EFiled: Oct 29 2014 06:02PM EDT
Transaction ID 56265256
Case No. N14C-08-010 PRW

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AGNIESZKA KOSTYSZYN and MAREK KOSTYSZYN, Plaintiffs, v. GIANMARCO MARTUSCELLI, GILDA MARTUSCELLI, The ESTATE OF BRETT J. HARRIS FROZEN ENDEAVORS, INC., a Delaware Corporation, AJT, INC., a Delaware Corporation, and CHESAPEAKE INN, INC., a Maryland Corporation, Defendants.	)	C.A. No.: N14C-08-010 PRW TRIAL BY JURY OF TWELVE DEMANDED

DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Dated: October 29, 2014
Wilmington, Delaware

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Plaintiffs[1] knew what they were purchasing, and they believed that they could be more successful than Frozen Endeavors had been at operating Paciugo. Plaintiffs chose to proceed without the advice of counsel, and to conduct little to no due diligence. Shortly after the sale, Plaintiffs changed their minds and asked to rescind the sale. In Marek Kostyszyn's own words: "[A] week after we signed that contract, I started heaving [sic] really bad feeling about this, I went to you [Gianmarco] and BJ [Harris] begging to take it back and keep the $100K." (OB, Ex. C, p. 1). Endeavors did not agree to Plaintiffs' request.

Once demand for gelato at the Chesapeake Inn, the Creamery and La Casa Pasta (the "Restaurants") declined in 2012 and the first half of 2013, Plaintiffs again came to Gianmarco in order to get out of a purchase they regretted making. This time, they claimed that Endeavors had not lived up to the Agreement because gelato sales to the Restaurants were not as strong as they had been in the summer of 2011, and the Creamery had to be closed. This claim forms the entire basis for Plaintiffs' case—both the fraud-related and contract-related claims. Plaintiffs assert that, in spite of its plain language, the Agreement entitles them to have guaranteed catering sales to the Restaurants for a period of 10 years, regardless of actual demand.

Shortly after Endeavors again refused to rescind the sale of Paciugo, Plaintiffs filed the Chancery Complaint. Plaintiffs transferred their suit to this Court after the parties full briefed a motion to dismiss the Chancery Complaint, and the Court of Chancery dismissed Plaintiffs' equitable claims with prejudice and other claims for lack of subject matter jurisdiction. At no time have Plaintiffs attempted to correct the deficient nature of the factual allegations contained

[1] Capitalized terms shall have the same meaning as assigned to them in Defendants' Opening Brief in Support of Their Motion to Dismiss Plaintiffs' Complaint, filed on September 26, 2014 (the "Opening Brief"). (Trans. ID No. 56097728). All citations to "OB" shall be to the Opening Brief.

in the Chancery Complaint or the Complaint filed in this Court, in spite of having over a year to do so.[2] Plaintiffs' reliance on their original, defective allegations is telling.

Plaintiffs' Answering Brief fails to address the bulk of Defendants' arguments head on, instead repeating Plaintiffs' general and conclusory allegations concerning fraud, and an unsupportable interpretation of the Agreement. Plaintiffs desperately resort to an argument that Endeavors lacks standing to file a motion to dismiss, and ask that Gianmarco be reported to the Delaware and Maryland State Attorneys General in connection with the lapse of Endeavors' charter.[3] Plaintiffs also raise new arguments (based on theories and facts not even alleged in the Complaint) seeking to invalidate the very Agreement they seek to enforce.

For the reasons stated in the Opening Brief and herein, Plaintiffs' claims fail as a matter of law. Defendants respectfully submit that Plaintiffs should not be allowed any further opportunity to amend the Complaint. Moreover, even if the Court were to allow certain claims to survive, Defendants request that the Court dismiss those Defendants who cannot be liable as a matter of law, and award Defendants attorneys' fees in connection with their efforts to have those Defendants dismissed.

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[2] Defendants also note that Plaintiffs have been advised on numerous occasions that they have improperly named certain Defendants in this case, yet have refused to correct even the most basic of mistakes, such as alleging that Gilda Martuscelli was somehow involved in fraud, when she never met Plaintiffs prior to the closing on the sale and never had substantive discussions with them concerning the sale. (*See, e.g.*, Exhibit A hereto). Defendants respectfully request that the Court award their fees for having to address this issue when there is no good faith basis for Plaintiffs to persist in naming Defendants inappropriately and Defendants have put Plaintiffs on notice of their intent to request fees.

[3] Defendants filed a Certificate of Revival on October 27, 2014, filed the requisite annual statements, and paid past due franchise taxes plus interest and penalty. (*See* Exhibit B hereto). Delaware recognizes that the type of oversight that led to the voiding of Endeavors' charter happens frequently and without malicious intent. Accordingly, 8 *Del. C.* § 312(e) gives corporate revival retroactive effect, "as if [the] certificate of incorporation had not been forfeited or void," and states that revival "shall validate all contracts, acts, matters and things made, done and performed ... by the corporation, its officers and agents during the time when its certificate of incorporation was forfeited or void[.]"

I. PLAINTIFFS' FRAUD CLAIMS FAIL AS A MATTER OF LAW.

A. Plaintiffs Fail To Identify With Particularity Any False Statement Of Present Fact, And Those That Plaintiffs Identify Do Not Constitute A False Statement Of Present Fact.

Plaintiffs agree that in order to state a claim for fraud, they must plead facts establishing that a defendant misrepresented a ***present*** fact (*i.e.*, at the time the representation was made). *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005); and *Alleco Inc. v. Harry & Jeanette Weinberg Foundation, Inc.* 665 A.2d 1038, 1047 (Md. 1995) (internal citations omitted). The Complaint identifies only two items as being false: (1) Profit Statement 1; and (2) Section 5.d of the Agreement.[4] (Compl. ¶ 24). Neither contains a misrepresentation of fact.

1. Profit Statement 1 does not contain any false statements of fact.

Plaintiffs' Answering Brief[5] does not argue that any specific information within Profit Statement 1 was false. Rather, Plaintiffs argue that Profit Statement 1 *misled* them into believing that Paciugo was a profitable business, in spite of the facts that: (i) Profit Statement 1 reflected a net profit of only $7,186.21 over a 14-month period; (ii) in 6 out of 14 months, Profit Statement 1 actually reflected a loss; and (iii) there were other expenses of Endeavors (about which Plaintiffs were aware) not accounted for on Profit Statement 1.[6]

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[4] Otherwise, the Complaint makes only general allegations about other unspecified statements and/or documents that were false and misleading. (*See, e.g.*, Compl., ¶ 53). Such general allegations are deficient. *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990) ("A well-pleaded fraud claim must include at least, "the time, place, and contents of the false representations.").

[5] The term "Answering Brief" shall refer to Plaintiffs' Answering Brief in Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint, filed on October 15, 2014. (Trans. ID No. 56201711). All citations to "AB" shall be to the Answering Brief.

[6] Plaintiffs argue that, depending upon the structure of repayment of Endeavors' debt to M&T Bank, Paciugo still could have had a profit during the period reflected on Profit Statement 1. (AB, pp. 13 and 15). First, simply because the loan had a ***balance*** of approximately $70,000 at the time Endeavors sold Paciugo, that does not mean that the original balance of the loan was $70,000. Second, even if there was some "profit" left after accounting for loan payments, a "profit" of $7,000 or less over a 14-month period is not reflective of a thriving business.

Further, according to Plaintiffs, the catering sales figures in Profit Statement 1 were misleading because Gianmarco failed to disclose that: (i) there was a three-year lease for the Creamery; (ii) before the end of the summer 2011 (*prior* to the execution of the Agreement), the Creamery began offering ice cream in addition to gelato; and (iii) Gianmarco did not disclose to Plaintiffs that he was losing money at the Creamery in 2011. (AB, p. 15). Here, the *sole* basis for their claim that the catering sales data was misleading and evidence of fraud is the Gianmarco E-mail. A fair reading of the Gianmarco E-mail contradicts Plaintiffs' theory of fraud.[7]

Plaintiffs' selective quoting from the Gianmarco E-mail in the Complaint and Answering Brief fails to inform the Court of the following statements that contradict Plaintiffs' claims:

- With regard to the sale of ice cream at the Creamery, the Gianmarco E-mail discloses that the Creamery began to sell ice cream in August 2011 *in response to customer complaints about not offering ice cream*, and that the Chesapeake Inn already had been offering ice cream prior to the sale. (OB, Ex. C, p. 2).[8]

- The only reason the decline in volume of catering sales to the Restaurants was that the demand for gelato decreased. (OB, Ex. C, *passim*).[9]

- Although Plaintiffs argue that, "Gianmarco, on behalf of Defendant Chesapeake Inn, closed down the Creamery at his earliest opportunity," (AB, p. 15), the Creamery continued to operate and purchase gelato from Paciugo until sometime in 2013. (OB, Ex. C, p. 2). Moreover, not only were poor sales at the Creamery in 2012 a contributing factor to the discontinuation of the Creamery's business, but Mr. Harris' passing in

[7] The Court need not simply accept conclusory allegations unsupported by specific facts, nor draw unreasonable inferences in the plaintiff's favor. *Price v. E.I. du Pont de Nemours and Co.*, 26 A.3d 162, 166 (Del. 2011). If the unambiguous language of documents appropriate to consider on a motion to dismiss contradict the plaintiff's allegations, a claim may be dismissed. *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003); *cf. Doe 30's Mother v. Bradley*, 58 A.3d 429, 445 (Del. Super. 2012).

[8] Defendants respectfully submit that the Court may take judicial notice of the fact that a restaurant's menu is a matter of public record.

[9] Gianmarco stated: "I continue to sell your gelato in the restaurant. It is still on the menu—I cannot force people to order it if we do not have people in the restaurant"; "I will continue to use your gelato at both the restaurants and also sell it for weddings and anyone who asks for it...It's a matter of ordering when I need it. I love the gelato and want my guests to have it. I wish we ordered it more than we do."; "When I told you I would buy gelato from you; I was not being deceitful. I am and still am buying gelato from you for both my restaurants. I cannot guarantee what I am going to buy; that is based on supply and demand."

December 2012 was a factor as well. (*Id.*, at p. 2) ("The owner asked me over the winter if I wanted out of my lease because he had another tenant and customer of his that was interested and I said yes because I was losing money *and couldn't do it this year with the loss of BJ* [who had been the business manager at the Chesapeake Inn, *see* Compl., ¶ 5] *at the CI, I am shorthanded and could not do the Creamery as well.*") (emphasis added).

- It does not appear that the Creamery was operating a loss in 2011—sales dropped in 2012, and, with the benefit of hindsight, Gianmarco was able to explain to Marek Kostyszyn that 2011 had been a record year.[10] (OB, Ex. B., p. 2). Thus, the Creamery was ***not*** losing money in 2011.

2. The representation contained in Section 5.d of the Agreement was not false when made.

The only representation contained in Section 5.d is that Endeavors would continue to purchase gelato for the Restaurants for 10 years.[11] The representation made in Section 5.d was not false when made. Plaintiffs admit that gelato sales to the Restaurants (whether made directly or through Endeavors) did, in fact, continue following the sale of Paciugo. This fact directly contradicts Plaintiffs' claim, and precludes any inference in Plaintiffs' favor that the representation contained in Section 5.d was false when made. *See Bean v. Fursa*, 2013 WL 755792, at *45 (Del. Ch.) (finding that compliance with contractual provision for a period of time following the execution of the contract precluded inference that the contractual representation was false when made without additional, specific facts to support such an allegation).

[10] That the sales in the spring and summer of 2011 were remarkable in comparison to sales from July and August 2010 was apparent in Profit Statement 1.

[11] As discussed in connection with Plaintiffs' contract-related claims, Section 5.d does not a guarantee any specific amount of gelato to be purchased, nor does it guarantee that La Casa Pasta, the Creamery, or the Chesapeake Inn would be operated in the same manner (or at all) for 10 years regardless of the circumstances. Further, to the extent Plaintiffs are alleging that they were relying on extracontractual statements by any of Defendants regarding the future prospects for catering sales, those predictions cannot form the basis of a claim for fraud. *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 554 (Del. Ch. 2001) ("Predictions about the future cannot give rise to actionable common law fraud.").

B. Plaintiffs Have Failed To Plead Scienter With The Requisite Particularity.

Plaintiffs do not directly address the need to plead scienter with particularity in cases of promissory fraud, citing instead to the legal standard for pleading scienter in non-promissory fraud cases. (AB, p. 14). Plaintiffs' theory of fraud based on the supposed failure to comply with Section 5.d is one of promissory fraud, and a heightened scienter standard applies. *See, e.g., Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 208 (Del. Ch. 2006).

Plaintiffs argue that Gianmarco's supposed fraudulent concealment of facts concerning how the Creamery was to be run following the Sale supports an inference that Defendants never intended to comply with Section 5.d of the Agreement. As set forth above, this implication is plainly contradicted by a fair reading of the Gianmarco E-mail. Moreover, Endeavors' compliance with Section 5.d following the sale defeats any inference that there was no intention to comply with Section 5.d when Endeavors made that representation.

C. Plaintiffs' Claim For Negligent Misrepresentation Fails As A Matter Of Law.

Plaintiffs have failed to address Defendants' arguments specifically directed to their claim for negligent misrepresentation. Plaintiffs' claim for negligent misrepresentation was, in essence, dismissed by the Court of Chancery, and it is unsupportable here. As stated in the Opening Brief, equitable fraud and negligent misrepresentations are, in essence, the same claim. *See Corp. Prop. Assoc. 14 Inc. v. CHR Holding Corp.*, 2008 WL 963048, at *8 (Del. Ch.) (citation omitted). The Court of Chancery explicitly dismissed Plaintiffs' equitable fraud claim, finding that there was no special relationship or duty between Defendants and Plaintiffs in this arm's length transaction. (*See* OB at Ex. A). For the same reason, Plaintiffs' claim for negligent misrepresentation may be dismissed here. Additionally, this Court lacks jurisdiction to preside over a claim for negligent misrepresentation, which presents a separate and independent ground

for dismissal. *See Mark Fox Grp., Inc. v. E.I. duPont de Nemours & Co.*, 2003 WL 21524886, at *5 (Del. Ch.).

II. PLAINTIFFS' CONTRACT-RELATED CLAIMS FAIL AS A MATTER OF LAW.

As discussed in Defendants' Opening Brief, Section 5.d is not, as Plaintiffs allege, a guarantee that Endeavors or the Restaurants will (i) purchase gelato whether or not there is demand for it; (ii) stop selling or never sell ice cream; or (iii) remain in business if it is not viable to do so. Plaintiffs did not negotiate such guarantees from Endeavor, and to read Section 5.d to include such obligations is not only inconsistent with its plain language, but also unreasonable because it produces an unintended and commercially unreasonable result. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010) (an unreasonable interpretation of a contract is one that produces an absurd result or one that no reasonable person would have accepted when entering the contract.).

Plaintiffs respond to Defendants' arguments with a bewildering series of assertions. First, Plaintiffs incorrectly claim that Section 5.d is ambiguous. (AB, p. 19). A contractual provision is not rendered ambiguous simply because the parties disagree as to its meaning; it will be found to be ambiguous only if it is reasonably susceptible of two meanings. *GMG Capital Inv., LLC v. Athenian Venture Partners I, L.P.*, 26 A.3d 776, 780 (Del. 2012). The only reasonable interpretation of Section 5.d is that advanced by Defendants.[12]

Plaintiffs also argue that Section 5.d lacks definiteness, and therefore, was either invalid from its inception or its terms need to be defined by the Court. (AB, p. 20). It is unclear exactly

[12] Plaintiffs argue that the doctrine of *contra preferentum* should be applied to resolve this matter against Defendants. (AB, p. 22). The doctrine of *contra preferentum* is applied on the event that a contract is found to be ambiguous. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398-99 (Del. 1996). Further, that doctrine may be rebutted by extrinsic evidence. *Brady v. i2 Techs. Inc.*, 2005 WL 3691286, *4 (Del. Ch.).

what Plaintiffs hope to accomplish by making this argument as the party seeking to enforce Section 5.d. If Section 5.d is invalid due to lack of definiteness, then, by the terms of the Agreement, Section 5.d would be excised and Plaintiffs could not enforce it. (*See* Agreement, § 9.a) ("...if a particular provision of this Agreement shall be found to be invalid...such provision shall be deemed amended to delete therefrom the portion thus found to be invalid...").

Finally, Plaintiffs make another brand new argument that the Agreement should be void by failure of an express contingency. (AB, p. 23). Once again, it is difficult to understand what Plaintiffs are trying to accomplish by making this argument. Plaintiffs are attempting to enforce the Agreement; by asserting that the Agreement is void, they cannot hope to enforce it.

Moreover, Section 10 of the Agreement provides that, "[t]his Agreement of Sale is contingent upon the Landlord, Ray Smith, agreeing to a Lease for the premises by Buyer." Plaintiffs claim in the Answering Brief—without any citation to the Complaint or its exhibits—that "[t]o our knowledge 'Ray Smith' has not agreed to any leases for the Plaintiffs." (AB, p. 23). Section 10 of the Agreement appears to be referring to a lease for the premises of Paciugo. Plaintiffs have assumed the lease for Paciugo's premises, and therefore, the contingency referred to in Section 10 of the Agreement has at least been substantially satisfied, even if the lease was not with an individual named "Ray Smith." (Compl., ¶ 13)("The Paciugo lease with the Christiana Mall was assumed by Plaintiffs....")[13]

III. PLAINTIFFS' CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING FAILS AS A MATTER OF LAW.

Plaintiffs' claim for breach of the covenant of good faith and fair dealing fails as matter of law. To the extent that Plaintiffs insist upon the application of Maryland substantive law to

[13] Defendants rely on the arguments contained in their Opening Brief as to the reasons for dismissal of Plaintiffs' claims for breach of express warranty and indemnification.

their Complaint, which they appear to do, the claim for breach of the covenant of good faith and fair dealing must fail because Maryland does not recognize an independent cause of for breach of the covenant of good faith and fair dealing. *See e.g., Mount Vernon Props., LLC v. Branch Banking & Trust Co.*, 907 A.2d 373 (Md. App. 2006).

Further, the only supposed implied obligation identified by Plaintiffs is that Endeavors was, "to continue to purchase gelato in an amount consistent with prior sales." (AB, p. 24). This argument fails because a claim for breach of the implied covenant of good faith and fair dealing, "only applies where a contract lacks specific language governing an issue and the obligation the court is asked to imply advances, and does not contradict, the purposes reflected in the express language of the contract. *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 770 (Del. Ch.), *aff'd*, 976 A.2d 170 (Del. 2009) (citations omitted).

IV. IF PLAINTIFFS' COMPLAINT IS NOT DISMISSED IN ITS ENTIRETY, CERTAIN DEFENDANTS SHOULD BE DISMISSED ALTOGETHER OR FROM CERTAIN CLAIMS.

If Plaintiffs' complaint is not dismissed in its entirety, Plaintiffs' have failed to state claims against all Defendants against which those claims are asserted. First, only Endeavors is a signatory to the Agreement, and therefore, only Endeavors should be a defendant with respect to Plaintiffs' contract-related claims. Plaintiffs argue that exceptions to the general rule that only signatories may be held liable under contract apply here. (*See* AB, p. 19) (citing *NAMA Holdings, LLC v. Related World Market Ctr., LLC*, 922 A.2d 417, 430 (Del. Ch. 2007)). Plaintiffs fail to explicitly identify which theory they assert applies to the present case, but appear to be advancing an estoppel theory. Plaintiffs argue that because they negotiated the terms of the Agreement with Gianmarco, who, according to Plaintiffs, is also an agent of CI (the entity that owned the Creamery and owns the Chesapeake Inn), and AJT (the entity that owns La

Casa Pasta), Gianmarco bound CI and AJT to the Agreement when he signed on behalf of Endeavors. There is no basis for an estoppel theory to be applied under these circumstances alone. *ING Bank, FSB v. Palmer*, 2010 WL 4038604, at *2 (D. Del.) ("Courts utilize equitable estoppel to 'prevent a non-signatory from embracing a contract, and then turning its back on the portions of the contract ... that it finds distasteful.'") (citing *E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)). This is especially true when the Agreement specifically states that *Endeavors* will purchase gelato, and even Plaintiffs appear to believe that the obligation to purchase gelato was Endeavors' alone, since Plaintiffs argue that direct purchases from the Restaurants were not sufficient to discharge Endeavors' duties under Section 5.d.[14]

V. PLAINTIFFS' REQUEST TO AMEND THE COMPLAINT IS UNTIMELY.

Defendants include a footnote requesting leave to amend the Complaint in lieu of dismissal. (AB, p. 24, n.1). Defendants respectfully ask that any request for leave to amend the Complaint be denied. This case has been going on for more than a year, and Plaintiffs have had ample notice of the deficiencies in their Complaint and ample opportunity to seek to cure those deficiencies.[15] Plaintiffs make their cursory request in a footnote, without giving the Court or Defendants any idea of how the Complaint would be amended, or what additional information they could include that would cure the deficiencies noted by Defendants. Defendants submit that any attempt at this late stage to amend the Complaint would be futile.

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[14] Plaintiffs also persist in naming all Defendants in connection with their fraud claims, in spite of alleging that the only false representations made were by Gianmarco and Harris on behalf of Endeavors. Defendants respectfully refer the Court to Exhibit E to the Opening Brief for a spreadsheet setting for the bases for dismissing various Defendants from various claims.

[15] Notably, in spite of the strictures of Court of Chancery Rule 15(aaa), Plaintiffs did not attempt to amend the Chancery Complaint after receipt of Defendants' motion to dismiss.

Respectfully submitted,

BERGER HARRIS LLP

By: */s/ Brian M. Gottesman*

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Attorneys for Defendants

Dated: October 29, 2014
Wilmington, Delaware

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EXHIBIT A

BERGER | HARRIS

MICHAEL W. MCDERMOTT, ESQUIRE
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August 22, 2014

VIA U.S. MAIL AND E-MAIL
Gregory D. Stewart, Esquire
Law Office of Gregory D. Stewart, P.A.
715 North Tatnall Street
Wilmington, Delaware 19801

Re: Kostyszyn, *et al.* v. Martuscelli, *et al.*

Dear Greg:

I write to address a few serious concerns we have with the previously verified Complaint that you re-filed in the above-referenced matter on August 1, 2014 in the Superior Court. (Trans. ID No. 55820700). These concerns are largely unrelated to the pleadings-stage legal issues that we will address in our clients' opening brief in support of a motion to dismiss the Complaint due to be filed in September. The present concerns involve (i) certain representations contained in the pleadings; (ii) the nature and reasonableness of the inquiry performed by Plaintiffs before asserting (and now re-asserting) certain legal and factual claims as required under the Superior Court Civil Rules; and (iii) the underlying purpose behind naming (and now re-naming) certain parties. As set forth more fully below, we believe that Plaintiffs lack a good faith basis to proceed on certain of their claims, and are obligated under Superior Court Civil Rule 11 to dismiss them.

Gilda Martuscelli Should Be Dismissed From All Claims Asserted Against Her Individually

First, as counsel has advised you already on a number of occasions, the allegations contained in paragraph 4 of the Complaint concerning Gilda Martuscelli lack any factual basis at all. Ms. Martuscelli is not a principal of Chesapeake Inn, Inc. or AJT, Inc. Plaintiffs should dismiss all of the claims in the Complaint asserted against Ms. Martuscelli predicated upon those incorrect corporate capacity allegations.

Second, as Plaintiffs are well aware, Ms. Martuscelli never met or communicated with Plaintiffs in any way until the day of closing on the sale of Paciugo. The Complaint does not reference or identify any representation at all (let alone a false representation) made by Ms. Martuscelli upon which Plaintiffs relied—this is likely because they did not meet or communicate in any way until the day of closing. Accordingly, Plaintiffs should dismiss Ms. Martuscelli from any claims in the Complaint asserting that she, in her individual capacity, made representations to Plaintiffs in connection with the sale of Paciugo.

Third, as Defendants have already noted in the briefing on their motion to dismiss in the Court of Chancery, Plaintiffs and Frozen Endeavors, Inc. are the sole signatories to the

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sale agreement. Delaware law (and Maryland law for that matter) is clear that only a signatory to a contract can breach it. Plaintiffs do not allege any theories that would modify that axiomatic legal principle, nor did they provide any justification for these claims in response to Defendants' arguments concerning this issue on the motion to dismiss. Therefore, Plaintiffs should dismiss the contract-based claims that have been asserted against Ms. Martuscelli because she is not a signatory in her individual capacity to any contract at issue in this case.

All Defendants Except Frozen Endeavors Must be Dismissed from the Contract Claims

Plaintiffs and Frozen Endeavors, Inc. are the sole signatories to the sale agreement. As set forth above—whether in Delaware or Maryland—only parties to a contract and intended third-party beneficiaries may enforce or be bound by that agreement's provisions. Plaintiffs have failed to state any basis in the Complaint to assert contract-based claims against non-contracting parties, nor did they provide any justification for these claims in response to Defendants' arguments concerning this issue on the motion to dismiss. Plaintiffs must dismiss any contract-based claims against any of the Defendants other than Frozen Endeavors, Inc.

* * *

This is not a pleasant letter to write and I am sure it is not a pleasant letter to receive. But in light of the above issues, which have been known to your clients for some time, we believe Plaintiffs have failed to consider (and re-consider upon re-filing) whether they have a good faith factual or legal basis to continue to pursue any claims against Ms. Martuscelli individually and the contract-based claims against non-contracting parties. We truly hope that Plaintiffs will consider this final opportunity to faithfully address each of the concerns raised above before causing various Defendants to incur further unnecessary expenses.

We are, of course, amenable to crafting a stipulation of partial dismissal that addresses these issues while preserving the present briefing schedule on the motion to dismiss. If Plaintiffs elect to proceed without addressing these issues and without providing some further basis in fact or law, and we are forced to unnecessarily incur fees to successfully obtain the dismissal of the claims based upon the concerns noted above, we will seek an award of those unnecessarily incurred fees to be assessed against Plaintiffs predicated, in part, upon this communication.

Very truly yours,

Michael W. McDermott

4825-7101-5965, v. 1

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EXHIBIT B

CERTIFICATE FOR RENEWAL
AND REVIVAL OF CHARTER
OF
FROZEN ENDEAVORS, INC.

Frozen Endeavors, Inc. (the "Corporation") is a corporation organized under the laws of the State of Delaware, the charter of which was voided for non-payment of taxes and for failure to file a complete annual report, and now desires to procure a restoration, renewal and revival of its charter pursuant to Section 312 of the General Corporation Law of the State of Delaware, and hereby certifies as follows:

1. The name of the Corporation is Frozen Endeavors, Inc.

2. The Registered Office of the corporation in the State of Delaware is located at 74 Montaque Road, Newark, Delaware 19713. The name of the Registered Agent at such address upon whom process against this Corporation may be served is Gianmarco Martuscelli.

3. The date of filing of the Corporation's original Certificate of Incorporation in Delaware was November 24, 2009.

4. The renewal and revival of the charter of this corporation is to be perpetual.

5. The corporation was duly organized and carried on the business authorized by its charter until the 31st day of March, 2011, at which time its charter became inoperative and void for non-payment of taxes and failure to file a complete annual report and the certificate for renewal and revival is filed by authority of the duly elected directors of the corporation in accordance with the laws of the State of Delaware.

IN WITNESS WHEREOF, the undersigned has executed this Certificate for Renewal and Revival of Charter as of the 20 day of October, 2014.

By: _____
Name: Gianmarco Martuscelli
Authorized Officer

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AGNIESZKA KOSTYSZYN and MAREK KOSTYSZYN,	)	
Plaintiffs,	)	
v.	)	
GIANMARCO MARTUSCELLI, GILDA MARTUSCELLI, The ESTATE OF BRETT J. HARRIS, FROZEN ENDEAVORS, INC., a Delaware Corporation, AJT, INC., a Delaware Corporation, and CHESAPEAKE INN, INC., a Maryland Corporation,	)	C.A. No.: N14C-08-010 PRW TRIAL BY JURY OF TWELVE DEMANDED
Defendants.	)	

CERTIFICATE OF SERVICE

I, Brian M. Gottesman, Esquire, hereby certify that a copy of the foregoing **DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT** was served this 29th day of October, 2014, upon the following in the manner below:

VIA FILE AND SERVEXPRESS

Gregory D. Stewart
The Law Offices of Gregory D. Stewart, P.A.
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BERGER HARRIS LLP

By: */s/ Brian M. Gottesman*

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October 29, 2014

VIA ELECTRONIC FILING
The Honorable Paul R. Wallace
Superior Court
New Castle County Courthouse
500 N. King Street
Wilmington, Delaware 19801

Re: Kostyszyn v. Martuscelli, C.A. No. N14C-08-010 PRW (Del. Super.)

Dear Judge Wallace:

Pursuant to the Joint Stipulation and Order on Briefing Schedule entered by the Court on August 22, 2014, we write to advise the Court that briefing on Defendants' Motion to Dismiss is complete and to ask that the Court schedule oral argument at its earliest convenience.

Respectfully,

/s/ Brian M. Gottesman

Brian M. Gottesman
(DE ID # 4404)

cc: Gregory D. Stewart, Esq. (via e-file)

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