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Transaction ID 14902589
Case No. 2129-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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: January 25, 2007
Date Decided: May 16, 2007

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NOBLE, Vice Chancellor

I. INTRODUCTION

An entity with no assets of its own was formed for the special purpose of a future transaction with a for-profit nursing home chain. It engaged the services of an investment banking advisory firm, agreeing to pay it a success fee upon the completion of any transaction with the target company. The assetless entity, along with two other acquiring entities, eventually entered into a merger agreement with the target company. The merger agreement contained a standard no-brokers' fee provision, stating that no broker, finder, financial advisor, or investment banker could expect to receive a fee for work performed in connection with the merger. The provision contained a parenthetical exception for the investment banking advisor engaged by the assetless entity.

Three months after the merger agreement was signed, the parties agreed that the three acquiring entities would be exchanged for three other acquiring entities, who would assume the obligation to acquire the target company from the original group of acquirers. Reference to the financial advisor's success fee remained intact. That would soon change as efforts to finalize their agreement came to a close.

Late into the final evening of negotiation of the last set of amendments to the merger agreement, the two principals representing the original acquiring entities, who had previously delivered their signature pages to a fellow law partner, left the

negotiations and went home. They gave him no instructions, limitations, or conditions on which to proceed during the negotiations. A few hours later, another partner, still negotiating the terms of the amendment, would agree to delete the merger agreement's one reference to the financial advisor's fee. The practical effect of this amendment was that the obligation to pay the success fee was neither assigned to nor assumed by the second group of acquirers.

Both the investment banking advisory firm and the assetless entity which had engaged its services bring suit for reformation. The firm also brings suit for fraud, unjust enrichment, and for damages under a third-party beneficiary contract theory. Before the Court is a motion to dismiss on behalf of the second group of acquirers and the target corporation.

II. BACKGROUND[1]

Plaintiff North American Senior Care, Inc. ("NASC") is a Delaware corporation and special purpose entity formed in connection with a transaction with Defendant Beverly Enterprises, Inc. ("Beverly"), a Delaware corporation that operates nursing home facilities throughout the United States.[2] On August 16, 2005, NASC, along with NASC Acquisition Corp. ("NASC Acquisition") and SBEV Property Holdings LLC ("SBEV"), entered into a merger agreement (the

[1] The Background is drawn from the Amended Complaint (sometimes, the "Complaint") and those documents referenced by the Amended Complaint.
[2] Compl. ¶¶ 7, 11.

"Merger Agreement") with Beverly whereby it would be acquired in an all-cash deal of more than $2 billion.[3]

Sometime prior to the Merger Agreement, NASC had engaged Plaintiff MetCap Securities LLC ("MetCap") to serve as its financial and business advisor in connection with a Beverly transaction. The five-page agreement (the "Advisor Contract"), which was only between NASC and MetCap, provided for an "investment advisory fee" to be paid to MetCap, along with expenses, upon the closing of any business combination transaction with Beverly.[4]

The Merger Agreement, by Section 5.10, recited generally that no financial advisor's fees were owed, but it expressly referenced the MetCap fee:[5]

> 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 commission in connection with the Merger based upon arrangements made by or on behalf of Parent or Merger Sub.[6]

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[3] *Id.* ¶ 8; Herbert Aff. Ex. C ("Merger Agreement").

[4] *Id.* ¶ 9; Herbert Aff. Ex. B ("Advisor Contract"). Payment of the fee was guaranteed by SBEV. *See* Advisor Contract at 5. The Advisor Contract remained in force when the Beverly deal closed.

Although a court assessing a motion to dismiss typically only considers facts alleged in the complaint, it may also consider documents referred to in the complaint. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006). Here, several documents are expressly or impliedly referenced in the Complaint: the Merger Agreement, the Advisor Contract, preliminary and final drafts of the Third Amendment to the Merger Agreement, and certain e-mails.

[5] Compl. ¶ 10.

[6] The Merger Agreement referred to NASC as "Parent" and to NASC Acquisition as "Merger Sub."

NASC, however, was without assets of its own.[7] Thus, for several months before August 2005, Leonard Grunstein, a principal of SBEV and a partner at the law firm of Troutman Sanders LLP ("Troutman Sanders"), sought financing to fund the obligations that would be incurred as part of a transaction with Beverly.[8] He negotiated extensively with Ronald Silva of Fillmore Capital Partners ("Fillmore Capital") and its counsel, Joseph Heil of the law firm of Dechert LLP ("Dechert").[9] In the course of these negotiations, Silva and Heil were given drafts of the Merger Agreement; each draft included Section 5.10 and its reference that the MetCap fee was to be paid by NASC.[10]

The Merger Agreement was amended on September 22, 2005, to reflect the equity that was to be secured to fund the acquisition of Beverly. Section 2.11 of this amendment (the "Second Amendment")[11] provided that Fillmore Capital would deliver an "Equity Commitment Letter" by November 18, 2005, detailing Fillmore Capital's commitment to purchase the "common stock and preferred stock of Parent [NASC] for at least $350 million to cause Parent . . . to make the proceeds of such purchase available as consideration for the [Beverly] merger."[12]

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[7] *Id.* ¶ 11.
[8] *Id.* ¶ 13.
[9] *Id.*
[10] *Id.* ¶ 14.
[11] The First Amendment to the Merger Agreement is not pertinent to the dispute before the Court.
[12] *Id.* ¶ 15. The Equity Commitment Letter was signed by Silva and attached as Exhibit C to the Second Amendment.

The Second Amendment did not alter, or even reference, NASC's obligation (as "Parent") to pay the MetCap fee as described in Section 5.10 of the Merger Agreement.[13]

In mid-November, Silva announced that he had raised the $350 million in equity that was the subject of the Second Amendment. Shortly thereafter, on November 20, 2005, the parties to the merger executed another amendment (the "Third Amendment"), which would shift the obligation to purchase Beverly from the NASC, NASC Acquisition, and SBEV, entities all represented, at least to some extent, by Troutman Sanders, to Pearl Senior Care, Inc. ("Pearl"), PSC Sub Inc. ("PSC"), and Geary Property Holdings, LLC ("Geary"),[14] all created at Silva's behest and represented by Dechert.[15] Before the negotiations had culminated in the final version of the Third Amendment, however, Grunstein (for SBEV) and Mark Goldsmith, also a Troutman Sanders partner, (for NASC and NASC Acquisition) signed signature pages on November 18, 2005, and had them delivered to

[13] *Id.* ¶¶ 15-16.

[14] *Id.* ¶¶ 17-18. Silva is the president of Pearl and PSC, entities formed by Fillmore Capital. It should also be noted that the names of the substituted acquiring entities are taken from the Complaint. The Defendants maintain that Pearl and PSC have been incorrectly named in the Complaint and that their proper names are Pearl Senior Care, LLC and PSC Sub LLC.

[15] The Complaint (¶ 17) states that shortly before execution of the Third Amendment, Grunstein suggested that the names of the original acquiring entities be changed from NASC, NASC Acquisition, and SBEV to Pearl, PSC, and Geary, respectively. The reasons for the requested change are not alleged and the effects of that change are not clear, but the Court notes that the parties appear to agree that the name changes are not pertinent to their dispute, which focuses primarily on the execution of the Third Amendment.

As a result of the Third Amendment, Fillmore Capital would not purchase the stock of NASC. As a consequence, perhaps not fully appreciated at the time, of this structural change, the pending dispute would evolve.

Lawrence Levinson, another attorney at Troutman Sanders, to be held in escrow.[16] The signature pages were eventually attached to the final version of the Third Amendment.

But negotiations were far from over. On November 20, 2005, various drafts of the Third Amendment were circulated throughout the day between, *inter alia*, Grunstein and Goldsmith (on behalf of the assignor acquiring entities) and Silva and Heil (on behalf of the assignee acquiring entities).[17] None of these drafts altered, much less referenced, Section 5.10 of the Merger Agreement. By 7:00 p.m. that evening, Beverly's Board of Directors had approved the latest draft of the Third Amendment—again, a draft that did not reference Section 5.10 or the MetCap fee. Around 10:00 p.m., Grunstein and Goldsmith, apparently believing that no further changes would be forthcoming, went home.

But one of Grunstein and Goldsmith's other partners at Troutman Sanders, W. Brinkley Dickerson, stayed behind. At Heil's request, Dickerson, apparently without consulting with his partners, made the change to the Third Amendment that is at the center of the parties' dispute.[18] At 12:59 a.m. on November 21, 2005, a few hours after Grunstein and Goldsmith had left, Dickerson e-mailed Beverly's counsel at Covington & Burling LLP and copied several parties, including

[16] *Id.* ¶ 19.
[17] *Id.* ¶ 20.
[18] *Id.* ¶ 23.

Grunstein (for SBEV) and Heil (for Silva and Pearl), but not Goldsmith (for NASC and NASC Acquisition).[19] Another draft had emerged. This time, a provision of the Merger Agreement—and perhaps a critical one for MetCap—was stricken. Section 3.9 of the Third Amendment deleted the parenthetical of Section 5.10, which concerned payment of the MetCap fee.[20] The obvious significance was that Pearl, as a party generally assuming NASC's duties under the Merger Agreement (an assignment made by the Third Amendment), would not have any even arguable contractual obligation to pay MetCap for its advisory services. The final version of the Third Amendment, which appeared around 4:00 a.m. on November 21, 2005, reflected this change, a change that MetCap and NASC would not discover until March 2006.

In their Complaint, MetCap and NASC explain that "[w]hat happened was that defendants caused the new version of Section 3.9 to be drafted; and signature pages were removed from a prior version of the Third Amendment and attached to the new unauthorized version."[21] This occurred, of course, after Grunstein and Goldsmith had departed. They allege that Dickerson was only "deal counsel" to all

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[19] Goldsmith e-mailed Dickerson earlier that evening at 9:36 p.m., informing him that, although he was unsure if the Third Amendment had to be signed that evening, he had given Levinson, another colleague at Troutman Sanders, his signed signature pages on behalf of NASC and NASC Acquisition. *See* Herbert Aff. Ex. H.

[20] Section 3.9 of the Third Amendment provided: "Section 5.10 of the Merger Agreement is amended by deleting the parenthetical contained therein."

[21] Compl. ¶ 22.

the buyers in the transaction, collectively "coordinating and representing everyone on the buyer's side,"[22] but that he lacked the authority to bind NASC, NASC Acquisition, or SBEV individually.[23]

The Defendants' conduct with respect to the Third Amendment forms the basis for MetCap and NASC's claims. The Complaint makes no allegations of a separate agreement, such as an amendment to, or an assignment of, the Advisor Contract by which Pearl, PSC, or Geary, agreed expressly to assume NASC's obligation to pay MetCap.

The merger with Beverly closed on March 14, 2006.[24] Despite the work it performed in connection with the transaction, MetCap has yet to receive any portion of its advisory fee and now seeks recovery against Pearl, PSC, Geary, and Beverly.[25]

III. CONTENTIONS

Seeking to recover an investment advisory fee it claims it is owed, MetCap, along with NASC, filed a four-count Amended Complaint. In Count One, MetCap alleges that the Defendants, with the exception of Beverly, defrauded it of its fee by failing to disclose that Section 3.9 of the Third Amendment had been changed

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[22] *See* Tr. of Oral Arg. Jan. 27, 2007, at 44.
[23] Compl. ¶ 23. It is not alleged that Troutman Sanders represented MetCap.
[24] *Id.* ¶ 26.
[25] Fillmore Capital reimbursed MetCap $1.5 million for sums it had advanced in connection with the transaction. *Id.* ¶ 25. The Complaint does not address the status of MetCap's efforts, if any, to collect from SBEV under its guarantee of the Advisor Contract.

to remove the reference in the Merger Agreement regarding payment of MetCap for its services. Because of the silence of the Defendants with respect to this late-hour change, MetCap, to its detriment, continued working. In Count Two, MetCap alleges that all of the Defendants were unjustly enriched by the work it performed in connection with the merger because they knew that, after adoption of the Third Amendment, NASC was no longer a party to the Merger Agreement and, in addition, had no assets of its own. Without relief, MetCap argues that the Defendants will have received the benefit of its work through NASC's assignment of developed contract rights without assuming a material obligation that should have come with it: compensating MetCap for its services. In Count Three, MetCap alleges that Pearl became and remains obligated to pay the fee because MetCap, as an intended third-party beneficiary of the Merger Agreement before the Third Amendment, never consented to the change caused by Section 3.9 of the Third Amendment.[26] Finally, both MetCap and NASC seek reformation of the Third Amendment because of its alleged failure to express the agreement between the parties that Pearl would assume NASC's obligation to pay MetCap's fee.

[26] Section 3.9 of the Third Amendment, throughout this Memorandum Opinion, will be used to refer to the final version which deleted the parenthetical contained in Section 5.10 of the Merger Agreement. Before the final revisions, Section 3.9 addressed subject matter not related to the pending dispute.

Pearl, PSC, Geary, and Beverly have collectively responded by moving to dismiss this action under Court of Chancery Rule 12(b)(6).[27] They focus on two points: first, NASC's counsel consented to the addition of Section 3.9 of the Third Amendment; and, second, any right MetCap has to a fee is governed solely by the Advisor Contract it has with NASC, as there is neither an agreement between MetCap and any of the Defendants nor an agreement in which any of the Defendants assumed NASC's obligation under the Advisor Contract.

IV. ANALYSIS

A. *The Applicable Standard*

A motion to dismiss under Court of Chancery Rule 12(b)(6) may be granted only if "it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiffs would not be entitled to relief."[28] This is because, in considering such a motion, the Court is required to accept the well-pleaded facts alleged in the complaint as true and to view those facts, and all reasonable inferences that may be drawn from them, in the light most

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[27] They also challenge, under Court of Chancery Rule 9(b), the adequacy of the Plaintiffs' efforts to plead fraud and mistake with particularity.

[28] *VLIW Tech., L.L.C. v. Hewlett-Packard Co.*, 840 A.2d 606, 610-11 (Del. 2003) ("Accordingly, under Delaware's judicial system of notice pleading, a plaintiff . . . need only allege facts that, if true, state a claim upon which relief can be granted."); *see Palese v. Del. State Lottery Office*, 2006 WL 1875915, at *2 (Del. Ch. June 29, 2006), *aff'd*, 913 A.2d 570 (Del. 2006) (TABLE); *see also Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984) (reminding that a court's role on such a motion is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof").

favorable to the plaintiffs.[29] The Court is not, however, compelled to accept every strained interpretation of fact or every conclusory allegation unsupported by facts contained in the complaint.[30]

B. *The Complaint Fails to State a Claim for Fraud Against Pearl, PSC, or Geary*

MetCap's first claim is for fraud. The Complaint alleges that Pearl, PSC, and Geary defrauded MetCap when they: (1) inserted Section 3.9 of the Third Amendment at the last minute without the knowledge or authorization of either MetCap or NASC and (2) failed later to disclose this change.[31] The purpose and effect of the Defendants' conduct was, MetCap contends, to deprive it of its fee and to induce it to continue working on the merger.[32]

To state a common law fraud claim, MetCap must plead facts supporting an inference that: (1) Pearl, PSC, or Geary falsely represented or omitted facts that they had a duty to disclose; (2) they knew or believed that certain representations were false or made representations with a reckless indifference to the truth;

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[29] *E.g.*, *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003). The Court may also consider documents integral to the complaint and incorporated by reference. *Id.* at 149.

[30] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 168.

[31] Although Count One (the one alleging fraud) is brought only by MetCap against Pearl, PSC, and Geary, the parties appear to have joined issue as if both MetCap and NASC had asserted that claim. *See* Defs.' Opening Br. at 19 ("Plaintiffs have failed to allege . . . that Defendants made any false statements."); Pls.' Ans. Br. at 33 ("Plaintiffs have a claim for fraud . . ."); Defs.' Reply Br. at 13 ("[P]laintiffs' fraud claim is defeated by the imputation of Troutman Sanders' knowledge to Leonard Grunstein."). The Court, however, will address only the claims asserted in the Complaint. A fraud claim by NASC is not among them.

[32] Compl. ¶¶ 29-30.

(3) they intended to induce MetCap to act or refrain from acting; (4) MetCap acted in justifiable reliance on the representation; and (5) MetCap was injured by its reliance.[33]

Metcap's claim for fraud fails because it depends upon the contention that the Defendants were knowingly silent as to the late-hour change to the Third Amendment and that there was a "duty to disclose" the change to MetCap.[34] Generally, a duty to disclose arises when there is a fiduciary or other similar relationship of trust between the parties or where the custom or course of dealing between the parties merits disclosure.[35] MetCap has failed to set forth any facts that would support any inference that the Defendants had some fiduciary or other obligation to disclose changes to the Merger Agreement to MetCap, which, of course, was not a party to the Merger Agreement. Where there is no fiduciary or contractual relationship, Delaware law generally does not impose a duty to speak.[36] Because MetCap makes no allegation that such a relationship existed between it and the Defendants or that it had engaged in a course of dealing with the

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[33] *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005); *see also Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) ("[F]raud does not consist merely of overt misrepresentations. It may also occur through deliberate concealment of facts, or by silence in the fact of a duty to speak. Thus, one is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading.").
[34] MetCap does not allege any false representation.
[35] *See, e.g.*, *Matthews Office Designs, Inc. v. Taub Invs.*, 1994 WL 267479, at *2 (Del. May 25, 1994).
[36] *See Nicolet, Inc. v. Nutt*, 525 A.2d 146, 150 (Del. 1987).

Defendants entitling it to any particular disclosure, the Defendants owed no "duty to disclose" to MetCap and, accordingly, MetCap has not stated a claim for fraud against the Defendants.[37]

C. *The Claim for Unjust Enrichment—It Survives in Part*

MetCap also asserts a claim for unjust enrichment against all Defendants. It argues that it was the "procuring cause" of the Beverly acquisition and that, absent a recovery, the assignee Defendants and Beverly will have received the benefit of its services without the corresponding obligation to pay MetCap for those services.[38]

Unjust enrichment is the "unjust retention 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."[39] In finding a party is entitled to an equitable remedy for unjust enrichment, courts look to several factors: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification, and (5) the absence of a remedy

[37] To the extent that MetCap might argue that the "duty to disclose" would arise out of its status as a third party beneficiary to the Merger Agreement, see Part IV.D, *infra*.
[38] *See* Compl. ¶¶ 33-34. The Complaint does not go much further than a broad brush allegation that MetCap was the "procuring cause" of the merger. For example, the Complaint notes MetCap's "substantial contribution and work in connection with the merger" and that it "conferred the benefit of its services directly upon defendants," but it makes no reference as to what exactly it performed for the Defendants.
[39] *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

provided by law.[40] Of cardinal significance is whether a contract already governs the parties' relationship. In short, if there is a contract between the complaining party and the party alleged to have been enriched unjustly, then the contract remains "the measure of [the] plaintiff's right."[41]

There is, of course, no contract between MetCap and the Defendants. This fact, MetCap appears to assert, should itself be dispositive to the Court's analysis, leading it to conclude that the claim for unjust enrichment can withstand Defendants' motion to dismiss. The mere absence of a contract between the complaining party and the defendant, however, is not dispositive. Also crucial—but lacking here—is that some direct relationship be alleged between a defendant's enrichment and a plaintiff's impoverishment.

Although the doctrine of unjust enrichment is one of "substantial flexibility,"[42] it is axiomatic that there must be some relationship between the parties. A showing that the defendant was enriched unjustly by the plaintiff who acted *for* the defendant's benefit is essential. As one court cogently explained:

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[40] *Cantor Fitzgerald, L.P. v. Cantor*, 1998 WL 326686, at *6 (Del. Ch. June 16, 1998); *Khoury Factory Outlets, Inc. v. Snyder*, 1996 WL 74725, at *11 (Del. Ch. Jan. 8, 1996).

[41] *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979); *ID Biomedical Corp. v. TM Tech., Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995). *See, e.g.*, *Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 16, 2006) ("When the complaint alleges an express, enforceable contract that controls the parties' relationship, however, a claim for unjust enrichment will be dismissed."); *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, 2005) (dismissing an unjust enrichment claim "when the existence of a contractual relationship [was] not controverted").

[42] *Palese*, 2006 WL 1875915, at *5.

> [T]o recover under a theory of quasi contract, a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if the services were performed at the behest of someone other than the defendants, the plaintiff must look to that person for recovery.[43]

With the focus on "for whom" MetCap's services were performed, the Complaint frames two discrete periods: (i) through execution of the Third Amendment and (ii) after the Third Amendment. Before the Third Amendment, MetCap's services, in accordance with the Advisor Contract, were performed for NASC; afterward, with NASC out of the transaction, the Defendants, or so it must be inferred from the Complaint, knew that MetCap was performing work, supporting the transaction, for their benefit.

The Complaint refers to the Advisor Contract between MetCap and NASC. That agreement evinces their understanding that MetCap would "act as [NASC's] financial and business advisor to assist [it] in proposed transactions involving Beverly Enterprises, Inc."[44] in exchange for NASC's "pay[ing] to [MetCap] an Investment Advisory Fee of Twenty Million Dollars ($20,000,000) . . . [u]pon the closing of any . . . Business Combination Transaction [with Beverly]."[45] Absent from the Advisor Contract, however, is any link to Pearl, PSC, Geary, or Beverly.

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[43] *Michele Pommier Models, Inc. v. Men Women NY Model Mgmt., Inc.*, 14 F. Supp. 2d 331, 338 (S.D.N.Y. 1998), *aff'd*, 173 F.3d 845 (2d Cir. 1999).
[44] Advisor Contract at 1.
[45] *Id.* at 2.

It does not specify or even contemplate that advisory services would be provided to any party other than NASC.[46] Those services were not requested by any of the Defendants. The Advisor Contract does not reveal, and the Complaint does not allege, a relationship of agency between NASC and any one of the Defendants or that the Advisor Contract was amended to reflect a change in NASC's status as the sole recipient of MetCap's services. Furthermore, the Complaint makes no allegation that any of the Defendants expressly agreed to assume, either in whole or in part, NASC's obligation under the Advisor Contract to compensate MetCap.[47]

Because our law precludes the doctrine of unjust enrichment from being invoked "to circumvent basic contract principles [recognizing] that a person not a party to [a] contract cannot be held liable to it,"[48] the Court must conclude that

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[46] Particularly odd is MetCap's unjust enrichment claim against the target corporation in this transaction; the Advisor Contract makes plain that MetCap was advising the entity *acquiring* Beverly. *See id.* at 1-2. Under the agreement, that entity was, of course, NASC.

[47] The Plaintiffs do contend that Pearl's duty to pay MetCap would have arisen under the parenthetical of Section 5.10 of the Merger Agreement if it had not been revised at the last minute by the Third Amendment.

[48] *WSFS v. Chillibilly's Inc.*, 2005 WL 730060, at *19 (Del. Super. Mar. 30, 2005). *See also* RESTATEMENT (SECOND) OF RESTITUTION § 110 (1988) ("A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other *merely* because of the failure of performance by the third person.") (emphasis added). The parties engage in a minor debate about the guidance provided by Section 110 of the RESTATEMENT and how that guidance might be expanded by consideration of the tentative draft. Section 110 cannot be read as precluding *every* claim of unjust enrichment simply because there is an agreement between "A", who claims that "B" has been unjustly enriched at "A's" expense, and "C" (instead of "B"). To be fair, none of the Defendants, despite MetCap's characterization, has argued precisely this. The word "merely" in Section 110 serves as a reminder that something more is necessary to invoke the doctrine of unjust enrichment. The "more" that is required may be suggested by Section 29 of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (tentative draft No. 3, 2004) which provides in part:

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.[49]

Following the Third Amendment, MetCap's work was no longer for NASC; instead, the Court must infer from the Complaint that it was for the benefit of the

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> A person who has conferred a benefit on a recipient as the performance of a contract with a third person is entitled to restitution from the recipient upon the failure of performance by the third person, but only as necessary to prevent unjust enrichment. In this context, the conclusion that a recipient would be unjustly enriched by the retention of a given benefit requires a determination that:
> (a) absent liability in restitution, the claimant will not be compensated for the performance in question, and the recipient will retain the benefit of the claimant's performance free of any liability to pay for it; (b) liability in restitution will not subject the recipient to an obligation from which it was understood by the parties that the recipient would be free; and (c) liability in restitution will not subject the recipient to a forced exchange.

The tentative draft is, of course, just that: tentative. More importantly, if literally applied, MetCap's claim would fail because it has not alleged that "absent liability in restitution," it would not be paid. It has alleged that NASC is unable to pay; it has not alleged that SBEV will not pay under its guarantee of the Advisor Contract. As for whether liability would be imposed on Pearl for "an obligation from which it was understood by the parties that [it] would be free," the analysis is less clear. When the Advisor Contract was executed, Pearl obviously was not involved in any way and no one believed that it would become obligated. At some point, especially during the period shortly after the Second Amendment when it was anticipated that Pearl would acquire the stock of NASC, it could be argued that Pearl (and NASC and MetCap) expected that Pearl would become obligated. Pearl, however, did not buy the stock of NASC and, thus, a transaction which never occurred cannot be the basis for imposing the liability upon Pearl. Moreover, no benefit was arguably conferred by MetCap on Pearl until the Third Amendment.

[49] The Court is not insensitive to MetCap's predicament. Both MetCap and NASC allege that NASC was an entity with no assets of its own and, thus, seeking recovery from it would be futile. *See* Compl. ¶ 11 (alleging further that "it was contemplated that NASC would meet its financial obligations . . . by means of funds that it would raise"). But the inability of a party to a contract to fulfill an obligation thereunder cannot serve as a basis to conclude that other entities, who are not party to the contract, are liable for that obligation. *See WSFS*, 2005 WL 730060, at *19 ("A greater injustice would result if this Court were to ignore the lease agreement [between the parties] and award unjust enrichment damages . . . WSFS was in the better position to protect itself by claiming other collateral, or in the alternative, refusing to loan its funds . . . Finding otherwise would be inequitable.").

Defendants, most likely for the benefit of Pearl. If, as alleged, Pearl knew of the services for its benefit, relied upon and benefited from those services, and understood that NASC could not (or would not) pay MetCap for those services, the Court cannot conclude "with reasonable certainty" that there is no set of facts that MetCap could prove to support its claim for unjust enrichment as to the benefits it conferred upon Pearl following the Third Amendment.[50] Thus, the motion to dismiss MetCap's unjust enrichment claim must be denied to that extent.[51]

D. *The Complaint Does Not State a Claim That MetCap Was a Third-Party Beneficiary of the Merger Agreement*

Next, the Court considers MetCap's claim that it was a third-party beneficiary to the Merger Agreement, before the Third Amendment, and that, as such, the parties to the Merger Agreement could not vary or eliminate MetCap's right to a fee without its express consent because MetCap had acted in reliance upon its third-party rights.[52] For reasons set forth, this claim does not survive the Defendants' motion to dismiss.

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[50] MetCap's claim of unjust enrichment against PSC, Geary, and Beverly do not survive the motion to dismiss. No non-conclusory facts are alleged to suggest in any fashion how any of these entities benefited from MetCap's services, contracted for by NASC and only arguably at some point benefiting Pearl.

[51] The Complaint provides little insight to the work of MetCap after the Third Amendment (or before the Third Amendment for that matter). How to establish appropriate compensation, assuming the MetCap is so entitled, may be a difficult task, but it is not one that the Court need confront now. Indeed, the Court, in this context, does not preclude any argument (if MetCap should choose to make one) as to when any particular benefit resulted.

[52] *See* Compl. ¶¶ 12, 37-38. For MetCap to prevail, it must allege that (1) it was a third-party beneficiary of the Merger Agreement before the Third Amendment and (2) the terms of that

Well-settled within precepts of contract law is recognition that non-parties to a contract ordinarily have no rights under it.[53] Fixation with privity between parties, however, waned as modern commerce spawned increasingly sophisticated and complex relationships.[54] An exception emerged that an intended—but not incidental—third-party beneficiary might also have enforceable legal rights under a contract, even if it was not a party to that contract.

Delaware courts have often looked to *Insituform of North America, Inc. v. Chandler*[55] to determine whether a party is an intended third-party beneficiary under a contract. There, the Court explained that:

> In order for third party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon third parties that was intended, but the conferring of a *beneficial* effect on such third party—whether it be a creditor of the promisee or an

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agreement which benefited it could not be changed without its approval. The Merger Agreement, as amended by the Third Amendment, confers no rights, by its terms, upon MetCap.

[53] *E.g.*, *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *2 (Del. Ch. Feb. 17, 2004) (citing *Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257, 268 (Del. Ch. 1987)) (recognizing "the general rule that strangers to a contract ordinarily acquire no rights under it . . .").

[54] *See Wilmington Housing Auth. v. Fid. & Deposit Co. of Md.*, 47 A.2d 524, 528 (Del. 1946) (holding that a third-party beneficiary may recover on a contract made for his benefit and noting that "the exceptions grafted upon the English doctrine by our Delaware Courts have breached the imaginary barrier erected by the seal against the overwhelming force of justice and reason supporting the American doctrine, thereby opening the way for us to wipe out the last vestiges of an 'outworn, archaic' rule which is in conflict with the demands of modern-day business and social policy"); *see also* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:1 (4th ed. 2000) (noting that, while courts "recite[d] talismanically—and somewhat misleadingly—that 'strangers to a contract' have no rights under the contract, [i]n practice, the traditional common-law view proved too inflexible and harsh . . . [and an] exception to this rule has grown up under our law . . . .").

[55] 534 A.2d 257 (Del. Ch. 1987).

> object of his or her generosity—should be a material part of the contract's purpose.[56]

Thus, three elements are essential: (1) an *intent* between the contracting parties to benefit a third party through the contract, (2) the benefit being intended to serve as a gift or in satisfaction of a pre-existing obligation to the third party, and (3) a showing that benefiting the third party was a *material* aspect to the parties agreeing to contract.[57]

MetCap alleges that Section 5.10 of the Merger Agreement made it an intended beneficiary.[58] Merely alleging that it was an intended beneficiary is, of course, not sufficient to state a claim.[59] First, MetCap must allege facts demonstrating that both NASC *and* Beverly intended to benefit MetCap. It has not done so. The no-brokers' fee provision makes plain that Beverly is not liable for any broker, finder, banking, or advisory fee and, although it references the MetCap fee, it does so by clarifying that that fee is entirely the responsibility of NASC as the acquiring entity under the Merger Agreement before the Third Amendment. It is the Advisor Contract between the Plaintiffs that is the sole agreement defining the scope of MetCap's services, the party to whom those services were to be

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[56] *Id.* at 270 (emphasis in original).
[57] *See Madison Realty Partners 7, LLC v. AG ISA, LLC*, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001).
[58] Compl. ¶ 12. For the text of Section 5.10, see Part II, *supra*.
[59] *See Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 534 (Del. Super. 1990) ("[A]side from stating a legal conclusion, [merely alleging the status as an intended beneficiary] falls far short of establishing that [one] was an intended beneficiary of the . . . contract.").

rendered, the consideration it was to receive for those services, and the party responsible for paying it for those services.[60] That the Merger Agreement, a document executed after the Advisor Contract, makes reference to NASC's pre-existing obligation to MetCap does not make MetCap a third-party beneficiary to the Merger Agreement. The pertinent provision in the Merger Agreement recites that no one is entitled to any fee for financial advisor services and the parenthetical simply notes that MetCap is an exception and is entitled to payment of fees by NASC (defined as "Parent"). The parenthetical merely reconfirms NASC's obligation to MetCap under the Advisor Contract and defeats any argument that the Merger Agreement, by its statement that no such obligation exists, eliminated NASC's obligation to MetCap. If MetCap has no rights as a third-party beneficiary under the Merger Agreement before the Third Amendment, it would follow that it has no rights after the Third Amendment because there is no plausible argument that its rights are greater under the Merger Agreement after the Third Amendment than before the Third Amendment. Also, the financial advisor services rendered by MetCap—up to the time of the Third Amendment—were for NASC, which remains liable—if insolvent—for that obligation.

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[60] Although the acquiring entities changed following execution of the Merger Agreement, no assignment or other agreement was executed to assign, transfer, or alter NASC's continuing and freestanding obligation to remunerate MetCap. NASC may have no assets to satisfy its obligation, but that is not a dilemma for this Court to resolve in MetCap's favor on a third-party beneficiary basis. *See Street Search Partners, L.P. v. Ricon Int'l, L.L.C.*, 2005 WL 1953094, at *3 (Del. Super. Aug. 1, 2005) ("The Third Party Beneficiary doctrine is not meant to rescue a sophisticated corporate entity from its contractual appraisal of a business risk.").

Second, to survive the Defendants' motion to dismiss, MetCap must draw the Court's attention to facts indicating that the parties intended for the parenthetical exception of the MetCap fee from the no-brokers' fee provision to be either a gift or a means of satisfying a pre-existing obligation. Neither is the case. Nowhere in the Complaint is it alleged that Beverly sought to confer a gift to MetCap, and the parenthetical exception language itself does not satisfy NASC's preexisting obligation, but merely restates that NASC alone is responsible for paying a fee it already was committed to paying.[61]

Moreover, even if MetCap had been a third party beneficiary of the Merger Agreement before the Third Amendment, its claim would, nonetheless, be dismissed. MetCap correctly notes that a contract benefiting a third party who has acted in reliance upon it cannot be amended to the detriment of the third party beneficiary without its consent.[62] MetCap, however, is confronted with the inescapable fact that the Third Amendment changed nothing regarding its rights. Before the Third Amendment, NASC was obligated to pay MetCap's fee. After the Third Amendment, NASC was obligated to pay MetCap's fee. Its right to seek

[61] The Court does not need to resolve whether payment of MetCap was material to the Merger Agreement. *See Insituform*, 534 A.2d at 270. *See also Madison Realty*, 2001 WL 406268, at *1, *5 (finding the engagement of third-party providers of "personnel, services, and infrastructure that [were] essential both to operate, and to acquire" a partnership's investment interests was not a material purpose of a partnership organized for "the limited purpose to purchase . . . hold and otherwise manage . . . equity or any debt securities [of the partnership]" and, thus, the third-parties were merely incidental beneficiaries with no more standing to sue for breach of the partnership agreement "than would the local utility company or the office supply store").

[62] *See* RESTATEMENT (SECOND) OF CONTRACTS § 311(3) (1981).

to recover its fees from NASC has not changed. MetCap, instead, seeks to elevate its rights at the expense of entities which were not parties to the Merger Agreement at any time when it—even arguably—was expressly provided a benefit under the Merger Agreement.[63]

In sum, MetCap has failed to allege a claim as a third-party beneficiary under the Merger Agreement.

E. *The Carefully Crafted Allegations of the Complaint Preclude Dismissal of NASC's Claim for Reformation; MetCap is Not so Fortunate*

Finally, both MetCap and NASC seek reformation of the Third Amendment to the Merger Agreement to reflect the parties' understanding, or so it is alleged, that Pearl was to assume all of NASC's obligations, including the obligation to pay MetCap. Specifically, they petition the Court to eliminate Section 3.9 of the Third Amendment, which deleted the parenthetical in Section 5.10 of the Merger Agreement. Under Delaware law, the Court may use its equitable power to "reform" a contract so that it expresses the "real agreement"[64] of the parties in three circumstances: mutual mistake, unilateral mistake, and fraud.[65] Count Four

[63] Before the Third Amendment, the term "Parent" was defined as NASC. Thus, any reference to "Parent" prior to the Third Amendment meant NASC and only NASC. The Merger Agreement, by its terms, at no time in its history, ever expressly obligated any party other than NASC (assuming for these purposes that it did obligate NASC) to pay MetCap's fee.

[64] *Colvocoresses v. W.S. Wasserman Co.*, 28 A.2d 588, 589 (Del. Ch. 1942) ("The very purpose of reformation by a Court of Equity is to make an erroneous instrument express correctly the real agreement between the parties; *no court can make a new contract for them*.") (emphasis added).

[65] *See e.g.*, *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002); *James River-Pennington, Inc. v. CRSS Capital, Inc.*, 1995 WL 106554, at *2 (Del. Ch. Mar. 6, 1995)

of the Complaint seeks reformation on the basis of unilateral mistake and fraud (or "knowing silence").[66]

MetCap and NASC first plead that reformation is necessary because the final draft of the Third Amendment did not comport with the prior understanding among the parties. The prior agreement to which the Plaintiffs cite is evidenced by the version of the Third Amendment that was circulated by e-mail at 9:04 p.m. on November 20, 2005.[67] In that version, Sections 1.1 and 1.2 made plain that NASC, NASC Acquisition, and SBEV were assigning all rights and obligations under the Merger Agreement and that Pearl, PSC, and Geary were assuming all of those rights and obligations. Significantly, no reference was made to Section 5.10 of the Merger Agreement or to the MetCap fee itself (*i.e.*, the parenthetical contained in Section 5.10. of the Merger Agreement remained intact).

MetCap and NASC assert that the agreement contained in the e-mail of 9:04 p.m. represents a specific prior agreement that differed materially from the version of the Third Amendment that appeared at 12:59 a.m. on November 21, 2005. Goldsmith and Grunstein had been involved in the negotiations all day on November 20, and no one had ever broached the subject of payment of MetCap's

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("Reformation is appropriate only when the contract does not represent the parties' intent because of fraud, mutual mistake or, in exceptional cases, a unilateral mistake coupled with the other parties' knowing silence.").

[66] Compl. ¶ 43.

[67] *Id.* ¶ 10. Dickerson sent the 9:04 p.m. e-mail. Recipients included Grunstein, Goldsmith, Heil, Silva, and Levinson. *See* Herbert Aff. Ex. I.

fee. They relied, so NASC alleges, on the course of conduct of negotiations among the parties that assured them that they would be consulted if any such changes were contemplated.

In *Cerberus International, Ltd. v. Apollo Management, L.P.*, the Supreme Court held that, regardless of whether mutual mistake or unilateral mistake is cited as the ground for reformation, "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."[68] Moreover, "[t]his understanding need only be complete as to the issue involved . . . [i]t need not constitute a complete contract in and of itself."[69] Thus, the Court must determine here whether NASC has alleged facts demonstrating that the parties came to a "real agreement," not on all aspects of the merger itself, but on the more narrow issue of which entity was to pay MetCap.

The *Cerberus* case is instructive in two factual respects. First, the Court concluded that a rational fact finder could have concluded that the parties had reached a specific prior understanding with respect to the disposition of certain proceeds because one party had stipulated that the specific disposition was a condition to going forward and the other party had consented. Second, the Court

[68] 794 A.2d 1141, 1151-52 (Del. 2002).
[69] *Id.* at 1152.

determined that there was no evidence in the record that the parties altered this agreement in subsequent negotiations.[70]

By contrast, the revision to the Third Amendment did occur within the context of a negotiation process. After Grunstein and Goldsmith departed, Dickerson continued to represent NASC and other "acquiring entities" that night as "deal counsel."[71] With respect to the negotiation of the Third Amendment, Pearl, PSC, and Geary, were represented by Heil. Because the change to the Third

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[70] As explained in *Cerberus*:

> First, we turn to the element of the prior agreement. Cilurzo told Harris in writing that having the proceeds from the options and warrants go to MTI's stockholders was a condition to further negotiations, and Harris responded in his handwritten note on that writing: "This looks fine." *Absent any evidence that this term was eliminated in the negotiation process* (and there is none on this record), it is certainly a permissible inference that the parties had a prior agreement relative to the proceeds from the options and warrants.

Id. at 1153 (internal citations omitted) (emphasis added).

[71] The definitional contours of "deal counsel," a term without well-defined, independent significance, present a recurring conundrum. Indeed, it is not clear from the Complaint whether NASC seeks to describe a role for Dickerson that differs from Troutman Sanders generally. Whether an attorney representing others as "deal counsel" has exceeded the scope of his or her authority would, of course, depend upon the conduct and understanding of the parties whom he or she was representing. It would also be a question for this Court, one that could only be considered in light of, among other things, the nature of the parties' relationship and the existence of any limitation on that relationship.

It is not surprising that, in the context of negotiating complex transactional documents, parties (and their attorneys) routinely accept that those attorneys representing counterparties to a contract are acting with the requisite authority to bind their principals. Although a motion to dismiss provides the Court with a poor forum for considering the issue of apparent authority, especially because all reasonable inferences must be drawn in favor of the nonmoving party, the Court would eventually be guided by the general maxim within our law that "[i]f a third party relies on the agent's apparent authority in good faith and is justified in doing so by the surrounding circumstances, the principal is bound to the same extent as if actual authority had existed." *Old Guard Ins. Co. v. Jimmy's Grille, Inc.*, 2004 WL 2154286, at *3 (Del. Sept. 21, 2004) (citations omitted). For the moment, however, it is notable that MetCap and NASC have offered no allegation in their Complaint that Heil, as counsel to Pearl and its related entities during the negotiations, was aware of any limitation on Dickerson's authority whether as "deal counsel" or as a partner in Troutman Sanders for purposes of the Beverly transaction.

Amendment occurred during the negotiations between these two groups, there was an obvious divergence from the key facts in *Cerberus*. When Goldsmith and Grunstein left, the negotiations had not concluded, and it is difficult to accept that, in these circumstances, a "real agreement" between parties had been reached when those parties were still in the fluid process of negotiating, drafting, and arriving at a common understanding.

That NASC may now regret the outcome of Dickerson's efforts that evening is, of course, not cause to rewrite a contract negotiated by sophisticated counsel. The Complaint, however, alleges specifically that Dickerson had no authority to make the changes on behalf of NASC or SBEV because, again according to the Complaint, he was not separately representing NASC or SBEV.

The Complaint, accordingly, may be read to allege that it had been agreed, perhaps through acquiescence, that the parenthetical of Section 5.10 of the Merger Agreement would not be changed (or was not to be the subject of further negotiation in the absence of Goldsmith and Grunstein) even though negotiation of other issues was continuing. That sufficiently alleges the prior understanding that is essential to a reformation claim. Thus, the Complaint alleges that the Third

Amendment, as the result of a unilateral mistake attributable to Dickerson, did not reflect the parties' intent.[72]

Unilateral mistake alone does not provide a basis for reformation. It must be coupled with "knowing silence."[73] Dickerson did not send Goldsmith, NASC's principal in the negotiations, the final version of the Third Amendment.[74] Therefore, Goldsmith (and, presumably, NASC) was unaware of the Third Amendment. Similarly, Pearl, its counsel, and related entities, did not supply the information to NASC either.[75] Thereafter, Pearl and its counsel remained silent about the changes.

Under agency law, the knowledge of an agent is generally imputed to his principal except when the agent's own interests become adverse.[76] In the context

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[72] By Court of Chancery Rule 9(b), both mistake and fraud must be pled with particularity. The Complaint, with its detailed, although selective, recitation of certain events of the evening of November 20, satisfies that standard.

[73] *See, e.g.*, *Universal Compression, Inc. v. Tidewater, Inc.*, 2000 WL 1597895, at *7 (Del. Ch. Oct. 19, 2000) (referring to "knowledge and concealment").

[74] An e-mail that Goldsmith had sent to Dickerson before "signing off" of his computer that evening indicates that he had signed multiple copies of the signature pages for NASC and NASC Acquisition and that he had instructed Dickerson that the signature pages had been left with Levinson. *See* Herbert Aff. Ex. H. The Court notes that Dickerson e-mailed the offending change to Grunstein (but, for reasons that cannot be gleaned from the Complaint, not to Goldsmith) within hours.

[75] Heil and others affiliated with Pearl received a copy of Dickerson's e-mail transmitting the Third Amendment; that e-mail does not reflect that a copy was sent to Goldsmith.

[76] *Albert*, 2005 WL 2130607, at *11 ("Delaware law states the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal."); *Ambrose v. Thomas*, 1992 WL 208478, at *2 (Del. Super. Mar. 13, 1992) ("In Delaware, well settled agency law provides where an agent acquires knowledge in the course of his or her agency and has no personal interest in the transaction adverse to the interest of the principal, any knowledge of or notice to the agent is chargeable to the principal whether or not knowledge or notice is actually communicated to the principal. This rule promotes the underlying policy of holding accountable

of "dual agency," or where an agent acts in a role common to two principals, the rule is much the same. That is, notice to, or knowledge of, an agent will be considered to be notice to, or knowledge of, both principals except in a situation of divided loyalties or where the agent's own interests run adverse to one of the principals.[77]

Dickerson was representing NASC; that is not disputed. NASC seeks to limit his role to that of "deal counsel." The question, however, is whether Dickerson's knowledge of the revision to Section 5.10 of the Merger Agreement through the Third Amendment (a revision which Dickerson himself accomplished) can be attributed to NASC within the context of whatever attorney-client relationship may have existed between NASC and Troutman Sanders. The Complaint carefully and somewhat flimsily—but sufficiently—alleges facts that would support an inference—one that must be given in the "plaintiff-friendly" confines of Court of Chancery Rule 12(b)(6)—that, during the evening of November 20, Dickerson was somehow conflicted because of his role as "deal counsel" and the payment of his fees by Pearl (or its related entities). In the

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one who transacts his business through another for what the other does or does not do in conducting that business. The principal should bear the burden rather than a third party who has dealt with the agent to the third party's detriment.") (internal citations omitted).

[77] *See Holley v. Jackson*, 158 A.2d 803, 808 (Del. Ch. 1959) ("Ordinarily the knowledge of an agent is imputed to his principal . . . [but] where an agent is interested in the result of a transaction adversely to the interest of his principal, the rule of imputed knowledge on the part of the principal no longer obtains.") (citations omitted).

appropriate factual setting, the knowledge of a conflicted agent may not be imputed to the principal. That, accordingly, precludes the Court from attributing Dickerson's knowledge to NASC.[78]

Accordingly, the Complaint states, perhaps only marginally, a claim for reformation of the Third Amendment for the benefit of NASC.[79]

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[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. It may also be that Pearl was entitled to rely upon Dickerson's apparent authority or that it reasonably assumed that Dickerson would share any material information regarding the transaction with Goldsmith, his partner. Those are arguments—however tempting—that the Court may not reach at this stage of the proceedings because of the incomplete development of the factual background.

[79] The Complaint was carefully drafted with respect to Dickerson's role. It alleges that he did not have the authority to bind NASC. It alleges that he was paid for some of his work by Pearl or its related entities. It alleges that he was "deal counsel," but it provides no basis for gaining a full understanding of Dickerson's role. Without an understanding of Dickerson's actual role, it is difficult for the Court, within the confines imposed by Court of Chancery Rule 12(b)(6), to determine whether or not Dickerson had the authority to do what he did or, more importantly, whether Dickerson's knowledge may be imputed to NASC. Because the Court must give NASC the benefit of any reasonable inference that can be drawn from the allegations of the Complaint, the Complaint must be read to suggest that Dickerson was somehow conflicted and that his conflicted status would make it improper or inequitable to attribute his conduct or his knowledge to NASC, even though the Complaint scrupulously avoids any such express allegation and that inference is far from the one most likely to be drawn from the allegations of the Complaint. Ultimately, Dickerson's role will be a factual matter, one informed by an understanding of the ethics of the practice of law, and, if NASC has no more to offer than what has been set forth in its Complaint, its claim for reformation might fail not only because it is fairly charged with Dickerson's knowledge, but also because it is bound by Dickerson's conduct. NASC's position must be something more than a whine that it did not like what its lawyer did during the final hours of negotiation of the Third Amendment. Parties to a transaction and their counsel must be able to rely—and to act accordingly—on the negotiating authority generally accorded transactional attorneys. This is especially true when the negotiations are ongoing and the principals have abandoned the negotiation field after leaving signature pages. Nothing in this Memorandum Opinion should be viewed as undercutting that dynamic. The result here is more the product of Court of Chancery Rule 12(b)(6) than it is of substantive law.

Also, the Court expresses no view as to whether the reformation sought by NASC would bring the substantive result—Pearl's obligation to pay MetCap—that it seeks.

On the other hand, MetCap's effort to obtain reformation fails. MetCap is a party neither to the Merger Agreement nor to the Third Amendment. Reformation is available, perhaps subject to certain exceptions not present here, only to parties to the contract.[80] As such, MetCap, as a matter of law, may not pursue a claim for reformation of the Third Amendment.

V. CONCLUSION

For the foregoing reasons, (i) Count One (Fraud) and Count Three (Third-Party Beneficiary) of the Amended Complaint will be dismissed; (ii) Count Two (Unjust Enrichment) of the Amended Complaint, except to the extent that it purports to assert a claim against Pearl based on benefits conferred after the Third Amendment to the Merger Agreement, will be dismissed; (iii) MetCap's claim for reformation presented in Count Four will be dismissed; and (iv) otherwise, Defendants' Motion to Dismiss will be denied. An implementing order will be entered.

[80] *See, e.g.*, *Emmert v. Prade*, 711 A.2d 1217, 1219 (Del. Ch. 1997); *Fritz v. Nationwide Mut. Ins. Co.*, 1990 WL 186448, at *3 (Del. Ch. Nov. 26, 1990); *but cf. Chase Manhattan Bank v. Iridium Africa Corp.*, 307 F. Supp. 2d 608, 614 n.6 (D. Del. 2004).