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Transaction ID 23987170
Case No. 2129-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

METCAP SECURITIES LLC and NORTH AMERICAN SENIOR CARE INC.,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 2129-VCN**
PEARL SENIOR CARE, INC., PSC SUB INC., GEARY PROPERTY HOLDINGS, LLC and BEVERLY ENTERPRISES, INC.,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: August 5, 2008
Date Decided: February 27, 2009

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NOBLE, Vice Chancellor

The facilitators of an acquisition valued at roughly $2 billion expected a $20 million fee for their (arguably) relatively minimal, but critical, efforts. As negotiations to finalize the merger documents ran into the early morning hours, a contractual change was made with the consequence of depriving them of any direct claim to compensation. In an effort to gain back the anticipated economic awards, they filed this action. Many of their claims were jettisoned at the motion to dismiss stage.[1] Two claims, however, survived: (1) whether the merger documents can be reformed to allow for their fee; and (2) whether the Defendants were unjustly enriched by the work performed by one of the Plaintiffs during the period between the final negotiation of the merger documents and closing.

Since the Court's decision on the motion to dismiss, the parties have engaged in extensive discovery, and the Defendants now seek dismissal of the Plaintiffs' remaining claims through summary judgment.

I. BACKGROUND[2]

Plaintiff North American Senior Care, Inc. ("NASC") is a Delaware corporation formed solely for the purpose of acquiring Defendant Beverly Enterprises, Inc. ("Beverly"), a Delaware corporation that operates nursing home

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[1] *MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989 (Del. Ch. May 16, 2007) (hereinafter "*MetCap I*"); *MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1954442 (Del. Ch. June 29, 2007).

[2] The general background of this case has been previously set forth. *See supra* note 1. Some familiarity with the Court's earlier efforts is presumed. The facts relevant to the pending motion, including some new facts provided by discovery, will be set forth as necessary to frame the Court's analysis and decision.

facilities throughout the United States.[3] The two entities entered into a merger agreement (the "Merger Agreement") on August 16, 2005, pursuant to which Beverly would be acquired for $2 billion. Leonard Grunstein, a partner at the law firm of Troutman Sanders LLP ("Troutman Sanders"), is a principal of NASC. Grunstein had been the architect of an acquisition involving Mariner Healthcare ("Mariner"), and he sought to structure a similar transaction for the Beverly acquisition.

Grunstein is also a principal of Plaintiff MetCap Securities LLC ("MetCap"). Before the Merger Agreement between NASC and Beverly, MetCap had entered into an agreement (the "Advisory Agreement") with NASC to act as NASC's financial advisor in connection with the Beverly transaction. Under the Advisory Agreement, MetCap was to receive a $20 million fee for its services upon closing of that transaction; the fee would represent one percent of the merger consideration.

Section 5.10 of the Merger Agreement, as originally drafted between NASC and Beverly, contained the following "no-brokers' fee" clause, which referenced the MetCap fee:

> No Broker, finder, financial advisor, investment banker or other Person (other than Wachovia Securities and MetCap Securities LLC, the fees and expenses of which will be paid by Parent) is entitled to any brokerage, finder's, financial advisor's or other similar fee or

[3] *MetCap I*, at *2.

> commission in connection with the Merger based upon arrangements made by or on behalf of Parent or Merger Sub.[4]

Although the Merger Agreement contemplated that NASC would acquire Beverly, NASC was an assetless shell company. NASC was serving as a placeholder (of sorts) while Grunstein sought financing for the Beverly takeover. In or around August 2005, Grunstein approached Ronald Silva of Fillmore Capital Partners ("Fillmore") after another source of financing had fallen through. Silva and Fillmore had been involved (in a limited capacity) in the Mariner acquisition. Grunstein began negotiations with Silva and his counsel, Joseph Heil of the law firm of Dechert LLP ("Dechert"). During these negotiations, both Silva and Heil were given copies of the Merger Agreement, which contained Section 5.10 (the passage referencing MetCap's fee).

Silva executed on behalf of Fillmore an "Equity Commitment Letter" stating that Fillmore was to secure by November 15, 2005, $350 million in financing for the purchase of NASC's common and preferred stock, and would cause NASC to use those proceeds for the Beverly acquisition. The Merger Agreement was amended on September 22, 2005 to incorporate this Equity Commitment Letter. Section 5.10, however, remained intact.

On or about November 17, 2005, the parties decided that the structure of the transaction would change. NASC (and its related entities, SBEV Property

[4] "Parent," at this early stage, was understood to be NASC.

Holdings, LLC ("SBEV") and NASC Acquisition Corp.) would no longer acquire Beverly; instead, Defendants Pearl Senior Care, Inc. ("Pearl"), PSC Sub Inc. ("PSC"), and Geary Property Holdings, LLC ("Geary") would acquire Beverly. Pearl, PSC, and Geary were entities created by Silva (and Fillmore) for the purpose of acquiring Beverly. Silva served as President of Pearl and PSC. The Merger Agreement had to be amended to reflect this change in structure. Accordingly, the parties began to negotiate the Third Amendment to the Merger Agreement which would eventually lead to this litigation.

During the negotiations leading up to the Third Amendment, Grunstein and his partner at Troutman Sanders, Mark Goldsmith, represented NASC and SBEV. On November 18, Grunstein and Goldsmith signed signature pages on behalf of NASC and SBEV and left them with another Troutman Sanders partner, Lawrence Levinson, to be held in escrow and delivered at the close of negotiations.

In the evening of November 20, after a number of revisions had been made to the Merger Agreement (but at that point none to Section 5.10) Grunstein and Goldsmith went home, apparently under the impression that negotiations had concluded. Another Troutman Sanders partner, W. Brinkley Dickerson, stayed behind. Later the same evening, Heil sent a revised draft of the Merger Agreement to Dickerson; in that draft, for the first time, the parenthetical in Section 5.10 that referenced the MetCap fee had been deleted. Heil testified at deposition that he did not know why he asked Dickerson to agree to the deletion of the parenthetical. Dickerson, however, testified that Heil had "said we'd [(Dechert on behalf of the Pearl Entities)] like to delete the parenthetical. And I [(Dickerson)] said why. And he said, well,) we don't want to screw anybody, but we want to be able to negotiate fair deals with them." The Third Amendment, which included the revised Section 5.10, became final shortly thereafter. After the Third Amendment, and before the Beach acquisition was completed, MetCap's sole employee, Mark Forman, continued to work on the Beverly transaction.

NASC and MetCap commenced this action to recover the $20 million fee from the Silva entities. In *MetCap I*, this Court granted the Defendants' motion to dismiss with respect to many of NASC's and MetCap's claims. The following two claims survived the motion and are now the subject of the Defendants' motion for summary judgment: (1) whether NASC can reform the Third Amendment and return to the earlier version of Section 5.10 of the Merger Agreement which acknowledged a potential right to compensation; and (2) whether the Defendants were unjustly enriched by work performed by MetCap *after* the Third Amendment.

II. ANALYSIS

A. *The Summary Judgment Standard*

Summary judgment is appropriate if the moving party demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law.[5] The burden is on the moving party to show the absence of a material issue of fact, and the Court must review all evidence in the light most favorable to the non-moving party.[6] However, if the moving party puts into the record facts which, if undenied, entitle it to summary judgment, the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight;[7] i.e., the party opposing summary judgment is obliged to adduce some evidence of a dispute of material fact.[8]

B. *NASC's Reformation Claim*

The Defendants move for summary judgment on the claim for reformation of Section 5.10 of the Merger Agreement—the section alleged to have confirmed the obligation to pay the fee that is the subject of this litigation. NASC, however, claims that summary judgment is inappropriate. It argues that Dickerson was conflicted in his role as "deal counsel" with an interest adverse to NASC, and, therefore, his actions and knowledge cannot be imputed to NASC—i.e., Dickerson did not have the authority to bind NASC at the time of the Third Amendment. Therefore, the parties' prior agreement regarding the fee should be restored.[9] For

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[5] *Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992).
[6] *Id.* at 10-11.
[7] *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979).
[8] *Id.*
[9] Of course, the existence of a specific prior agreement on a contract term is only an element of a reformation claim. A party seeking reformation must also show a mutual or unilateral mistake. *See Cerberus Int'l, Ltd. v. Apollo Mgmt. L.P.*, 794 A.2d 1141, 1151 (Del. 2002). If based on

the following reasons, the Court rejects the Plaintiffs' argument and grants the Defendants' motion for summary judgment on the reformation claim. The Court concludes that Dickerson was not conflicted beyond those conflicts inherent in a common agency relationship and therefore he had the authority to bind NASC. Accordingly, negotiations regarding the fee did not become final until after the Third Amendment; thus, there was no specific prior agreement regarding the obligation to pay, a requisite element for reformation of contract.[10]

In *MetCap I*, the Court held that the complaint alleged facts sufficient to infer the following: (1) Dickerson was representing all the parties on the "acquisition side" of merger agreement (NASC and SBEV as one group, and Pearl, PSC, and Geary as another (but not Beverly, the acquired entity)) as "deal counsel" during the negotiations surrounding the Third Amendment, and therefore Dickerson was a "dual" or "common" agent; (2) "Dickerson was somehow conflicted because of his role as 'deal counsel' and the payment of his fees by Pearl (or its related entities)";[11] (3) a conflicted agent has no authority to bind his principal; (4) because of his conflict, Dickerson had no authority to agree to the

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unilateral mistake, that party "must show that it was mistaken and that the other party knew of the mistake but remained silent." *Id.*

[10] *See MetCap I*, at *9-10; *Cerberus*, 794 A.2d at 1151-52 (noting that in order to succeed on a claim for reformation of contract "the plaintiff must show by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement.").

[11] *MetCap I*, at *10.

deletion of the parenthetical from Section 5.10; (5) therefore, the parties' specific prior agreement regarding the fee was improperly removed by Dickerson after the Third Amendment and should thus be reformed.[12]

Of critical importance to this motion, therefore, is whether Dickerson was conflicted. If Dickerson were conflicted by an interest adverse to NASC, his actions might not be attributable to NASC. If not conflicted, however, the opposite is true, and summary judgment should be granted. In *MetCap I* the Court noted that "[i]t may turn out that Dickerson's conflict, if indeed there was one, was limited or minimal or was understood and accepted by NASC and, thus, would not preclude imputation of his knowledge to NASC."[13] Now that the parties have completed discovery, the Court is in a position to decide whether, as a matter of law, Dickerson was conflicted such that he did not have the authority to bind NASC. He was not.[14]

For the purposes of the present argument, the Court assumes that Dickerson was acting as "deal counsel,"[15] representing both NASC (on one side of the transaction) and Pearl (and its affiliated entities, on the other)—i.e., Dickerson was

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[12] *Id.* at *9-10.
[13] *Id.* at *10 n.78. *See also id.* at *10 n.79 (noting that "the Complaint must be read to suggest that Dickerson was somehow conflicted" even though it "provides no basis for gaining a full understanding of Dickerson's role.").
[14] Because the Court concludes that Dickerson had actual authority, it need not reach the issue of whether Dickerson was acting with apparent authority and whether Pearl was justified in relying upon Dickerson's apparent authority.
[15] For a limited discussion of the role of "deal counsel," see *MetCap I*, at *8-10, *9 n.71.

a "dual" or "common" agent. As an agent of NASC, he had authority to bind that entity, unless, as stated above, he was conflicted by an interest adverse to it. NASC argues that Dickerson was conflicted, but its argument does not focus so much upon any inherent conflict that may have come from Dickerson's performance of legal services for various parties in the transaction. Instead, it looks to the financial self-interest of Dickerson (and Troutman Sanders) in closing the transaction in order to assure payment of its substantial legal fees.[16] Therefore, NASC argues that Dickerson had a self interest (closing the deal so that his fees would be paid) which was adverse to NASC's (keeping the parenthetical clause in Section 5.10).

This "conflict" (if it can accurately be characterized as one), however, is insufficient, as a matter of law, to preclude imputation to NASC of Dickerson's acquiescence in the amendment of Section 5.10. Even if the Court were to deem Dickerson's self-interest in collecting attorneys' fees a conflict, it is a limited one.[17] To be sure, attorneys generally working on a transaction have some financial incentive to see that it closes, and yet this does not preclude them from acting on their clients' behalf. Under NASC's approach, no transaction in which an attorney represented divergent interests (to any extent) would ever be completed

[16] Pls.' Ans. Br. at 41.

[17] *See MetCap I*, at *10 n.78 ("It may turn out that Dickerson's conflict, if indeed there was one, was limited or minimal or was understood and accepted by NASC and, thus, would not preclude imputation of his knowledge to NASC.").

without the risk that an unhappy party would come forth to challenge the transaction after the fact. Further, NASC was aware of the "conflict." The principals of NASC—Grunstein and Goldsmith—were Troutman Sanders partners and were directly involved in the Beverly transaction. NASC thus "understood and accepted" Dickerson's conflict, precluding them from complaining about it.[18]

The cases upon which NASC relies in support of its argument that Dickerson's "conflict" disabled him from binding NASC are readily distinguished. At the outset, it may be sufficient simply to reiterate that the conflict argument is being advanced by an entity, NASC, whose principals are not only lawyers, were not only involved in the transaction, were not only aware of the functions to be carried out by Dickerson and Troutman Sanders, but also are partners of Dickerson in Troutman Sanders. Equity is not readily invoked to relieve sophisticated parties when they not only have full knowledge of the factual setting but are also aware of the possible consequences that might result from, or be attributable to, those facts.

Nonetheless, a review of the two principal cases upon which NASC relies may be helpful. First, in *Holley v. Jackson*,[19] an attorney was acting as a common agent in connection with a purchase of real property, representing both the plaintiff buyer and the seller. In addition to receiving fees for his services as counsel, the

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[18] *Id.*
[19] 158 A.2d 803 (Del. Ch. 1959).

attorney also owned a real estate agency which was to receive a commission upon closing. This adverse interest was not disclosed to the plaintiffs, however. A dispute later arose when the plaintiffs became aware of liens on the property that had not been disclosed at or before closing. The plaintiffs sought rescission of the sale contract. At issue was whether plaintiffs, through their attorney agent, took title with notice of the liens. The Court held that the attorney "had a personal interest [(the commission his real estate agency was to receive)], adverse to the plaintiffs, in seeing that the transaction was completed."[20] Therefore, the Court held that notice to the attorney was not notice to his principals.

Here, in contrast, Dickerson's interest in fees was not only known, but it also was not tied to the transaction in the same way the attorney's real estate company's commission in *Holley* was. While it might be true—though this point is not entirely clear from the record before the Court—that Dickerson feared that had the deal not closed his firm's fees would go unpaid, this interest is not tantamount to, for example, a third party entity owned by Dickerson, but unknown to NASC and its principals, that was to receive some fee if the transaction were consummated.

Second, *Aument v. Kosciuszko Savings & Loan Association*[21] similarly fails to aid NASC. In that case, the attorney, who represented the plaintiff purchasers in

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[20] *Id.* at 808.
[21] 1978 WL 194997 (Del. Super. Apr. 4, 1978).

the sale of real property, was also a member of the board of directors of the defendant corporation, the seller in the transaction in question.[22] The Court held that this "divided liabilit[y]" meant that the attorney's knowledge could not be imputed to the plaintiff seller because it was an adverse interest. *Aument* is inapposite for the same reasons *Holley* is: there was additional adverse self-interest—the common agent sitting on the board of directors of the defendant corporation—above and beyond that which is inherent in any situation involving a common agency.[23] The type of "self-interest" Dickerson had in the transaction, on the other hand, is present in virtually all common agency relationships.

In sum, the Court rejects NASC's argument that Dickerson was conflicted in his alleged role as "deal counsel" such that his actions could not be attributed to NASC. Accordingly, the Court grants the Defendants' motion for summary judgment on NASC's reformation claim.

C. *MetCap's Unjust Enrichment Claim*

In *MetCap I*, the Court held that MetCap, but not NASC, in its complaint stated a claim for unjust enrichment.[24] Unjust enrichment is the "unjust retention

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[22] *Id.* at *2.

[23] An attorney acting as a common agent has concerns differing from those of other common agents because attorneys are bound by rules of professional conduct, which require the attorney to disclose the conflict to, and obtain informed, written consent from, both parties. *See, e.g.*, Del. Lawyers' Rules of Prof'l Conduct R. 1.7(b). Here, the parties have not invoked the rules of professional conduct, and the Court, for present purposes, need not address the professional conduct rules further.

[24] *MetCap I*, at *6.

of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[25] Courts analyze equitable claims of unjust enrichment by looking to the following factors: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law."[26] Before reaching these factors, however, courts will engage in the threshold inquiry of determining whether a contract already governs the parties' relationship; if it does, the contract provides the measure of the plaintiff's right.[27] There is no contract between MetCap and the Defendants, and accordingly, the threshold inquiry does not preclude quantum meruit recovery.

The Defendants argue that summary judgment should be granted for the following reasons: (1) MetCap has an adequate remedy at law; (2) the doctrine of unclean hands precludes recovery; (3) MetCap did not confer a benefit upon the

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[25] *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) (internal quotation marks omitted).
[26] *Cantor Fitzgerald, L.P. v. Cantor*, 1998 WL 326686, at *6 (Del. Ch. June 16, 1998). This formulation of the test for unjust enrichment (restitution) has been criticized. DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 12.01[b], at 12-16 n.78 (2009). The lack of an adequate remedy at law is not critical to an unjust enrichment claim because some unjust enrichment claims may be heard in the law courts. This formulation is best understood as setting forth the standard for presenting an unjust enrichment claim in equity. In addition, the emphasis on "impoverishment" is not entirely warranted because restitution may be awarded based solely on the benefit conferred upon the defendant, even in the absence of an impoverishment suffered by the plaintiff.
[27] *MetCap I*, at *5.

Defendants after the Third Amendment, and if it did, it did not communicate that fact to the Defendants; and (4) any benefit conferred was done so officiously, which precludes recovery for unjust enrichment because the retention of officiously conferred benefits is not unjust.[28] Each will be addressed in turn.

1. <u>Does MetCap Have An Adequate Remedy At Law?</u>

The Defendants argue that MetCap has a cause of action against NASC for the fee, and, even though NASC has no assets, it may hold a chose in action against Troutman Sanders on a theory of negligence. Therefore, according to the Defendants, MetCap has an adequate remedy at law, barring any equitable recovery. MetCap, however, points out that it has no cause of action against Troutman Sanders—it is a possibility only for NASC—and MetCap cannot cause NASC to sue Troutman Sanders. Therefore, according to MetCap, it is without a legal remedy.

"It is a basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has an adequate remedy at law . . . ."[29] "The fundamental principle that equity will grant no relief where an adequate remedy at law exists, must be limited strictly to cases in which there is an adequate legal

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[28] RESTATEMENT OF RESTITUTION § 2 cmt. a (1937) ("[W]here a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched.").

[29] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (internal quotation marks omitted).

remedy *against the defendants before the court*."[30] Numerous cases have so held,[31] and this Court has not stated otherwise.[32] Therefore, the existence of a cause of action against NASC—whether sufficient (because of its chose in action against Troutman Sanders) or not (because it cannot cause NASC to sue Troutman Sanders)—is not determinative. The absence of a legal remedy element of unjust enrichment asks whether there is a legal remedy as to Pearl, Geary, and/or PSC, the Defendants from whom restitution based on unjust enrichment is sought. Because there is no contract between MetCap and those entities (or any other basis for recovery at law from them), MetCap does not have an adequate remedy at law.[33]

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[30] *Barr v. Roderick*, 11 F.2d 984, 986 (N.D. Cal. 1925) (citation omitted) (emphasis added).

[31] *Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996) ("Equitable relief should not be denied . . . unless the available legal remedy is against the same person from whom equitable relief is sought."); *Dudley v. Keller*, 521 P.2d 175, 178 (Colo. App. 1974) ("an adequate remedy at law must exist against the same person from whom the relief in equity is sought in order to bar the equitable action"); *Hill v. Hill*, 345 P.2d 1015, 1025 (Kan. 1959) ("[A] remedy [at law] must exist against the same person from whom the relief in equity is sought."); *Buttinghausen v. Rappeport*, 24 A.2d 877, 880 (N.J. Ch. 1942) ("the legal remedy which may move equity to deny relief is a remedy against the same person from whom relief in equity is sought.").

[32] For consideration of the complexities that can arise among the relationship of multi-tier subcontractors on a construction project, see, for example, *Griffin Dewatering Corp. v. B.W. Knotts Constr. Corp.*, 2001 WL 541476, at *8-9 (Del. Super. 2001) (holding that a sub-contractor could not recover in *quantum meruit* against the contractor without first attempting to recover from the sub-contractor who had been paid).

[33] Although MetCap seeks a $20 million fee that traces back to its advisory agreement with NASC, it is worth noting that MetCap's work after the Third Amendment was not so much for NASC, which was no longer expected to be the acquisition vehicle. Thus, there is some doubt as to whether MetCap's work after the Third Amendment was within the scope of the advisory agreement. If that doubt is warranted, MetCap would not have had any theoretical claim enforceable at law against anyone.

2. Does The Doctrine Of Unclean Hands Preclude Recovery?

The Defendants argue that MetCap has come to equity with unclean hands, barring any recovery. In particular, the Defendants argue that there is no documentary evidence that the Advisory Agreement between NASC and MetCap, which allegedly created the obligation to pay MetCap the $20 million fee, exists because the parties could not produce a dated copy.[34] Further, even if it did exist, it was not the result of an arm's length negotiation because the principles of both signatories to the contract, NASC and MetCap, were the same individuals. Finally, the Defendants argue that $20 million in compensation for the limited work MetCap performed after the Third Amendment is "grotesquely unreasonable."[35]

It is said, "A Court of Equity is a Court of Conscience."[36] Therefore, "when faced with a litigant whose acts threaten to tarnish the Court's good name,"[37] the Court will invoke the doctrine of unclean hands. Under the doctrine, "the Court refuses to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals."[38] In addition, the Court has broad discretion when applying the unclean hands

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[34] The Advisory Agreement produced by Plaintiffs was signed, but not dated. *See* Defs.' Mot. Summ. J. Ex. 19.
[35] Defs.' Mot. Summ. J. at 29.
[36] *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947).
[37] *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).
[38] *Id.*

doctrine.[39] Viewing the evidence in a light most favorable to MetCap, the Defendants have failed to meet their burden of proving that they are entitled to judgment as a matter of law on the issue of whether MetCap has offended the "very sense of justice" to which it appeals.

First, assuming, for the sake of argument, that, as the Defendants contend, the Advisory Agreement was never signed,[40] and, even if it was, it was not the product of arm's length negotiations,[41] a defense of unclean hands cannot prevail at this stage of this litigation. In particular, even if a signed Advisory Agreement did not exist, application of the unclean hands doctrine would be premature because Plaintiffs have pointed to facts in the record which raise a dispute over whether some sort of *oral* agreement that MetCap would be paid $20 million had been

[39] *SmithKline Beecham Pharm. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 448 (Del. 2000) ("The Court of Chancery has broad discretion in determining whether to apply the doctrine of unclean hands."); *Nakahara*, 718 A.2d at 522 ("[T]he decisional authority is almost universal in its acceptance that courts of equity have extraordinarily broad discretion in application of the doctrine [of unclean hands].").

[40] The nonexistence of a signed and dated Advisory Agreement does not appear to be in dispute. While Plaintiffs do not expressly concede that a signed and dated Advisory Agreement does not exist, they argue that its existence is irrelevant to the unclean hands analysis. In particular, they argue that the correct issue is whether the parties had reached an oral agreement concerning the payment of MetCap's fee. *See* Pls.' Ans. Br. at 37 ("[T]he written advisory agreement is irrelevant to the claim for unjust enrichment."). For reasons set forth below, the Court agrees.

[41] Plaintiffs appear to concede that the Advisory Agreement was *not* the product of an arm's length negotiation. *See* Pls.' Ans. Br. at 38 ("Obviously, the fee was negotiated among related parties."). Again, Plaintiffs' argument is that the existence of the Advisory Agreement is irrelevant.

reached between Silva and Grunstein.[42] For example, at his deposition, Grunstein testified:

> Q. Did you discuss the $20 million investment banking fee for MetCap with Ron Silva?
> A. Absolutely yes.
> Q. When did you do that?
> A. At the very inception of the deal and probably one and possibly two times after that.
> Q. When you say "the very inception of the deal," what do you mean?
> A. When we originally had the sit-down to review the deal and agree to be partners, I went through all of the costs and expenses of the deal
> Q. Including the $20 million investment banking fee.
> A. Yes.
> Q. Did Mr. Silva agree to that figure?
> A. Yes.[43]

The Court, therefore, may not presume that the absence of a signed Advisory Agreement necessitates the conclusion that the parties had not reached *any* agreement regarding MetCap's fee.

Second, the Defendants' argument that the $20 million dollar fee is so "grotesquely unreasonable" as to offend the principles of equity also fails. The

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[42] The Defendants allege that it is improper for Plaintiffs now to allege the existence of an oral agreement or partnership. They claim that Plaintiffs must amend their complaint pursuant to Court of Chancery Rule 15(aaa). The Plaintiffs attempting to allege a new claim based on an oral contract or partnership. Instead, Plaintiffs have brought forth these facts in order to demonstrate that they have not acted contrary to the principles of equity they seek to invoke. In other words, Plaintiffs are not precluded from pointing to discovered facts to assert a defense simply because those facts could, in theory, also support a separate and distinct claim for the $20 million fee. Accordingly, the Court declines to ignore the existence of alleged oral agreement because it is evidence that MetCap's principals were not negotiating inequitably amongst themselves.

[43] Pls.' Ans. Br. App. Ex. 1 at 78.

Defendants have failed to point to any facts in the record from which this Court can conclude, as a matter of law, that $20 million is unreasonable. To some, receiving $20 million in compensation for just a few days' work might seem exceedingly unreasonable. However, in a complex transaction worth approximately $2 billion, a one percent finder's fee or advisory fee is perhaps reasonable. The Defendants have not cited—and it may be that they cannot—any facts that could lead the Court to conclude on this motion for summary judgment that a $20 million fee is unreasonable.[44] Further, the Defendants' focus on the $20 million figure may miss the point because NASC, on its unjust enrichment claim, could only recover the reasonable value of the benefit conferred, not necessarily the $20 million. Therefore, the Court cannot conclude, as a matter of law, that no fee could be recovered.

In sum, the Defendants have failed to meet their burden of demonstrating that they are entitled to judgment as a matter of law on the issue of whether MetCap has offended the very sense of justice to which it appeals.

3. Did MetCap Confer A Benefit Upon The Defendants After The Third Amendment?

In *MetCap I*, the Court held that MetCap did not state a claim for unjust enrichment for work it allegedly performed on the Beverly transaction before the

[44] They point only to its size and some disputed factual evidence about what work MetCap did after the Third Amendment.

Third Amendment. Before the Third Amendment, MetCap's relationship to the Beverly transaction was governed by its Advisory Agreement with NASC. Accordingly, the Court noted:

> Because our law precludes the doctrine of unjust enrichment from being invoked "to circumvent basic contract principles [recognizing] that a person not party to [a] contract cannot be held liable to it," the court must conclude that MetCap's route to recovery for work performed (or benefit conferred) through the Third Amendment is defined by its contract with NASC and that its unjust enrichment claim to that extent must be dismissed."[45]

The Court further held that MetCap could only recover for work it performed after the Third Amendment because "[f]ollowing the Third Amendment, MetCap's work was no longer for NASC; instead, the Court [inferred] from the Complaint that it was for the benefit of Defendants, most likely for the benefit of Pearl."[46]

The Defendants argue that MetCap is precluded from recovering for any work it performed on the Beverly transaction post-Third Amendment for two reasons. First, any work MetCap performed did not benefit the Defendants in any way—i.e., the Defendants were not enriched, unjustly or otherwise. Second, MetCap's work was never communicated to the Defendants—i.e., the Defendants were unaware that MetCap was working on the Beverly transaction after the Third

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[45] *MetCap I*, at *6 (alterations in original) (footnotes omitted) (quoting *WSFS v. Chillibilly's Inc.*, 2005 WL 730060, at *19 (Del. Super. Mar. 30, 2005)).
[46] *Id.*

Amendment, so even if MetCap's work benefited the Defendants, MetCap is not entitled to recover for it. Both issues are addressed in turn.

According to MetCap, Forman performed the following tasks after the Third Amendment:

> (a) analysis of the implication of future price increases for Beverly;
> (b) work on proposals for acquiring the company as well as other post-acquisition matters;
> (c) dealings with regulators and politicians regarding professional liability litigation;
> (d) telephone and in person meetings with Cap Source and Credit Suisse. Although both of these firms had signed letters of intent or commitment, "there's a myriad amount of work that has to be done in order to turn that commitment letter into an actual funding";
> (e) review and an "analysis of assets and liabilities of Beverly . . . including service contracts and third party supply agreements." According to Mr. Forman, there were opportunities for better pricing and terms with respect to supply contracts, and possible better strategies with respect to settlement of professional liability claims;
> (f) "advisory services with respect to various aspects of the management and operations of Beverly," which included "implementing the structure similar to the one we employed at Mariner" and working on the search for a "chief operating officer for the new operating company";
> (g) work with Houlihan Lokey et al., to ensure that the solvency opinion delivered prior to the third amendment "would still be valid"; and
> (h) identification of "issues in connection with operations and formulating solutions."[47]

The Defendants, however, claim that the work listed above is irrelevant because it did not benefit them in any way. The Defendants argue, for example,

[47] Pls.' Ans. Br. at 30-31 (citations omitted).

that Forman's "dealings with regulators and politicians" provided no benefit because Forman could not "recall any specific meetings" that occurred after the Third Amendment.[48] The Defendants similarly attack much of the work listed above;[49] but such attacks simply raise, rather than prove the nonexistence of, material factual disputes.

The Defendants' better argument is that the work MetCap performed after the Third Amendment was not communicated to the Defendants. Although the Court finds this argument to be somewhat persuasive, Grunstein's "carefully-drafted statement" that Silva was aware of MetCap's post-Third Amendment work precludes summary judgment on this issue.

At his deposition, Forman testified that he did not communicate to the Defendants any work he had done after the Third Amendment, but he did discuss the work with Grunstein and thought, but was not sure, that Grunstein had in turn

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[48] Pls.' Ans. Br. App. Ex. 5 at 183.

[49] For example, the Defendants attack Forman's testimony regarding the "advisory services" he performed "with respect to various aspects of the management and operations of Beverly," including "implementing the structure similar to the one" utilized in the Mariner transaction. The Defendants claim that these "advisory services" "could not have benefited defendants" since the Mariner structure was ultimately not employed in the Beverly transaction. It is apparent that this is a genuine dispute of material fact, not the foregone conclusion the Defendants would have the Court believe. Simply because the Beverly transaction did not end up using the Mariner structure does not in any way lead to the conclusion that advisory services concerning the Mariner structure did not benefit the Defendants. It could have provided a meaningful comparison, and understanding why *not* to utilize that structure could have been a substantial benefit. Further, Forman stated that the advisory services he performed "included" implementing the Mariner transaction's structure; use of the word "including" suggests "including but not limited to." Therefore, the Defendants' attack on MetCap's advisory services is unavailing.

discussed the work with the Defendants.[50] For the purposes of this motion, Plaintiffs submitted an affidavit in which Grunstein stated:

> Mr. Forman kept me informed of the work he was doing on behalf of MetCap in connection with the acquisition of Beverly, including the work done by Mr. Forman after the Third Amendment to the Merger Agreement. Based on personal knowledge, Mr. Silva was aware of the work Mr. Forman was doing before and after the Third Amendment.

The Court acknowledges the Defendants' observation that this statement was "carefully drafted." Forman testified that he did not communicate any of his efforts to anyone except for Grunstein and that Grunstein communicated the work to the Defendants.[51] Grunstein read this testimony, thereby learning that the only way the Defendants could have learned of MetCap's post-Third Amendment efforts was through him. And yet, Grunstein did not testify that he did in fact

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[50] For example, at Forman's deposition, the following question-and-answer too place after he was questioned about work he performed on the analysis of the price change after the third amendment:

> Q. Did you communicate the results of your work with respect to the price change to anybody at Fillmore?
> A. No.
> Q. Did you communicate the results of your work on the price change to anybody?
> A. Clearly, I discussed it with Mr. Grunstein.

Pls.' Ans. Br. App. Ex. 5 at 181.

This question-and-answer was typical the typical exchange between Forman and the questioner about Forman's post-Third Amendment work. *See, e.g.*, *id.* at 185 ("Q. Did you communicate the results of those [negotiations with lenders] to anybody at Fillmore? A. Anything that came out of those communications would be communicated to Mr. Grunstein, who would then communicate it to Fillmore."); *id.* at 187 ("Q. Did you communicate the results of your work with anybody at Fillmore with respect to any of items 1 through 9? A. Not directly. Q. Do you know whether any of the results of your work on items 1 through 9 were communicated to Fillmore indirectly? A. I believe that they were through Mr. Grunstein").

[51] *See supra* note 50.

communicate Forman's work to Silva (or any of the Defendants). He simply stated that based on his personal knowledge, Silva was *aware* of the work. Therefore, by omitting to state that he *communicated* to Silva Forman's work, it could reasonably be inferred that Grunstein did not do so. It would follow that the Defendants were unaware of Forman's work because, based on the record before the Court, the only potential link between Forman's work and the Defendants' knowledge is Grunstein. Unfortunately for the Defendants, the Court is obligated to draw every reasonable inference it can in favor of the nonmoving party—MetCap. And it can be inferred based on Grunstein's sworn affidavit, which he submitted under penalty of perjury, that Silva knew about Forman's work. Accordingly, summary judgment cannot be granted on the issue of whether the Defendants knew about the work MetCap did after the Third Amendment.

4. <u>Whether MetCap Officiously Conferred A Benefit Upon the The Defendants</u>

The Defendants argue that, if MetCap did confer a benefit upon the Defendants, it did so officiously and, therefore, the Defendants' retention of that benefit is not unjust. The Restatement of Restitution provides that "where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched";[52] thus, "[a] person who officiously confers a

[52] RESTATEMENT OF RESTITUTION § 2 cmt. a (1937).

benefit upon another is not entitled to restitution." Restatement of Restitution § 112, defines an officiously conferred benefit as follows: "A person who without mistake, coercion or request has unconditionally conferred a benefit upon another . . . ."[53]

The Defendants argue that MetCap's claim for unjust enrichment fails under § 112 because there are no facts of mistake, coercion, or request. Remarkably, MetCap does not dispute this point. Instead, MetCap argues that "Delaware courts have never prohibited a claim of unjust enrichment in the absence of a 'mistake, coercion or request.' Instead, the Delaware courts have adopted a more flexible standard pursuant to which all a plaintiff must show is that it acted 'for the defendant's benefit.'"[54] MetCap's newly minted "flexible" standard has no foundation in Delaware case law. To the contrary, Delaware has expressly adopted § 112.

MetCap invokes *Creditors' Committee of Essex Builders, Inc. v. Farmers Bank*[55] and *In re Weir*[56] for the proposition that "Delaware courts have never prohibited a claim of unjust enrichment in the absence of a 'mistake, coercion or

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[53] *Id.* § 112.
[54] Pls.' Ans. Br. at 34 (citations omitted).
[55] 251 A.2d 546 (Del. 1969).
[56] 1981 WL 88258 (Del. Ch. Jan. 21, 1981).

request.'" Perhaps that is an accurate statement about our case law, but it does not follow that merely benefiting another suffices. In *Creditors' Committee*, the Delaware Supreme Court stated: "Receipt of a benefit as the incidental result of someone else's activities is not enough to require restitution. RESTATEMENT ON RESTITUTION § 1, Comment (c). *There is no evidence here of any mistake, coercion, or request which might change that result*. RESTATEMENT ON RESTITUTION § 112."[57] The Court, therefore, expressly adopted § 112's standard for restitution. Of course, the Court did not "prohibit" an unjust enrichment claim on § 112 grounds, but that was because there was no evidence of mistake, coercion, or request.

MetCap invokes *MetCap I* for the proposition that "Delaware courts have adopted a more flexible standard" than § 112. It claims that, under this "flexible standard," all a plaintiff must show to succeed on a claim of unjust enrichment is that it acted "for" a defendant's benefit. The only authority MetCap relies upon in support for the claim is the following statement from *MetCap I*: "A showing that the defendant was enriched unjustly by the plaintiff who acted *for* the defendant's benefit is essential."[58] MetCap's reliance is misplaced. First, and more obviously, the inclusion of the words "is essential" connotes the statement's reach—it is a

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[57] 251 A.2d at 549 (emphasis added).
[58] *MetCap I*, at *6.

prerequisite to an unjust enrichment claim, which by no means ends the inquiry. Second, and more importantly, the Court was considering a motion to dismiss, and the parties had not raised § 112 as an issue in the case.

Therefore, because it is conceded that there was no mistake,[59] coercion, or request, as required by § 112, the Court must conclude that any benefit MetCap conferred upon the Defendants was done so officiously. Accordingly, the Defendants' motion for summary judgment on MetCap's unjust enrichment claim is granted.

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[59] The Court pauses briefly to discuss § 112's use of the word "mistake" in its formulation of a test for officiousness—for two reasons. First, the doctrine of unilateral mistake has been at issue in this litigation, *see Metcap I*, at *8, and, thus, a discussion of the term "mistake" as used in § 112 is necessary to avoid confusion of the issues. Second, though not argued by the parties, it could be said that Forman was working under the "mistaken" belief that MetCap was to be compensated for the services he allegedly provided. This argument, however, would fail because "mistake," as contemplated by Restatement § 112, does not cover this sort of conduct.

Pursuant to § 112, in the absence of "mistake, coercion or request," a benefit conferred has been done so officiously. "This principle is based on the notion that 'one who confers a benefit upon another without affording that other the opportunity to reject the benefit, has no equitable claim for relief against the recipient of the benefit in the absence of some special policy . . . .'" *Hill v. Cross Country Settlements, LLC*, 936 A.2d 343, 352 (Md. 2007) (quoting DANIEL B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.9 (1973)).

Section 112's inclusion of the word "mistake" is recognition that, in a limited set of circumstances, a plaintiff's conferral of a benefit under a mistaken belief that she was required to do so is the sort of "special policy" that justifies restitution by the defendant even though the defendant did not request the benefit. For example, "[i]f plaintiff pays defendant's debt under the mistaken apprehension that he was himself under a duty to do it . . . there is less reason to treat him as being officious, and the courts will usually grant restitution." John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183, 1201 (1966). "A similar result is usually reached when the plaintiff mistakenly performs a defendant's legal obligation." *Id.* In these limited cases there is scant reason to treat the benefit conferred as officious, thus a defendant's retention of that benefit is unjust.

In the present case, although Forman might have been operating under the assumption that MetCap was going to be compensated for its services, the policy concerns underpinning § 112's mistake exception to the officious intermeddler doctrine noted above are absent. Accordingly, whether Forman was under the mistaken belief is not material to this claim.

III. CONCLUSION

For the foregoing reasons, the Defendants' motion for summary judgment is granted. An implementing order will be entered.