p]romissory estoppel is more accurately described as a particular application or subcategory of the general doctrine of equitable estoppel, rather than as a principle of contract law that operates as a substitute for consideration."[55] The Defendants dismiss this as dicta from an earlier case, and assert that the court in *Ramone* continued to uphold the standard in *Lord* that "[p]romissory estoppel is more accurately viewed as a

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[54] Defs.' Reply Br. in Supp. of their Mot. to Dismiss at 7.
[55] *Ramone v. Lang*, 2006 WL 4762877, at *16 n.83 (Del. Ch. Apr. 3, 2006) (quoting *Keating v. Bd. of Educ. of Appoquinimink Sch. Dist.*, 1993 WL 460527, at *3 n.3 (Del. Ch. Nov. 3, 1993)).

consideration substitute for promises which are reasonably relied upon, but which would otherwise not be enforceable."[56]

The Defendants seek to confine promissory estoppel to the realm of contract, and seemingly dismiss the notion that the "fundamental idea" underlying the doctrine of promissory estoppel is the prevention of injustice.[57] As Pomeroy has written: "The name 'promissory estoppel' has been adopted as indicating that the basis of the doctrine is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain situations."[58] Corbin's treatise on contracts similarly notes that "in Delaware promissory estoppel has evolved and matured beyond being only a contract consideration substitute to support expectancy relief,"[59] and Delaware courts have countenanced, at least in limited circumstances, the use of promissory estoppel to avoid application of the statute of frauds.[60]

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[56] *Lord*, 748 A.2d at 400.
[57] *See Chrysler Corp. v. Quimby*, 144 A.2d 123, 133 (Del. 1958).
[58] 3 John Norton Pomeroy, *Equity Jurisprudence* § 808(b), at 212 (Spencer W. Symons, ed., 5th ed. 1941).
[59] 3 *Corbin on Contracts* § 8.12, at 101 (John M. Perillo, ed., rev. ed. 1996).
[60] *See, e.g.*, *Borish v. Graham*, 655 A.2d 831 (Del. Super. 1994). *See also Feinberg v. Saunders, Karp & Megrue, L.P.*, 1988 WL 863284, at *17 (D. Del. Nov. 13, 1998) ("The doctrine of promissory estoppel is an equitable remedy 'designed to enforce a contract in the interest of justice where some contract formation problem would otherwise prevent enforcement.'" (citations omitted). *But see CBA Collection Servs., Ltd. v. Potter, Crosse & Leonard, P.A.*, 1996 WL 527214, at *6 (Del. Super. Aug. 14, 1996) ("Where promissory estoppel is used as a substitute for a required writing, the burden on the plaintiff is greater than [where] promissory estoppel is used as a substitute for consideration.").

Promissory estoppel has historically functioned as a consideration substitute for relied-upon promises because a bargained-for promise made with consideration functioned as an enforceable contract and eliminated any need for an additional equitable remedy.[61] Indeed, should the Defendants prevail in asserting that no Partnership Agreement existed among the Plaintiffs and the Defendants, then, as a matter of law, any pecuniary harm to the Plaintiffs could only function as detrimental reliance on a promise, not as consideration.

Perhaps not surprisingly, the principal question in Delaware promissory estoppel cases is not whether the plaintiff's response to a promise constituted detrimental reliance or consideration, but, instead, whether injustice could be avoided only by an enforcement of the promise.[62] This is because courts have been unwilling to apply strict contractual interpretation on what is, at base, an equitable remedy. Accordingly, at least in the circumstances of this case, the failure to plead lack of consideration is not fatal to the Plaintiffs' promissory estoppel claim.

3. Have Plaintiffs Failed to Plead Reasonable Reliance?

Finally, the Defendants maintain that the Plaintiffs' promissory estoppel claim fails because the Plaintiffs cannot prove that they reasonably relied on any

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[61] *See, e.g.*, *Lord*, 748 A.2d at 404 (Lamb, V.C., concurring) (explaining that promissory estoppel analysis does not apply when the promise in question was made enforceable by a bargained-for exchange); *Genencor Int'l*, 766 A.2d 8 at 12 ("[B]ecause this is a dispute about enforcement of a bargained-for contract right, we conclude that the remedy Genencor seeks is not equitable estoppel.").

[62] *See, e.g.*, *Slater v. George B. Clarke & Sons, Inc.*, 186 F. Supp. 814 (D. Del. 1960).

promise concerning the partnership. This is because: (1) the Third Amendment contains integration and disclaimer provisions; (2) the Third Amendment gives Pearl the right, in its sole discretion, to change or modify the owners of the entities acquiring Beverly; and (3) the parties are sophisticated and the size of the transaction is very large.[63]

The Defendants invoke New York law to argue that reliance is unreasonable as a matter of law when oral promises directly contradict the terms of a written agreement,[64] and assert that the integration clause included in the Merger Agreement by way of the Third Amendment functions to preclude any reliance by the Plaintiffs. Specifically, Section 9.6 of the Merger Agreement states, in relevant part:

> This Agreement, as amended by that certain Third Amendment . . . constitute[s] the entire agreement of the Parties and supersede[s] all prior agreements and undertakings, both written and oral, between the Parties, or any of them, with respect to the subject matter hereof. . . . EACH PARTY HERETO AGREES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS AGREEMENT. . . , NONE OF PARENT [Pearl], MERGER SUB [PSC Sub] AND THE COMPANY [Beverly] MAKES ANY OTHER REPRESENTATIONS OR WARRANTIES, AND EACH HEREBY DISCLAIMS ANY OTHER REPRESENTATIONS OR

[63] Defs.' Reply Br. in Supp. of their Mot. to Dismiss at 9.

[64] *See, e.g.*, *Brinsights LLC v. Charming Shoppes of Del., Inc.*, 2008 WL 216969 (S.D.N.Y. Jan. 16, 2008) (citing *Morrissey v. Gen. Motors Corp.*, 21 Fed. App'x 70, 73 (2d Cir. 2001)); *Elliot v. Nelson*, 301 F. Supp. 2d 284, 288 (S.D.N.Y. 2004) ("Where there is a 'meaningful' conflict between a written contract and prior oral representations, a party will not be deemed to have justifiably relied on the prior oral representations.").

> WARRANTIES MADE BY ITSELF OR ANY OF ITS RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, FINANCIAL AND LEGAL ADVISORS OR OTHER REPRESENTATIVES, WITH RESPECT TO THE EXECUTION AND DELIVERY OF THIS AGREEMENT OR THE MERGER. . . .[65]

Thus, the Defendants claim that "any purported assurance by Silva that he was 'partners' with Grunstein and Dwyer contradicts the Third Amendment, which clearly assigned Grunstein's rights under the Merger Agreement (held by his entity SBEV) to defendants Pearl, PSC Sub, and Geary."[66]

The Defendants' heavy reliance on the Third Amendment to preclude the Plaintiffs' equitable estoppel claim, however, is misplaced, at least at this stage of the proceedings. As noted earlier, it cannot be said that the Third Amendment or the Merger Agreement addressed the rights and obligations present between the Plaintiffs and Silva or his entities in any meaningful way. Although the integration clause in Section 9.6 is broad in scope, it is narrowly focused to "the subject matter" of the Merger Agreement and Third Amendment, namely the acquisition of Beverly and the assignment of the Original Acquirers' rights and obligations therein to the Silva entities, not the post-acquisition disbursement of proceeds,

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[65] T.C., DX4 (Merger Agmt.) at 106; T.C., DX 5 (Third Amendment) at 13.

[66] Defs.' Opening Br. in Supp. of their Mot. to Dismiss First Am. Compl. at 14. Though not argued by Defendants, Section 9 of the Contribution Agreement has a similar provision, which states, "This agreement supersedes all prior agreements relating to the subject matter of this agreement including, without limitation, any notes and undertakings to which SBEV, Capital Funding and/or CSFB and/or their principals are parties relating to the Deposit and the repayment thereof." T.C., DX 6 § 9 at 6.

profits, or other benefits among the alleged Partners, none of whom was a direct party to that agreement.

Likewise, the language disclaiming all other representations and warranties is limited to "the execution of this agreement or the merger." Thus, Grunstein's reliance on oral representations that his assignment of the rights and obligations of the Original Acquirers to Silva's entities would not result in the complete abolition of his partnership interest in the venture appears to fall outside of the disclaimer provided for in Section 9.2.[67] The case law that the Defendants offer in support of their claim that a contradictory written agreement precludes reliance on oral promises as a matter of law seems to limit this rule to where the contractual terms "directly"[68] or "flatly"[69] contradict oral promises, or where there is a "'meaningful' conflict"[70] between them. This is clearly not the case here. Accordingly, reliance is not precluded as a matter of law.

The Defendants also point to two other passages in the Third Amendment that, they assert, serve to preclude the Plaintiffs' promissory estoppel claim. First,

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[67] Indeed, Grunstein's allegations may best be described as charging fraudulent inducement: that he assigned his rights to the Silva entities in the Third Amendment under the assumption that he maintained the Partnership Agreement with Silva. Such claims are not precluded by a standard integration clause, but require "explicit anti-reliance representations" that "demonstrat[e] with clarity that the plaintiff had agreed that it was not relying on facts outside the contract. . . ." *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004). This was not the case with the Third Amendment.

[68] *Morrissey*, 21 Fed. App'x at 73.

[69] *Brinsights*, 2008 WL 216969; *Robert J. McRell Assocs., Inc. v. Insurance Co. of N. Am.*, 677 F. Supp. 721, 731 (S.D.N.Y. 1987).

[70] *Elliot*, 301 F. Supp. 2d at 288.

Section 4.2 states that "Parent [Pearl] shall have the right in its sole discretion to change or modify in any way the equity and/or membership interests in Parent [Pearl], Merger Sub [PSC Sub], and GPH [Geary]; provided that the Equity Commitment Letter is not amended and remains in full force and effect and any such change or modification does not and could not reasonably be expected to result in any significant delay in the Closing. . . ."[71] The Defendants suggest that this clause served as acquiescence by the Original Acquirers that allowed the Silva entities to determine the ultimate equity claims on the acquired Beverly. Yet, this provision merely functions to prevent Beverly from contesting the acquisition should the partnership—represented in the Merger Agreement by the Silva entities—choose to modify its structure. Second, the Defendants look to Section 4.4(g), which states that:

> For purposes of this Section 4.4 and for the avoidance of doubt, (i) none of [Pearl], PSC Sub, and [Geary] shall be considered affiliates or successors of any of NASC, NASC Acquisition or SBEV, and none of NASC, NASC Acquisition or SBEV shall be considered affiliates or successors of [Pearl], PSC Sub or [Geary], (ii) [Fillmore], [FSI] and their affiliates shall not be considered NASC Releasing Parties . . . .[72]

This clause, however, has no bearing on the claims of the Plaintiffs to the equity received by the Silva entities since it only applies to Section 4.4, which clarifies that neither Beverly nor the Original Acquirers breached any covenants and

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[71] T.C., DX 5 (Third Amendment) at 14.

[72] *Id.* at 17. In making their claim, the Defendants omit the first part of the clause that limits this language to Section 4.4.

warranties before the assumption of the Original Acquirers' rights and obligations by the Silva entities through the Third Amendment, and that the Original Acquirers and Beverly release one another "from any all claims, demands, proceedings, causes of action and liabilities" that they may have.[73] As the Original Acquirers were asset-less entities created for the sole purpose of effectuating the Beverly acquisition, it makes sense that they would not have any ongoing obligations under the Merger Agreement following the assignment. That the Silva entities are treated as distinct from the Original Acquirers for purposes of these representations simply means that Section 4.4 does not function to release the Silva entities and Beverly from any of their claims or obligations to each other.

Finally, the Defendants assert that any reliance on oral representations regarding a partnership agreement would be unreasonable given the size of the transaction, sophistication of the parties, and the fact that other written agreements involving the Beverly Acquisition were executed. The fact that the Plaintiffs are not only sophisticated investors but also include an attorney at a major law firm (that helped draft many of the core documents for the transaction) certainly undermines their reasonableness in relying on oral promises alone with respect to

[73] *Id.* § 4.4(a) at 15. Section 4.4 acts as a general disclaimer between the original acquirers, Beverly, and the Silva entities with respect to those claims and liabilities that existed before the execution of the Third Amendment.

the equity distribution of a billion dollar deal.[74] The Plaintiffs may have to confront these negative inferences later. The Complaint, however, facially alleges sufficient facts to justify reasonable reliance in this case—even among sophisticated parties—such that it would be improper to dismiss reliance-based claims at this stage. These allegations include that the parties had preexisting relationships and had collectively worked on the acquisition for nearly a year before the signing of the Third Amendment, that the Plaintiffs and Silva prepared a draft Contribution Agreement for the allocation of costs associated with preparing the acquisition, as well as the fact that Silva continued to employ the services of Grunstein and Dwyer after the signing the Third Amendment and up until the close of the acquisition, and that Silva repeatedly affirmed the nature of their relationship (i.e., that the Plaintiffs maintained a carried interest in the deal) orally and in writing, both before and after the signing of the Third Amendment. Consequently, it cannot be said that the parties' sophistication necessarily precludes any reasonable reliance on oral promises.

As the elements of promissory estoppel have been sufficiently plead in the Complaint, the Defendants' motion to dismiss the Plaintiffs' estoppel claim is, therefore, denied.

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[74] On the other hand, the Plaintiffs' intimate involvement with the transaction may have made the need to memorialize their agreement seem less important than under more typical conditions.

With respect to remedy, the Defendants maintain that the Plaintiffs ultimately seek to enforce an unenforceable oral agreement by way of promissory estoppel, instead of seeking the traditional reliance damages.[75] The Court, however, need not consider the appropriate remedy for a promissory estoppel claim at the motion to dismiss stage.[76]

D. *The Fraud Claim*

The Plaintiffs have also asserted a fraud claim associated with Silva's representations regarding the existence of the Partnership Agreement.[77] In order for a fraud claim to survive a motion to dismiss, a plaintiff needs to allege: (1) that a defendant made a false representation, usually one of fact; (2) with the knowledge or belief that the representation was false, or with reckless indifference to the truth; (3) with an intent to induce the plaintiff to act or refrain from acting; (4) that plaintiff's action or inaction was taken in justifiable reliance upon the

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[75] Defs.' Reply Br. in Supp. of their Mot. to Dismiss at 9 n.6.

[76] The lodestar with respect to damages under promissory estoppel is the "prevention of injustice." *See, e.g.*, *Quimby*, 144 A.2d at 133. Accordingly, courts have found that expectation damages may be appropriate for promissory estoppel claims, rather than simply reliance damages.

[77] No one has questioned whether the Plaintiffs' fraud claim is governed by New York law or Delaware law. Consequently, until that issue is framed, the Court will assume that it is to be assessed under Delaware law and will decline the opportunity to apply New York law. *See, e.g., Cougar Audio, Inc. v. Reich*, 2000 WL 420546, at *6 n.4 (S.D.N.Y. Apr. 18, 2000) (discussing the "very long and very puzzling line of New York cases" establishing contradictory rules with respect to pleading promissory fraud).

representation; and (5) damage to the plaintiff as a result of her reliance on the representation.[78]

The Defendants seek dismissal of the Plaintiffs' fraud claim by arguing that it "improperly restates" the claim for breach of the Partnership Agreement and fails to identify "an independent misrepresentation of fact."[79] The Defendants assert that, by hanging their fraud claim on the Defendants' misrepresentation of their "intent to perform pursuant to the alleged partnership agreement," the Plaintiffs impermissibly attempt to bootstrap a breach of contract claim into a fraud claim.[80]

The Plaintiffs attempt to distinguish their fraud claim by emphasizing that Silva not only misrepresented his intent to honor the contract, but also now disclaims the very existence of a contract in the first place. Further, the Plaintiffs allege that Silva continued to advise them of the existence of the Partnership Agreement at the same time that he was engaged in activities to undermine and circumvent that very Partnership Agreement. Thus, these allegations appear

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[78] *See, e.g.*, *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992).

[79] Defs.' Opening Br. in Supp. of their Mot. to Dismiss First Am. Compl. at 17.

[80] *See, e.g.*, *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *8 (Del. Ch. Aug. 3, 2004) ("One cannot 'bootstrap' a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations. Couching an alleged failure to comply with [an agreement] as a failure to disclose an intention to take certain actions arguably inconsistent with that agreement is exactly the type of bootstrapping this Court will not entertain.") (citations omitted); *Diamond Elec., Inc. v. Del. Solid Waste Auth.*, 1999 WL 160161, at *7 (Del. Ch. Mar. 15, 1999) ("A breach of contract claim cannot be turned into a fraud claim simply by alleging the other party never intended to perform.").

distinct from an assertion that the Defendants simply "never intended to perform."[81]

This Court has held that whether an agreement has been reached "is not the type of fact that a court should consider for purposes of misrepresentation claims."[82] This is, in part, because of the general rule that "statements which are merely promissory in nature and expressions as to what will happen in the future are not actionable as fraud."[83] Instead, the putative misrepresentation must involve either a "past or contemporaneous fact or a future event that falsely implies an existing fact."[84] Courts, however, will convert an unfulfilled promise of future performance into a fraud claim if particularized facts are alleged that collectively allow the inference that, at the time the promise was made, the speaker had no intention of performing.[85] Indeed, "[s]tatements of intention . . . which do not,

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[81] *Diamond Elec.*, 1999 WL 160161, at *7.

[82] *See, e.g.*, *TriState Courier and Carriage, Inc. v. Berryman*, 2004 WL 835886, at *11 (Del. Ch. Apr. 15, 2004); *Mark Fox Group, Inc. v. E. I. duPont de Nemours & Co.*, 2003 WL 21524886, at *6 (Del. Ch. July 2, 2003). Notably, this Court found in *Mark Fox Group* that actions taken in reliance upon an alleged oral representation—later recanted—that parties had a contract, although insufficient for a fraud claim, appropriately raised a promissory estoppel claim. *Id.*

[83] *Outdoor Techs., Inc. v. Allfirst Financial, Inc.*, 2001 WL 541472, at *4 (Del. Super. Apr. 12, 2001) (citations omitted). *See also Esso Standard Oil Co. v. Cunningham*, 114 A.2d 380, 383 (Del. Ch. 1955) ("Opinions and statements as to probable future results are not generally fraudulent even though they related to material matters. . . .").

[84] *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch. Dec. 23, 2008).

[85] *Id.* (citing *Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1997 WL 793088, at *8 (Del. Ch. Dec. 15, 1997)). This is distinct from a plaintiff's conclusory allegation of such. *Cf. BAE Sys.*, 2004 WL 1739522, at *8; *Diamond Elec.*, 1999 WL 160161, at *7. *See also Dann v. Chrysler Corp.*, 174 A.2d 696, 700 (Del. Ch. 1961) ("Using the word 'fraud' or its equivalent in any form

when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent. This knowing misrepresentation of one's intention or state of mind is a misrepresentation of an existing fact."[86] The reasons for this rule have been explained as follows:

> Representations as to what will be performed or will take place in the future are regarded as predictions and hence are not fraudulent, irrespective whether the matter is before the court as an action for damages for deceit or defensively as a ground of avoidance of a written contract.
>
> A false assertion presupposes that an event has occurred, that a duty has been performed, that a fact has intervened or that an authority exists, either or all of which may have induced the contract or prevented its being consummated. (To anticipate the future and predicate falsehood upon an act to be done or omitted at a future day would change a mere broken promise into a fraud on the part of him who was bound to fulfill the engagement, thus practically illustrating the old forms of declarations in assumpsit, wherein the defendant was always charged with fraudulently and deceitfully refusing to perform his agreement.)[87]

However, "[a] party's failure to keep a promise does not prove the promise was false when made."[88] Unlike a traditional fraud claim that allows a plaintiff to plead intent generally, because the factual predicate of a promissory fraud claim is the speaker's state of mind at the time the statement is made, a general averment of

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is just not a substitute for the statement of sufficient facts to make the basis of the charge reasonably apparent.").

[86] *Stevanov v. O'Connor*, 2009 WL 1059640, at *12 n.66 (Del. Ch. Apr. 21, 2009) (quoting *College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200, 206 (Pa. 1976), cited with approval in *Berdel*, 1997 WL 793088, at *8).

[87] 9 Stuart M. Speiser et al., *The American Law of Torts* § 32:27 at 266-67 (2009).

[88] *Berdel*, 1997 WL 793088, at *8.

a culpable state of mind is insufficient. Instead, the plaintiff "must plead specific facts that lead to a reasonable inference that the promissor had no intention of performing at the time the promise was made."[89] In attempting to assert that Silva had no such intention, the Plaintiffs point to two principal factual allegations: (1) that "[a]t no time from at least early September 2005 through the closing did Mr. Silva ever mention Mr. Grunstein's name to WSIB or disclose to WSIB Mr. Grunstein's role in the Beverly Acquisition. . . . [A]s far as WSIB was concerned, Mr. Grunstein did not exist";[90] and (2) that "Mr. Silva represented to WSIB in writing on several occasions . . . that FCP had signed the Merger Agreement and paid the deposit to Beverly, when in fact *NASC* had signed the merger agreement and *Mr. Dwyer* had put up the deposit pursuant to the agreement between the parties."[91] Because these representations came shortly after the formation of the purported partnership and occurred concurrently with persistent representations from Silva to the Plaintiffs that such a partnership existed, the Plaintiffs assert that Silva intended to induce efforts by the Plaintiffs without any intention of complying with their agreement. Viewing these facts in the light most favorable to the Plaintiffs, they establish an intentionally false representation on which the

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[89] *Winner Acceptance*, 2008 WL 5352063, at *10. *Accord Berdel*, 1997 WL 793088, at *8. *See also Speiser et al.*, *supra* note 87, § 32:27 ("[R]elevant circumstances include a failure to perform, a failure to attempt performance, a repudiation of the promise soon after making it, and the speaker's continued assurances after it is clear the speaker does not intend to perform.").
[90] Compl. ¶ 86A.
[91] Compl. ¶ 86B (emphasis in original).

Plaintiffs relied to their detriment. Thus, it would be improper to dismiss the Plaintiffs' fraud claim at this stage. Nonetheless, the 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.[92]

In addition, the Plaintiffs have asserted a second factual representation made by Silva that could additionally give rise to a fraud claim. The Plaintiffs allege that "[s]ometime around the adoption of the Third Amendment," Silva informed Grunstein that "WSIB desired that Silva serve as the manager," specifically, "under the Washington rules that he had to be the manager; that he had some sort of special relationship with them. . . ."[93] This appears at least facially inconsistent with the Plaintiffs' other allegation that Silva never disclosed to WSIB that he had

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[92] These include, perhaps most onerously, that the original vehicles for carrying out the acquisition consisted of entities controlled by Grunstein, not Silva. Thus, Silva would presumably had to have anticipated (at the inception) an eventual restructuring of partnership obligations giving him full control over the acquisition vehicles. Moreover, the Plaintiffs may additionally have the seemingly impossible burden of also establishing that Silva anticipated that the clause assigning the obligation to pay the success fee owed to MetCap would ultimately be omitted from the Third Amendment. *MetCap Securities LLC*, 2007 WL 1498989, at *1. Presenting a somewhat lesser burden, the Defendants also suggest that the Plaintiffs are inconsistent in their allegations, having asserted elsewhere that "[i]n oral and written presentations to PSP *and/or* WSIB seeking the equity for the Beverly Acquisition, Mr. Silva . . . acknowledged . . . that Mr. Grunstein had been the architect of the acquisition of Mariner Health Care." Defs.' Reply Br. in Supp. of their Mot. to Dismiss at 16 (quoting Compl. ¶ 25). However, this fact, if proven, may tend to support, rather than undermine, the Plaintiffs' fraud claim. Besides, even if inconsistent, the Plaintiffs are allowed to plead in the alternative.

[93] Compl. ¶ 45 (quoting Grunstein's testimony).

partners and that Grunstein had a role in the Beverly Acquisition,[94] and, thus, may be additional grounds for fraud, if shown to have been untrue. However, in order to prevail on a fraud claim stemming from this assertion, 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 the manager, but also that Grunstein relied on this statement to his detriment.[95]

In addition, the Defendants argue that the Plaintiffs' fraud claim ought to be dismissed, either because Plaintiffs have failed to plead this claim with sufficient particularity or because the integration clause in the Third Amendment precludes a finding of reasonable reliance on any misstatements. Both of these arguments also fail.

Court of Chancery Rule 9(b) calls for a higher pleading standard for fraud claims, requiring "the circumstances constituting the fraud . . . [to] be stated with particularity." To satisfy the particularity requirements, "a complaint must allege (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations."[96] In essence, plaintiffs are required to allege the circumstances of the fraud "with detail sufficient to apprise the defendant of the

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[94] Compl. ¶ 86A.
[95] Presumably, the Plaintiffs would contend that this statement was intended to induce Grunstein to agree to replace the Original Acquirers with the Silva entities through the Third Amendment.
[96] *ABRY Partners V, L.P. v. F & W Acq., LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

basis for the claim."[97] The Plaintiffs have more than done so here. The Plaintiffs have asserted discrete representations by Silva at specifically delineated times during the acquisition negotiations, as well as what Silva stood to gain from making such representations.[98] These representations were also sufficiently close in time to the alleged formation of the Partnership Agreement potentially to sustain an inference that Silva did not intend to honor the agreement at the time it was made. Thus, the Complaint satisfies Rule 9(b).

As with the promissory estoppel claim, the Defendants' reliance on the integration clause in the Third Amendment fails in this context and does not serve to preclude reliance by the Plaintiffs as a matter of law.

E. *The Negligent Misrepresentation Claim*

The Plaintiffs attempt to plead a claim for negligent misrepresentation. Unlike traditional fraud claims, negligent misrepresentation, or equitable fraud claims do not require a knowing or intentional state of mind. A plaintiff need only allege: (1) a pecuniary duty to provide accurate information; (2) the supplying of false information; (3) failure to exercise reasonable care in obtaining or communicating the information, and (4) a pecuniary loss caused by justifiable

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[97] *Id.* (citing *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 145 (Del. Ch. 2003)).

[98] The Plaintiffs also point to allegations that Silva later discussed the possibility of using other sources of HUD financing as support for the proposition that Silva never intended to adhere to the Partnership Agreement. This fact, however, does not facially help support the inference that Silva had no intention to use CFG to secure HUD financing at the time the purported partnership was established, because the Complaint does not delineate a narrow enough timeframe for when such discussions allegedly occurred.

reliance upon the false information.[99] Negligent misrepresentation, however, "cannot lie where the underlying representations take the form of promises"[100] because promissory fraud requires an intentional or knowing act. That is because the promise to honor an agreement is only a misrepresentation if the promisor knows at the time of the promise that he will ultimately breach; such a misrepresentation cannot occur unknowingly or negligently. Thus, any negligent misrepresentation claim stemming from the Defendants' repudiation of the contract is dismissed.

On the other hand, the Plaintiffs' claim involving Silva's representations to Grunstein with respect to WSIB's ownership requirements for Beverly survives the motion to dismiss because it does not involve a false promise and because Plaintiffs' corresponding fraud claim—also setting forth the elements of a cause of action for negligent misrepresentation—otherwise survives.[101]

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[99] *Steinman v. Levine*, 2002 WL 31761252, at *15 (Del. Ch. Nov. 27, 2002).
[100] *Winner Acceptance*, 2008 WL 5352063, at *9 n.56; *Berdel*, 1997 WL 793088, at *8.
[101] *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996) ("To state a *prima facie* case for equitable fraud, plaintiff must…satisfy all the elements of common-law fraud with the exception that plaintiff need not demonstrate that the misstatement or omission was made knowingly or recklessly."); *VGS, Inc. v. Castiel,* 2003 WL 723285, at *9 n.44 (Del. Ch. Feb. 28, 2003), *rearg. granted*, 2003 WL 1794210 (Del. Ch. Mar. 27, 2003) (characterizing negligent misrepresentation as "essentially a lesser-included offense of fraud" and granting motion for summary judgment for a negligent misrepresentation claim following summary judgment on plaintiff's fraud claim); *Vague v. Bank One Corp.*, 2003 WL 22071564, at *6 (Del. Ch. Aug. 27, 2003), *rev'd on other grounds*, 850 A.2d 303 (TABLE), 2003 WL 22071564 (Del. May 20, 2004) (describing negligent misrepresentation as "functionally a subset of fraud or intentional misrepresentation").

F. *Dwyer and CFG's Breach of Contract Claim*

The Defendants move to dismiss Dwyer and CFG's breach of contract claim as running afoul of Delaware's statute of frauds. Dwyer's principal responsibility under the Partnership Agreement was to underwrite, through CFG, the portfolio of Beverly nursing homes for HUD financing. CFG was also to be given the opportunity to provide HUD financing for the Beverly portfolio upon completion of the acquisition. For this, CFG was to be paid at closing an Acquisition Fee of the greater of $3.5 million or 2.5% of the amount financed. The Defendants assert that this constitutes a contract for the lending of money for an amount greater than $100,000, which Delaware's statute of frauds requires to be in writing.[102] Thus, Defendants contend, Dwyer's oral contract claim should be dismissed. The Plaintiffs respond that it is not proper to dismiss a claim at the pleadings stage on statute of frauds grounds unless it clearly is subject to the statute, there is no possible exception to the statute that might apply, and there is no possible way that compliance with the statute might be achieved.

In particular, the Plaintiffs claim that Dwyer's obligation was not to lend money, but to function as an underwriter, and, thus, that the statute of frauds does

[102] 6 *Del. C.* § 2714(b) ("A contract, promise, undertaking or commitment to loan money or to grant or extend credit, or any modification thereof, in an amount greater than $100,000, not primary for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or the extending of credit shall be invalid unless it or some note or memorandum thereof is in writing and subscribed by the party to be charged or by the party's agent").

not apply. Moreover, the Plaintiffs further assert that, even if Dwyer's obligations are subject to the statute of frauds, the doctrine of part performance may function as an exception to the statute, or that draft contracts and other documents that reference CFG's retention and fees may suffice as writings for statute of frauds purposes. The Defendants respond that these documents were never executed by any Defendants; thus, they cannot be bound by them. The Plaintiffs and the Defendants also dispute whether or not Delaware law is applicable to the question.[103]

The Plaintiffs contend that the terms of the Partnership Agreement involving Dwyer and CFG do not constitute an agreement or commitment to loan money in an amount exceeding $100,000. Instead, it was Dwyer's obligation to provide underwriting services to the partnership for HUD financing. The Plaintiffs acknowledge that Dwyer had the option to lend HUD financing to the partnership but assert that Dwyer was not obligated to make such a loan when the opportunity

[103] The Plaintiffs suggest that New York law should be applied here, and the New York statute of frauds does not require agreements to loan money above a certain threshold to be in writing. N.Y. Gen. Oblig. Law § 5-701 (*McKinney* 2001). Thus, it would seem that this contract would not be subject to New York's statute of frauds. The Plaintiffs argue that, since none of the negotiations occurred in Delaware, it is not clear that Delaware law ought to be applied with respect to the statute of frauds. The Defendants counter that, because of the holding by the Southern District of New York that the Plaintiffs were bound by the forum selection clause in the Merger Agreement, they are also bound by the choice of law provision in the Merger Agreement that selects Delaware law as governing. The Court need not decide this question for purposes of the motion to dismiss.

was offered. According to the Plaintiffs, this absence of commitment precludes the application of the statute of frauds.

The contours of Dwyer's commitments to the partnership are factual questions not to be determined on a motion to dismiss. Taking the Plaintiffs' assertions regarding the nature of the contract—that it was for underwriting services with only the option to lend funding—as true for purposes of the motion to dismiss, it would seem that Dwyer's obligations fall outside of Delaware's statute of frauds, which governs only a "contract, promise, undertaking or commitment to loan money," not an option to do so.[104] Consequently, the Defendants' motion to dismiss Dwyer's breach of contract claim is denied, and the Court need not consider whether full or partial performance or the existence of a suitable writing cure any possible deficiencies under the statute of frauds at this time.

[104] It may be that Dwyer's obligations will ultimately be found to be subject to the statute of frauds, as the "writings" that the Plaintiffs put forward to satisfy any statute of frauds deficiencies may arguably be read to countenance a more robust commitment by Dwyer to lend funds to the partnership than the Plaintiffs assert. The memorandum prepared by Fillmore states that CFG "will [be] engaged . . . to complete the underwriting, application, and completion of HUD refinancing" of Beverly, while the Contribution Agreement states that "CFG has been retained to provide a HUD insured permanent mortgage refinancing" for Beverly, and that CFG "is to earn its reasonable and customary fees" for said financing. Compl. ¶¶ 30-32. *See also* T.C., DX 7 (CFG Commitment Letter).

G. *The Tortious Interference Claim*

The Plaintiffs assert a claim for tortious interference with "contractual relations and/or prospective business advantage"[105] against Fillmore, FSI, FSM, Drumm, Geary, Pearl, and PSC Sub (collectively, the "non-Silva Defendants").[106] The Defendants move to dismiss the claim on several grounds, including that a "party to a contract cannot tortiously interfere with that very same contract,"[107] that the "[P]laintiffs have failed to allege an intentional, improper, and unjustified interference on the part of the non-Silva Defendants,"[108] and that the Plaintiffs have failed to allege any causation between the actions of the non-Silva Defendants and the breach of the Partnership Agreement.[109]

Delaware generally follows the Restatement with respect to tortious interference.[110] In order to establish a claim for tortious interference with contractual relations, a plaintiff must show that there was: (1) a contract, (2) about

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[105] Compl. ¶ 106. *See* 44B Am. Jur. 2d Interference § 49 ("The relational torts of interference with prospective economic advantage and interference with contract are closely related, except that the former requires a mere business expectancy while the latter applies only where there is a legally binding contract between the parties.").

[106] The defined term here may not be as helpful as one might hope because it may obscure the allegation that these entities are either owned or controlled by Silva.

[107] Defs.' Opening Br. in Supp. of their Mot. to Dismiss First Am. Compl. at 22 (quoting *Young v. W. Coast Indus. Relations, Ass'n*, 763 F. Supp. 64, 76 (D. Del. 1991)).

[108] *Id.*

[109] *Id.*

[110] Restatement (Second) of Torts § 766 (1979) ("One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.").

which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury.[111] The Plaintiffs correctly note that "intentional" interference includes circumstances in which the actor "knows that the interference is certain or substantially certain to occur as a result of his action."[112] In other words, an action "that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action" is sufficient to meet the intent requirement of tortious interference.[113]

In addition, the action must also be "without justification" or "improper" in order to subject the actor to liability. Whether something is improper depends on a number of factors, chief among which is the nature of the conduct at issue. The issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does cause it.[114] The question of whether an action is improper is a factual determination not readily amenable to assessment by way of a motion to dismiss.

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[111] *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987). In contrast, to establish a claim for tortious interference with a prospective economic relationship, plaintiffs need not establish the existence of an enforceable contract, but merely of a valid business relation or expectancy that had a reasonable probability of maturing into a future economic benefit to the plaintiff.
[112] Restatement (Second) of Torts § 766, cmt. j.
[113] *Id.*
[114] *See, e.g., id.* § 767, cmt. c.

The doctrine that a party to a contract cannot tortiously interfere with that same contract includes the notion that, where an entity under the control of a contracting party is used by that party as an instrument to breach the contract, it is improper to accord it separate status as a tortfeasor.[115] Thus, if certain of the non-Silva Defendants functioned as the agents or instrumentalities of Silva to cause his breach of the Partnership Agreement, the claim must fail with respect to them. Similarly, Delaware courts have held that an "interference privilege" exists where non-parties to the contract share a "commonality of economic interests" with one of the parties and act "in furtherance of their shared legitimate business interests."[116] To overcome this affiliate "privilege," a plaintiff must adequately plead that the non-party "was not pursuing in good faith the legitimate profit

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[115] *See, e.g., TriState Courier and Carriage, Inc. v. Berryman*, 2004 WL 835886, at *12 (Del. Ch. Apr. 15, 2004). *See also Tenneco Auto. Inc. v. El Paso Corp.*, 2007 WL 92621, at *6 (Del. Ch. Jan. 8, 2007) ("Because one need not be a party to a contract to be deemed not to be a stranger to the contract, officers, subsidiaries, and agents, such as lawyers, benefit from a privilege against tortious interference claims because they are so closely related to the parties to the contract.").

[116] *Sherin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 591 n.14 (Del. Ch. 1994) (holding that a "commonality of economic interests . . . underlay[s] the creation of an interference privilege"); *James Cable, LLC v. Millennium Digital Media Sys.*, LLC, 2009 WL 1638634, at *4 (Del. Ch. June 11, 2009) (applying the *Shearin* framework to absolve a company's controlling stockholder and the stockholder's general partner from a tortious interference claim where the complaint conceded a commonality of economic interests).

seeking activities of the affiliated enterprises,"[117] or "was motivated by some malicious or other bad faith purpose to injure the plaintiff."[118]

The Plaintiffs argue that this claim is pleaded in the alternative. That is, if this Court finds that the non-Silva Defendants were not parties to the alleged contracts, then they might have sufficient separation from these contracts to be viewed as interlopers causing tortious harm by having caused Silva's breach. However, in asserting that Silva either owns, controls, or manages each of non-Silva Defendants, the Complaint concedes that the Defendants share common economic interests.[119] Thus, the non-Silva Defendants are protected by the affiliate privilege absent allegations that they acted according to a malicious or bad faith purpose "outside of an economic interest [they] shared with" Silva,[120] or that they were not pursuing their common economic interests in interfering with the contract. Instead, the Plaintiffs have alleged the exact opposite.[121] Accordingly, the actions allegedly taken by the non-Silva Defendants are protected by the

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[117] *Shearin*, 652 A.2d at 591 ("[T]he gist of a well-pleaded complaint for interference by a corporation of a contract of its affiliate is a claim that the 'interfering' party was not pursuing in good faith the legitimate profit seeking activities of the affiliated enterprises.").
[118] *Shearin*, 652 A.2d at 591. *See also Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175 (Del. Ch. 1999).
[119] Compl. ¶¶ 8-12.
[120] *James Cable*, 2009 WL 1638634, at *5.
[121] Pls.' Answering Br. in Opp'n to Defs.' Mot. to Dismiss the First Am. Compl. at 44 ("[P]laintiffs allege that the LLC defendants appropriate for themselves and Silva alone the opportunity to acquire Beverly in derogation of plaintiffs' contract with Silva to share in the acquisition. In taking those opportunities from plaintiffs for their own benefit, defendants' interference was unquestionably unjustified, particularly given the allegations that Silva agreed to carry out the parties' agreement through his companies.").

affiliate privilege and are insufficient to state a claim for tortious interference. Thus, the Defendants' motion to dismiss this claim is granted.

H. *The Claims against the Parties Created After the Oral Partnership Agreement*

The Defendants seek the dismissal of all counts asserted against the Defendants other than Silva and Fillmore on the ground that "there is no vicarious liability claim alleged against"[122] those six Defendants other than a conclusory allegation that "'[u]pon information and belief, each and all of the defendants acted in concert with, as instrumentalities of, and as agents, co-ventures [sic] and/or co-conspirators of each other in connection with the conduct of Defendants, as alleged in this Complaint.'"[123] However, the Plaintiffs have also asserted that the Partners agreed to the following:

> [I]f the Partnership should be successful in acquiring Beverly, each partner would share in all economic benefits received by any of them (or any entities controlled by them) resulting from the Beverly Acquisition. They agreed that the Partnership would include and would extend not only to themselves as individuals, but also to any entities that they then owned or controlled, as well as any entities that they would own and control in the future, that were used to carry out and/or receive the benefits of the Beverly Acquisition.[124]

The Defendants contend that language in the Complaint stating that the entity Defendants[125] were "formed by Silva for the purpose of carrying out and/or

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[122] Defs.' Opening Br. in Supp. of their Mot. to Dismiss First Am. Compl. at 23.
[123] *Id.* (quoting Compl. ¶ 54).
[124] Compl. ¶ 17.
[125] The Defendants exclude Fillmore from those entities that should be precluded from vicarious liability at this stage.

obtaining the benefits of the Beverly Acquisition, and each of these Defendants, along with Defendant [Fillmore], is owned and/or controlled by Silva" is conclusory and insufficient to extend the causes of action to these Defendants.[126] It is, however, clearly pleaded in the remainder of the Complaint—and apparent from the Merger Agreement and Third Amendment—that Pearl, PSC, and Geary *were* established to carry out the acquisition and are controlled by Silva, and that FSI, FSM, and Drumm are also either owned or controlled by Silva.

The Defendants argue that entities created after the supposed Partnership Agreement cannot be subject to that agreement, and point to the general rule that business entities are not liable for the contracts of their promoters prior to incorporation. However, under Delaware law, if the subsequently formed entity implicitly adopts the pre-formation agreement by accepting its benefits with knowledge of its terms, the entity may be bound by that agreement.[127] Specifically, "[o]ne who knowingly accepts the benefits intended as the consideration, coming to him or her under a contract voluntarily made by another

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[126] Defs.' Opening Br. in Supp. of their Mot. to Dismiss First Am. Compl. at 24 (quoting Compl. ¶ 54).

[127] *Am. Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 350 (Del. Ch. 2003). *See also Spering v. Sullivan*, 361 F. Supp. 282, 286 (D. Del 1973); *Stringer v. Elec. Supply Co.*, 2 A.2d 78, 79 (Del. Ch. 1938). The first question in determining whether a non-signatory can nevertheless be bound to a contract through adoption is one of contractual interpretation: "whether the original parties intended to create or permit future contractual obligations through adoption by non-signatories." *Am. Legacy*, 831 A.2d at 344. Here, the Plaintiffs have clearly alleged that the Partnership Agreement explicitly sought to create future contractual obligations on those entities that would be formed to effectuate the Beverly transaction.

in his or her behalf, becomes bound by reason of such acceptance to perform his or her part of the contract."[128] Notably, as is alleged to be the case here, "courts have most frequently imputed knowledge and implied corporate adoption of a promoter's contract in situations where the promoter was, in effect, an alter ego of the corporation. . . ."[129]

The Defendants maintain that "there is no allegation that these entities did anything to adopt, accept or ratify an agreement with Grunstein and Dwyer to accept profits and losses equally or otherwise subject themselves to an oral partnership agreement . . . [and] nothing that the defendants other than Silva and Fillmore Capital did is inconsistent with their rights under the Third Amendment."[130] Courts, however, have held that a pre-incorporation contract is properly considered ratified and adopted by implication or estoppel "where an obligation running to the corporation is carried out, and the corporation accepts performance under circumstances making it inequitable to allow the company thereafter to escape the provisions of the promoters' contract."[131] The Plaintiffs have alleged that, even after these entities were created and the Third Amendment went into effect, Silva (who acted both for himself and as an agent of the

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[128] *Westendorf v. Gateway 2000, Inc.*, 2000 WL 307369, at *4 (Del. Ch. Mar. 16, 2000), *aff'd*, 763 A.2d 92 (Del. 2000) (TABLE) (quotation and citations omitted).
[129] *Spering*, 361 F. Supp at 286.
[130] Defs.' Reply Br. in Supp. of their Mot. to Dismiss at 28 n.41.
[131] *Air Traffic & Service Corp. v. Fay*, 196 F.2d 40, 42 (D.C. Cir. 1952) (applying Delaware law).

Defendant entities) continued to seek contractual performance by the Plaintiffs and to assert that the Partnership Agreement was still in place. The Defendant entities thereafter accepted the benefits of the Plaintiffs' performance under the Partnership Agreement. Because the Defendant entities had knowledge (through Silva) of the Partnership Agreement and subsequently accepted its benefits, they have implicitly agreed to be bound by the terms of that agreement, or so it has been sufficiently alleged.[132]

With respect to the Plaintiffs' other causes of action, the Defendants assert that even if the Court does not dismiss the claim for breach of the Partnership Agreement against the Defendant entities, all other causes of action should be dismissed against them because "there are no allegations that these entities committed torts, agreed to a carried interest, or agreed to HUD financing."[133] Nevertheless, many of the allegations that give rise to the Plaintiffs' other causes of action occurred after these entities were created, when Silva could properly be seen as acting as their agent. Whether Silva is properly held to be an agent of certain Defendant entities with respect to the various causes of action is ultimately a factual question outside the purview of a motion to dismiss.

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[132] *See, e.g.*, *In re Acadia Dairies, Inc.*, 135 A. 846, 848 (Del. Ch. 1927) (holding that the knowledge of the organizer and promoter of the corporation, who was sole owner thereof, constituted knowledge by the corporation).

[133] Defs.' Reply Br. in Supp. of their Mot. to Dismiss at 28 n.40.

Accordingly, the Defendants' motion to dismiss all causes of action against Pearl, PSC Sub, Geary, FSI, FSM, and Drumm is denied.

IV. MOTION TO COMPEL

The Defendants have also moved to compel further responses to the interrogatories and document production requests submitted to the Plaintiffs. The Defendants assert that the "Plaintiffs' responses are composed primarily of objections and general references to document requests or deposition testimony in prior actions commenced against defendants. . . ."[134] Accordingly, the Defendants assert that (1) it is improper for the Plaintiffs to respond to discovery requests by referencing lists of documents or deposition testimony; (2) the Plaintiffs have not produced all the documents promised in their responses; and (3) the Plaintiffs' objections to discovery requests based on grounds that they are not relevant to the case, that requests call for confidential financial information or proprietary and trade secret information, that requests are "cumulative, burdensome, and oppressive," and that the requests are premature are all without merit.

The Plaintiffs respond that this motion is "premature, unnecessary, moot and without merit."[135] The Plaintiffs point out that much of the initial dispute regarding discovery has already been resolved between the parties or through the Plaintiffs' supplemental responses and little remains from the Defendants' initial

[134] Defs.' Opening Br. in Supp. of their Mot. to Compel at 2.
[135] Pls.' Memo. of Law in Opp'n to Defs.' Mot. to Compel at 1.

motion. All remaining requests are either covered by privilege or seek information that was already made available in the prior cases and, thus, is as equally available to the Defendants as to the Plaintiffs.

A. *Disputes over Plaintiffs' Use of Rule 33(d)*

The Defendants assert that the Plaintiffs have misused Court of Chancery Rule 33(d) with respect to certain interrogatories in an attempt to avoid giving straightforward answers and, in certain cases, to avoid admitting that they have no relevant documents. The Defendants also claim that Rule 33(d) does not include deposition testimony. The Plaintiffs reply that they have substantially responded to the Defendants' interrogatories and that the information requested is as equally available to the Defendants as it is to the Plaintiffs, and that the supplemental responses are sufficiently tailored to the Defendants' requests to serve their purpose. Accordingly, "[w]hat defendants still seek . . . is either makework or is not calculated to lead to the discovery of admissible evidence."[136] The Plaintiffs invoke Court of Chancery Rule 33(d), which provides in part:

> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records . . . , and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained . . . .

[136] *Id.* at 3.

The Plaintiffs initially responded to the Defendants' interrogatories by referencing the entire document production and deposition testimony in this case and in the related cases, instead of providing direct answers to the questions. After some wrangling among the parties, the Plaintiffs reduced the volume of the documents referenced, but their supplements to three of the four objected-to initial interrogatory answers still each list more than a hundred pages of documents and deposition exhibits.

The Plaintiffs' reliance upon Rule 33(d) in providing interrogatory answers has been somewhat overbroad.[137] Because these interrogatories deal with (1) the compensation received by parties to the Mariner transaction; (3) the identities of shareholders or members of those companies set up by Grunstein to effectuate the Beverly Acquisition; or (3) of those entities that owned these companies; and (4) descriptions of any governmental investigations into Mariner, it cannot be said that the burden of ascertaining the answer to these questions is "substantially the same" between the Defendants and the Plaintiffs. Indeed, the Plaintiffs have illuminated certain of the answers to the Defendants' interrogatories in their

[137] Rule 33(d), of course, applies to business records. The Court need not resolve any debate as to whether accumulated discovery materials from related litigation constitute business records within the meaning of that rule. The Court, instead, has broad discretion to facilitate and control the course of discovery pursuant to Court of Chancery Rule 26(c). In this context, Rule 33(d) offers a convenient model to guide the Court's exercise of its general discretion in discovery matters.

Memorandum of Law in Opposition to Defendants' Motion to Compel. Since these are all questions that should have discrete and straightforward responses that are easily produced in answer form, the Plaintiffs may not employ Rule 33(d) simply to direct the Defendants to the relevant documents.

B. *Disputes over Relevance*

Several of the contested interrogatories deal with certain relevance objections that the Plaintiffs made with respect to entities and issues best described as tangential to the central questions in this case. The Plaintiffs objected to the interrogatories on the grounds that they were "neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence," and, furthermore, "cumulative, burdensome and oppressive."[138] Defendants counter that the standard for relevance in a discovery context is low and that these interrogatories should be permitted, and suggest certain theories of the case for which evidence obtained might be useful.

Court of Chancery Rule 26 governs the scope of discovery and adopts a broad and flexible standard of relevance. Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the

[138] Pls.' Resp. to Defs.' First Set of Interrogs. at 5. For certain of these objections, the Plaintiffs point to the extensive discovery already accomplished in the predecessor New York action and in the *MetCap* case that remains relevant here. The Plaintiffs note that, thus far, over 200,000 documents have been produced and twelve witnesses deposed in actions here and in New York. *Id.*

subject matter involved in the pending action. . . ."[139] Any information that appears reasonably calculated to lead to the discovery of admissible evidence is discoverable. "Consequently, absent injustice or privilege, the Rule instructs the Court to grant discovery liberally."[140]

However, the scope of discovery is "squarely within the sound discretion of this Court."[141] As such, even where discovery is relevant, this Court may limit discovery, "recogniz[ing] that considerations of subject matter, time, and space are important to confine the scope of discovery to those matters that are truly relevant and to prevent discovery from evolving into a fishing expedition or from furthering purposes ulterior to the litigation."[142] Indeed, Rule 26(b)(1)(iii) recognizes that the Court may, among other reasons, limit discovery that is "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."[143] With these broad principles in mind, the Court turns to the specific discovery disputes at issue.

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[139] Ct. Ch. R. 26(b)(1).
[140] *Pfizer, Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999).
[141] *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2007 WL 2685011, at *1 (Del. Ch. Sept. 11, 2007) (citing *Dann*, 166 A.2d at 432).
[142] *Plaza Sec. Co. v. Office*, 1986 WL 14417, at *5 (Del. Ch. Dec. 15, 1986).
[143] Ct. Ch. R. 26(b)(1)(iii); *see also* Ct. Ch. R. 26(c) ("Upon motion by a party . . . and for good cause shown, the Court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .").

1. Information Concerning the Operations of MetCap

In Interrogatories 1, 2, and 3, Defendants ask questions regarding the control and operations of the MetCap entities. Specifically, Defendants seek information regarding payments between MetCap Holdings or MetCap Securities and certain individuals, including Grunstein, as well as information as to the amount, reasons for, dates of, and payer of all payments to MetCap from 2003 until the present. The Defendants argue that this information is relevant because it gets to the control and operation of MetCap. The Defendants plan to argue that Grunstein is in privity with MetCap, that MetCap serves as Grunstein's "personal investment bank," and that, consequently, Grunstein's claim is barred through *res judicata* as a result of this Court's dismissal of MetCap's claims in the earlier case.[144] The Plaintiffs assert that, for purposes of MetCap's ownership, they have already disclosed each of the four stockholders in MetCap who held more than a 10 percent interest, as well as what each of these partners paid to and received from MetCap, and that the Defendants' interest in what other payments MetCap paid to or received from non-partners is not relevant. The Court agrees.

[144] Additionally, the Defendants suggest that they will attempt to show that there is some equivalency between the contracted for fee to MetCap and Grunstein's claim for carried interest in the transaction, and, presumably, that the claim for MetCap's investment banking fee dismissed in the *MetCap* litigation was the same as Grunstein's expected interest under the Partnership Agreement.

The Defendants' assertion that further inquiries into the operations of MetCap will help establish a case for privity or control does not appear sufficiently likely to merit their intrusiveness. The Plaintiffs have provided evidence with respect to the ownership of MetCap as well as all payments to principles. All of the MetCap principals have been subject to depositions, while the extensive discovery material from the MetCap litigation also remains available to the Defendants. Additional information with respect to the control of MetCap and Grunstein's relationship to it does not appear likely to result from the objected-to interrogatories. Accordingly, this Court will not compel additional responses to Interrogatories 1, 2, and 3.

2. Information Concerning the Mariner Transaction

The Defendants also seek to obtain additional information with respect to the Mariner transaction that Grunstein arranged before the Beverly Acquisition, and upon which the Beverly Acquisition was allegedly to be based. The Plaintiffs object to an interrogatory that seeks information on all forms of payment or compensation related to the Mariner transaction received by certain individuals, including Grunstein, Dwyer, and CFG, as well as the MetCap entities. The Plaintiffs also challenge an interrogatory requesting detailed descriptions of all instances where a governmental entity has investigated Mariner or any successor in interest, along with a document request for all documents related to such

investigations. Plaintiffs object on the grounds of relevance and that the request is cumulative, burdensome, and oppressive.

The Defendants assert that this information is relevant to the fact that Grunstein has asserted that one of Silva's acts that was inconsistent with the Partnership Agreement was his failure to follow the Mariner Model. Additionally, the Defendants point out that the Plaintiffs have asserted that Silva's failure to utilize the Mariner Model reduced the return that the partnership would have received from the transaction. Accordingly, the Defendants seek to introduce evidence that the Mariner Model would not have been better for the Beverly Acquisition and to see if "[m]aybe there's a problem with the 'Mariner Model.'"[145]

The Plaintiffs respond that the issue of the reduction in compensation to the investors stems from the model itself, not the operation thereof; specifically, how certain taxation and liability issues are treated. Thus, they assert, the only relevant governmental inquires in this case would involve tax issues, which information they have already provided to the Defendants. The Plaintiffs contend that the

[145] Tr. at 70. The Defendants have also recently intimated that Grunstein's proposal of a transaction involving a pharmacy supply company in the Beverly transaction, in a manner similar to the one implemented in the course of the Mariner transaction and now subject to a federal investigation, was what led to a deterioration in Grunstein's and Silva's relationship and may have caused Grunstein to forfeit his partnership interest, and is additionally relevant on these grounds. Letter of Bruce E. Jameson, Esq., Nov. 6, 2009, at 2; Ex. 2 (Silva Dep. excerpt). The Plaintiffs respond that the Defendants are merely seeking to introduce unproven irrelevant allegations in order to embarrass Grunstein and to prejudice the Court against him, and that the Defendants' allegations as to relevance are inconsistent with deposition testimony and the timeline of events. Letter of Arthur L. Dent, Esq., Nov. 16, 2009.

compensation and payment received in the Mariner transaction, as well as any subsequent operational difficulties experienced by the post-acquisition Mariner, are irrelevant to this case.

The Court agrees that the Defendants have neither shown why the operation of Mariner is relevant to this case nor why its relative success or failure speaks to Silva's alleged failure to implement the Mariner Model in the Beverly transaction, absent evidence that Silva was aware of operational difficulties stemming from the Mariner Model during the relevant period and that such difficulties precluded the structure's use in the Beverly Acquisition. In addition, the Defendants have not sufficiently fleshed out why information regarding governmental inquiries into the operation of Mariner will lead to relevant evidence regarding a breakdown in the relationship between Silva and Grunstein or a forfeiture of Grunstein's partnership interest based on an unrealized aspect of the Beverly transaction. Turning to the compensation received by Grunstein and his colleagues in the Mariner transaction, although not relevant to the operation of Beverly or to Silva's choice not to employ the Mariner Model, the compensation is relevant to Grunstein's claims for damages in the instant case, specifically his expectations (based on his experience in the Mariner transaction) as to what he would be entitled to receive as a result of the Beverly Acquisition. It appears, however, that the Plaintiffs have already provided the relevant information in their supplemental response to

Interrogatory 4, and that increased disclosure would not reasonably lead to further admissible evidence. If more detailed information regarding compensation or governmental inquiries appears necessary as more facts are brought to light in this case, the Court will consider a later motion to compel additional disclosures. For now, the Defendants' motion to compel supplemental responses to Interrogatories 4 and 21 and Document Request No. 11 is denied.

3. Information Concerning Entities Formed by Plaintiffs for the Beverly Acquisition

Defendants seek to compel answers to a series of interrogatories, along with a document request, regarding the ownership of entities formed by the Plaintiffs to effectuate the Beverly Acquisition. Specifically, the Defendants seek: (1) the identities of all shareholders or members of NASC, SBEV, 405 Lexington Holdings, and SBEV Equity, at any time; (2) if other entities owned any of the aforementioned companies, the identities of all shareholders or members of those entities; (3) a description of any transfers in ownership of the companies involved in the Beverly Acquisition; and (4) all documents related to the Plaintiffs' answers to these interrogatories. The Plaintiffs simultaneously argue a relevance exception to these interrogatories along with an assertion that they have already provided all of the pertinent documents. The Plaintiffs explain that the ownership of NASC and SBEV was provided to the Defendants during the course of the *MetCap* litigation and that 405 Lexington Holdings and SBEV Equity are entities that were

discussed but that were never formed. The Plaintiffs contend that the Defendants' characterization of their response to Interrogatory 9 (whether there have been any transfers of ownership) as "vague and incomplete" is "disingenuous."[146]

The Defendants respond that the information is pertinent to their defense that the parties never contemplated the acquisition to be accomplished pursuant to a general oral partnership. The Defendants dispute the Plaintiffs' assertion that 405 Lexington Holdings and SBEV Equity were never formed, pointing to Delaware Secretary of State filings that show that they were. Although information on the ownership of those vehicles that the Plaintiffs established to effectuate the acquisition does not seem particularly likely to bolster the Defendants' argument that the existence of these juristic entities reduces the likelihood that an oral partnership agreement was formed, it also does not appear to be at all prejudicial to the Plaintiffs, since they assert that the relevant information has already been disclosed.

Accordingly, the Defendants' motion to compel information regarding the ownership breakdown of NASC, SBEV, 405 Lexington Holdings, and SBEV Equity is granted. Because of this Court's ruling with respect to the use of Rule 33(d) and its guidance for the Court's discretion under Rule 26(c), the Plaintiffs should respond to Defendants' Interrogatories 5, 7, and 9 with specific

[146] Pls.' Memo. of Law in Opp'n to Defs.' Mot. to Compel at 7.

answers to the information requested instead of merely referencing prior documents or depositions in this case or related actions.[147] Insofar as the Plaintiffs' supplemental response has sufficiently responded to Document Request No. 7 (for those documents dealing with the ownership interest of these entities) and did not exclude documents based on a relevance exception, the Defendants' motion to compel additional documents is denied.

4. Information Concerning Grunstein's Compensation at Troutman Sanders

The Plaintiffs' final relevance objection addresses Defendants' Interrogatory 11, which requests the amount of compensation Grunstein received from Troutman Sanders during fiscal years 2005 and 2006. The Plaintiffs further object that this calls for confidential financial information of both Grunstein and third parties. The Defendants respond that Grunstein's salary in these years is relevant to the Plaintiffs' unjust enrichment claim. The Defendants suggest that, because Grunstein's law firm, Troutman Sanders, obtained roughly $14 million in fees with respect to the Beverly Acquisition, and that Grunstein, himself, billed a significant amount for legal work related to the transaction, this provides an explanation as to why Grunstein might have decided to forego any personal stake in the transaction with the assignment of the Original Acquirers' rights under the

[147] The Plaintiffs' protestations notwithstanding, a response that "except as identified in their supplemental response [referencing 130 pages of documents and deposition exhibits] . . . plaintiffs have no knowledge of any transfers of ownership" does seem both vague and incomplete.

Third Amendment. Further, the Defendants assert that, should they be found liable for damages against Grunstein, they ought to get a set-off for the amounts that he earned as an attorney in connection with the transaction. The Defendants' motion to compel information regarding Grunstein's compensation from Troutman Sanders is denied.

Grunstein's total salary at Troutman Sanders is insufficiently relevant to the case to merit such an intrusion into his personal financial affairs. The Defendants have not provided any support for how his total salary figure will provide them with any admissible evidence in this case. While Grunstein billed hours for legal work related to the Beverly Acquisition, there is no evidence that such work constituted such a materially large portion of the legal work he performed at Troutman Sanders during this time period that his total salary could in any way function as an appropriate proxy for any kind of unjust enrichment set-off.

Moreover, the legal work that Grunstein performed in support of the transaction was distinct from his alleged efforts as a partner in the transaction, and seems to have been unaffected by the adoption of the Third Amendment. While the line between these two roles was often a blurry one, this Court would not presume to conflate them.

C. *Disputes over Appropriateness of Plaintiffs' Responses*

Finally, the Defendants seek to compel revised answers to certain interrogatories which, they assert, failed to answer the question presented. These interrogatories ask the Plaintiffs to identify all documents reflecting: (1) the terms of the oral partnership as alleged in the Complaint; (2) the terms of the alleged agreement to pay Dwyer or CFG $3.5 million for their work on the transaction; (3) the agreement between Silva and Grunstein that they would remain partners and Dwyer's interest would be acquired by Grunstein and Silva when CFG was retained to provide the HUD financing; and (4) the agreement to use the Mariner Model in the Beverly Acquisition.

In their supplemental response, the Plaintiffs object to these interrogatories on the grounds that they are "vague, ambiguous and uncertain" as to the meaning of the word "reflecting,"[148] that the interrogatories are overboard, and that they call for information that is "privileged by the attorney-client privilege, work product rule and/or other privileges, including without limitation confidential and proprietary and/or trade secret information privileges."[149] Nevertheless, though

[148] The original interrogatory requested all documents "concerning" these matters; however, after the Plaintiffs previously objected to the use of the term "concerning" as "vague, ambiguous and uncertain" in their answer, the Defendants agreed to modify the interrogatories to request those documents "reflecting' the contractual terms. Notwithstanding this agreed modification, the Plaintiffs have renewed their objection with respect to the term "reflecting."
[149] Pls.' Suppl. Resp. to Defs.' First Set of Interrogs. at 4-5.

subject to and without waiving these objections, the Plaintiffs supplemented their responses to these interrogatories with lists of documents and deposition exhibits.

The Defendants assert that the Plaintiffs have "evaded responding" to these interrogatories because their supplemental response includes documents that, the Defendants assert, are "not even arguably responsive to the requests."[150] For example, the Defendants object to the provision of various documents that imply the existence and broad contours of an agreement between the parties, but do not delineate any explicit terms of such an agreement, as requested by Interrogatories 12 and 13. The Defendants also complain that certain of the documents put forward are "contradictorily cited as reflecting the terms of the alleged oral partnership agreement, the oral contract with Dwyer (or Capital Funding), and the oral agreement concerning a carried interest between Grunstein and Silva."[151] The Defendants argue that the Plaintiffs have liberally interpreted what documents should be deemed responsive to these interrogatories in an attempt to avoid admitting that "no documents exist."[152]

The Plaintiffs' responses to these interrogatories appear completely appropriate. They have provided the full extent of the written documentation they rely upon to contend that certain oral contracts were in place with the Defendants.

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[150] Defs.' Reply Br. in Supp. of their Mot. to Compel at 16-17.
[151] *Id.* at 18.
[152] *Id.* at 16.

As the Plaintiffs ultimately rely solely on the alleged existence of these oral agreements, it is not surprising that there is no writing that portends to fully capture these terms. Whether these various documents, when aggregated, suggest the existence and contours of an oral agreement is, ultimately, a question of fact. The Plaintiffs were within reason to conclude that their answers to the Defendants' interrogatories "reflected" the terms and agreements at issue. The Defendants' motion to compel additional responses is, therefore, denied with respect to Interrogatories 12, 13, 16 and 17.

V. CONCLUSION

For the foregoing reasons, Counts II and IX of the Amended Verified Complaint will be dismissed and Count VI will be dismissed in part. All other aspects of the Defendants' motion to dismiss are denied. The Defendants' motion to compel supplemental answers is granted only with respect to Interrogatories 5, 6, 7, 9, and 10. Otherwise, the Defendants' motion to compel is denied. The Plaintiffs shall provide supplemental responses within 30 days.

Counsel are requested to confer and to submit an implementing order.