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COURT OF APPEALS

STATE OF NEW YORK

CONNAUGHTON,

Appellant,

-against-

No. 46

CHIPOTLE MEXICAN GRILL, INC.,

Respondent.

20 Eagle Street
Albany, New York
March 21, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 46, Connaughton v.
3 Chipotle Mexican Grill.

4 Counsel.

5 MR. KAISER: Thank you, Your Honors. Good
6 afternoon. May it please the court, my name is Dan Kaiser.
7 I represent the plaintiff-appellant Kyle Connaughton in
8 this - - - in this appeal. Mr. Connaughton - - -

9 CHIEF JUDGE DIFIORE: Counsel, may I interrupt
10 for a moment?

11 MR. KAISER: Sure.

12 CHIEF JUDGE DIFIORE: Would you like some
13 rebuttal time?

14 MR. KAISER: Two minutes, Your Honor, if I may.

15 CHIEF JUDGE DIFIORE: Certainly.

16 MR. KAISER: Mr. Connaughton is - - - was - - -

17 JUDGE RIVERA: Counsel, what are - - - what are
18 the damages that are either expressly set out - - -

19 MR. KAISER: Cutting to the chase.

20 JUDGE RIVERA: - - - in the complaint or
21 inferable from the complaint?

22 MR. KAISER: There are - - - in the nature of
23 reliance damages, which are the only category of damages
24 that you can get here or in any fraud claim, this is a
25 fraudulent inducement claim, there would be two principle

1 categories within that larger category of reliance damages,
 2 Your Honor. There is the lost business opportunities that
 3 he - - - he forewent when he relied upon the concealment -
 4 - - in this case, the fraudulent concealment is the - - -
 5 is the nature of the fraud - - - and went to work for
 6 Chipotle.

7 That lost business opportunity was addressed by
 8 the First Department's majority decision, and in that
 9 decision, the majority said - - - and actually, the dissent
 10 on this narrow part of the decision agreed - - - that lost
 11 business opportunity is not in the nature of the kind of
 12 damages you can get in a fraud claim. But I think what the
 13 court did, Your Honor, is they - - - they confused
 14 expectation damages with reliance damages. You can have a
 15 lost business opportunity damage that is in the nature of a
 16 reliance injury or you could have a lost business
 17 opportunity that is in the nature of an expectation loss.

18 JUDGE ABDUS-SALAAM: Were these damages
 19 specifically pled, though, as to what - - - what business
 20 opportunity was lost?

21 MR. KAISER: It - - - it was, Your Honor. In the
 22 complaint - - - there is reference in - - - in - - - in the
 23 complaint to two other restaurant organizations that he was
 24 dealing with at the same time he was dealing with the
 25 Chipotle organization. And he - - - and he testifies that

1 they were well underway, those discussions, and then he
2 forewent those discussions in order to take the Chipotle
3 opportunity.

4 JUDGE RIVERA: But - - - but isn't it still
5 speculative? He - - - he doesn't know if he'd actually
6 have ever gotten their interest?

7 MR. KAISER: Well, I - - - to that, Your Honor, I
8 would say there is - - - one, I - - - I would say no. It -
9 - - it wasn't. I think that if you were - - - if you
10 permitted this case to proceed, I think what the discovery
11 would demonstrate is, in fact, that the - - - that those
12 business opportunities were real, that they would have come
13 to fruition, and he would have been able to pursue them.
14 But at the point - - -

15 CHIEF JUDGE DIFIORE: And how would you measure
16 the damages, though? That's - - -

17 MR. KAISER: Well, if - - - if it's a business
18 opportunity, Your Honor, if that's what we're talking
19 about, then the measure of damages is if, in fact, he
20 turned away from those opportunities and went because of
21 this fraud and went - - -

22 JUDGE FAHEY: It's the transition from
23 speculative to real, I guess, is - - - is what we're
24 looking at here.

25 MR. KAISER: Right.

1 JUDGE FAHEY: And - - - and I - - - it's hard for
2 me to identify in the complaint that moment where it
3 actually moves from speculative to real.

4 MR. KAISER: What I would say, Your Honor, to - -
5 -

6 JUDGE FAHEY: Well, let me just say this.

7 MR. KAISER: Oh, I'm sorry. I'm sorry.

8 JUDGE FAHEY: It - - - so it's no problem. If -
9 - - if there's a place that you want us to look, say here's
10 where it does that Judge, tell me where that is. Where
11 does it transition from speculative to real?

12 MR. KAISER: Well, I - - - I think the answer - -
13 - my answer to that, respectfully, Your Honor, would be
14 that the transition would be in the information that would
15 be developed in a factual record that is not before this
16 court. So then the question is - - -

17 JUDGE FAHEY: So your answer is it's a motion to
18 dismiss, Judge?

19 MR. KAISER: It's a motion to dismiss.

20 JUDGE FAHEY: Right.

21 MR. KAISER: And that at the point of - - - of a
22 pleading, does this plaintiff have to provide those kinds
23 of particulars that would permit a court, any court, to
24 answer the question as to whether - - -

25 JUDGE STEIN: But I guess - - -

1 MR. KAISER: - - - it's speculative.

2 JUDGE STEIN: But I guess the question is is
3 unlike, for example, a situation where a person goes from a
4 particular job and then goes to another opportunity and - -
5 - and has that lost opportunity, there's something that
6 they can measure what they would have had had they not
7 moved to this new venture. Here, you know, what could he
8 possibly tell, you know, the - - - the jurors or the - - -
9 or the court that would make it a nonspeculative damage
10 award?

11 MR. KAISER: What - - - what he could tell the
12 court or jury, Your Honor, one day is that - - - I think
13 the name of the - - - one of the entities was Maverick
14 Restaurant Group or - - - or something to that effect that
15 look at, for example, this testimony from Maverick who
16 says, sure, we loved the ramen noodle concept. We were
17 prepared to make a deal with this entr - - - with - - -
18 with Mr. Connaughton, this world-renowned chef, but then he
19 came to us and said he was going the way of Chipotle. That
20 is a tangible injury.

21 JUDGE RIVERA: Yeah. But even if they said that
22 - - - but even if they said that, in this case, one of the
23 defendants, Ells, the CEO, comes forward with an offer and
24 they negotiate. So even if they said that you got to have
25 a negotiation. There's still no certainty that there ever

1 is going to be an agreement that's consummated. A mere
2 interest in the idea, the concept, sounds to me still
3 speculative.

4 MR. KAISER: Well - - - well, we don't know, Your
5 Honor, because we didn't develop a factual record, so we
6 don't know how far down the road of consummation, as you
7 put it, they were. He could certainly - - -

8 JUDGE RIVERA: Well, your client knows enough to
9 put something in the amended complaint, right, other than I
10 had a bunch of designs - - -

11 MR. KAISER: Well, he - - -

12 JUDGE RIVERA: - - - and I had a concept - - -

13 MR. KAISER: Sure.

14 JUDGE RIVERA: - - - and I was shopping it
15 around.

16 MR. KAISER: He may have known that, Your Honor.
17 But then the question is at the point of a pleading, a
18 notice pleading, did he have to plead that? There's all
19 sorts of, for example, strategic reasons as his lawyer I
20 may not want to put that in a pleading if I'm operating
21 under the assumption that this is a notice pleading, that
22 there's no particularity requirement at the point of a
23 complaint to set forth all of the information that would -
24 - - that would go to whether or not these damages are
25 speculative or not.

1 JUDGE RIVERA: So - - - so is there any other
2 category of damages or another type of damage other than
3 lost business opportunities?

4 MR. KAISER: Well, as the - - - as the dissent
5 did note, which I think is - - - is also in the - - - in
6 the nature of reliance damages, would be damages to his - -
7 - and - - - and was pled, certainly consistent with notice
8 pleading requirements, is damages to his reputation, his
9 professional reputation. He went - - - this was - - - he
10 lives, in his profession, in a - - - in a rarefied space in
11 terms of being a chef.

12 JUDGE STEIN: Is that based on what might have
13 happened if they had gone forward to it?

14 MR. KAISER: Well, I think in - - - well, I think
15 both, Your Honor. I think that there is - - - and the
16 dissent noted this, as well, is that he may well have
17 already, at this point of his departure from Chipotle, have
18 already suffered reputational loss for having worked
19 someplace that was destined to fail from the beginning,
20 that here he is, this - - - this really very reputable guy
21 going to introduce this - - - this concept of ramen cuisine
22 to Chipotle, works two years there in this relatively small
23 industry, and suddenly is - - - is left without having
24 accomplished that task.

25 And - - - and in this small industry, people

1 understanding, potentially, and that ultimately came out,
2 that the - - - the - - - David Chang, a very - - - also
3 very well-known chef was - - - was doing this for Chipotle
4 under a nondisclosure agreement. So here he is effectively
5 having certainly the perception of having stolen this idea
6 and worked on it. I mean there is significant reputational
7 loss - - -

8 JUDGE ABDUS-SALAAM: I find that - - -

9 MR. KAISER: - - - that is potentially - - -

10 JUDGE ABDUS-SALAAM: Counsel, I found - - - I
11 find what you just said very interesting because - - -

12 MR. KAISER: Oh, I'm sorry, Your Honor.

13 JUDGE ABDUS-SALAAM: I know. It's weird.

14 MR. KAISER: I heard a voice, so I'm looking
15 around.

16 JUDGE ABDUS-SALAAM: It's kind of weird, right?
17 Ghost voice. I find that interesting because your client
18 is also, as you pointed out, a very well-known chef, and he
19 apparently didn't know that Ells was working with Chang and
20 Momofuku on this.

21 MR. KAISER: He didn't.

22 JUDGE ABDUS-SALAAM: So how - - -

23 MR. KAISER: But - - - but then it came out, and
24 - - - and so at some point - - - and - - - and there's
25 been, you know, lost - - -

1 JUDGE RIVERA: No. But it came out to him. Not
2 publicly.

3 JUDGE ABDUS-SALAAM: Yeah.

4 JUDGE RIVERA: I think that's the point, right?

5 MR. KAISER: Well, then, but - - - I mean
6 certainly not in the record or pleadings, but certainly,
7 then, there's been, in - - - in his world and beyond, a
8 fair amount of press on this issue about this - - - this
9 dispute.

10 JUDGE RIVERA: Well, but he filed a complaint, so
11 now you've got that.

12 MR. KAISER: Well, but, you know, there is - - -
13 there is - - - there is - - -

14 JUDGE RIVERA: And he hasn't presented himself in
15 a bad light in the complaint. He certainly presented Ells
16 and Chipotle in a bad light in the complaint.

17 MR. KAISER: No. He didn't present himself.
18 That's true, Your Honor.

19 JUDGE RIVERA: That's true.

20 MR. KAISER: But here - - -

21 JUDGE RIVERA: He - - - he presents himself as
22 someone who - - -

23 MR. KAISER: But - - - but here's - - -

24 JUDGE RIVERA: - - - didn't know and was duped.

25 MR. KAISER: Right. Right. But having worked -

1 - - you know, for having worked as long as he did there on
2 this concept that someone else was doing, it - - -

3 JUDGE RIVERA: But if he's - - - but if he's an
4 at-will - - -

5 MR. KAISER: And there's prospective loss.

6 JUDGE RIVERA: Yes. I understand. But let - - -
7 he's an at-will employee.

8 MR. KAISER: Yeah.

9 JUDGE RIVERA: So let's say this wasn't the
10 problem. Ells just woke up one morning and said, you know,
11 I've decided I don't want to do this after all. I've - - -
12 I've decided it's not a good idea. You're fired. You're
13 fired.

14 MR. KAISER: No. Then - - - well, he's an
15 employee at will and - - -

16 JUDGE RIVERA: Right.

17 MR. KAISER: - - - certainly, he has the right to
18 do that.

19 JUDGE RIVERA: Correct.

20 MR. KAISER: And we don't challenge - - -

21 JUDGE RIVERA: That - - - that - - -

22 MR. KAISER: - - - in this lawsuit his right to
23 do that, and we don't - - -

24 JUDGE RIVERA: So the - - - all I'm saying is the
25 fact that it - - - they never launched the restaurant, in

1 and of itself, is not necessarily a reputational hit.

2 MR. KAISER: No. No. Yes.

3 JUDGE RIVERA: Because he's an at-will employee.

4 MR. KAISER: I agree with that.

5 JUDGE RIVERA: And he could have been fired at
6 any time.

7 MR. KAISER: I agree with that, Your Honor. It's
8 not - - -

9 JUDGE RIVERA: And he could have left at any
10 time.

11 MR. KAISER: I agree with that, Your Honor. It's
12 not - - - it's not the - - - it's not the failure to launch
13 the restaurant that is the - - - is the consequence for him
14 and his damages, but having worked - - - and it's not just
15 the reputational loss, we would argue there. And again,
16 there's no record here to know what his reputational loss
17 is. It's just pled. There is, as the dissent also, I
18 think, rightly noted, there is the prospective - - - there
19 is the prospective reputational loss going forward having
20 clashed in this way with another well-known chef, perhaps
21 being, you know, accused of stealing his ideas. Which, by
22 the way, would inevitably would have occurred had he
23 continued down this - - - down this road. I mean David
24 Chang wasn't going to sit idly by and permit this to occur.

25 So there was - - - there - - - I would say just

1 two things on this. I - - - there was reputational loss,
2 but, again, this is at the pleading stage. So to plead the
3 reputational loss without, you know, then having the
4 opportunity to say through discovery and all the - - - all
5 the ways in which plaintiffs, litigants, prove damages,
6 it's premature to stay at the pleading stage it's
7 speculative or premature to say this is - - - we haven't
8 had an opportunity to litigate these issues.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. KAISER: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel.

12 MR. MAZZOLA: Good afternoon.

13 CHIEF JUDGE DIFIORE: Good afternoon.

14 MR. MAZZOLA: Mr. Kaiser. May it please the
15 court. In terms of reputationable damages, if my
16 reputation's damaged in the legal community, I know it's
17 damaged. I hear that in the courthouse. I hear it - - -

18 JUDGE STEIN: Yes. But how - - - how
19 specifically do you have to plead it in the complaint?

20 MR. MAZZOLA: But I would at least know it was
21 damaged so I could say my reputation has been damaged
22 because of this. My reputation - - - it is only notice
23 pleading, but if you look at his complaint, all the
24 complaint says is would, coulds, shoulds. There's no
25 definitive. I certainly know when my reputation's damaged

1 because it's damaged.

2 JUDGE RIVERA: But isn't it inferable from the
3 complaint he's shopping this around. He ends up in this
4 agreement with Chipotle. They all know he's doing this.
5 He's - - - he's in various press releases. His name is
6 associated with Chipotle. And then - - - and then he
7 leaves or he's fired. He's gone. Isn't that a hit to his
8 reputation?

9 MR. MAZZOLA: Not unless it's - - - well, not
10 necessarily. He - - - as Your Honor just pointed out
11 earlier, he could have left for all sorts of reasons. He
12 could have quit. He could have got fired. Mr. Ells could
13 have woken up one day and said I - - -

14 JUDGE RIVERA: But isn't that the point? It's
15 showing there's some weakness in the concept or there's a
16 weakness in him? Otherwise, if - - - if it's such a great
17 concept, it's such a great partnership, as it has gone on
18 for over eighteen months, they would have seen this to
19 fruition.

20 MR. MAZZOLA: But that comes with every time an
21 employee-employer relationship ends. If I leave my old
22 firm, there could be rumors swirling around. There could
23 be discussions about why I left. But that's not damage to
24 my reputation that I can articulate in a pleading and get
25 past the pleading stage before this court.

1 JUDGE WILSON: So, counsel, if he - - - if he
2 pleaded that his reputation was, in fact, hurt that would
3 be sufficient for you?

4 MR. MAZZOLA: I think if he could articulate how
5 it was hurt and why it was hurt, it would - - - might be
6 sufficient.

7 JUDGE WILSON: In the complaint?

8 MR. MAZZOLA: In the complaint. But he can't
9 articulate that. And he says my reputation was damaged.
10 The one person who knows if it's damaged is the person
11 who's pleading it, and he can't say that. And now if we
12 look at the other allegations he talks about, he talks
13 about loss of business opportunity. You know, a loss of
14 business opportunity in and of itself is not damages that
15 are recoverable here in the state of New York. I mean this
16 court's already ruled on it in the Smalley v. Dreyfus case.
17 That was the case involving a number of young employees
18 that were seeking employment at the Dreyfus Fund, and they
19 were told repeatedly that this company is not going to be
20 sold. We're not going to be merged. That went on for four
21 years, and then, when the company was sold, they were all
22 fired. And they said well, hey, you know, we lost this - -
23 -

24 JUDGE STEIN: But isn't that different from the -
25 - - from the damages that are being asserted here where

1 they're - - - they're not saying because it - - - it didn't
2 pan out over here but because I could have done something
3 else? I had other opportunities that were concrete
4 opportunities. I haven't told you what the - - - all the
5 details of them are, but why shouldn't they be able to - -
6 - to show that?

7 MR. MAZZOLA: Because - - - well, those are not -
8 - - those are not recoverable damages in New York State.

9 JUDGE STEIN: Well, what - - -

10 MR. MAZZOLA: Any time you - - - I think the - -
11 - the - - -

12 JUDGE STEIN: What about Stewart v. Jackson &
13 Nash, the Second Circuit case?

14 MR. MAZZOLA: That's - - - that's the case with
15 the - - - the young lawyer, I recall. And in that case, we
16 had an affirmative present misrepresentation. At the time
17 they hired that young lawyer, that law firm never had an
18 environmental practice to speak of at all. So - - -

19 JUDGE STEIN: Right. Well, here we're talking
20 about an omission, right?

21 MR. MAZZOLA: Okay. Okay. But so let's use - -
22 - let's use that - - - let's use that case. In our case
23 over here, Chipotle was in a position to pursue a ramen
24 concept. They were, in fact, pursuing the concept when
25 they hired Mr. Connaughton and they said go explore this

1 concept.

2 JUDGE STEIN: But you agree that under certain
3 circumstances, an omission can also constitute a fraud - -
4 - a fraudulent - - -

5 MR. MAZZOLA: It - - - it can under certain
6 circumstances. We don't think those circumstances are
7 here.

8 JUDGE STEIN: But let's - - - let's just assume
9 that they were because right now we're talking about
10 damages. So if they were, if those circumstances were
11 present and there was a fraudulent omission that - - - that
12 induced Mr. Connaughton to forego other business
13 opportunities, why can't he recover for those business
14 opportunities - - -

15 MR. MAZZOLA: Aside - - -

16 JUDGE STEIN: - - - if he can prove - - - if he
17 can prove them?

18 MR. MAZZOLA: Aside from the fact that he's an
19 employee at will?

20 JUDGE STEIN: Yes.

21 MR. MAZZOLA: Okay.

22 JUDGE STEIN: Inclu - - -

23 MR. MAZZOLA: I mean he's an employee at will so
24 we don't even think he - - - we get there. And even if he
25 could pursue them, he hasn't articulated them, and he

1 doesn't seem to have any of them. Because if he had the,
2 he's in the position to plead those. And the mere fact
3 that he gave up another opportunity is not, in and of
4 itself, sufficient. People give up opportunities every
5 day. I leave one firm to join another firm. I give up
6 opportunities. I turn down one case to take another case.
7 We all give up opportunities. But we - - - we sell our
8 time. We receive our compensation for it. And in doing
9 that, we may have given up another opportunity. And that's
10 what we have over here. At the end of the - - -

11 JUDGE ABDUS-SALAAM: Haven't we already decided,
12 though, counsel, that you can pursue a fraudulent
13 inducement claim even if you are an employee at will? In
14 Smalley, didn't we decide that?

15 MR. MAZZOLA: You did not - - - in - - - in the
16 Smalley case, that - - - that's true. They could pursue it
17 if they established damages.

18 JUDGE ABDUS-SALAAM: That it was different than
19 just being terminated.

20 MR. MAZZOLA: Well, that - - - that's right. But
21 in the Smalley case, if anyone ever had damages, those guys
22 had damages because they gave up numerous opportunities to
23 work for Dreyfus. And they were misled. They were misled
24 con - - - concerning Dreyfus' plans for a merger or sale of
25 the company. I don't remember the details on that. But in

1 that particular case, that was not sufficient because the
2 court said you - - - the - - - this court said any - - -
3 people eschew opportunities all the time. They choose
4 every day to take one opportunity over another opportunity.
5 And just because you forego - - -

6 JUDGE STEIN: The question is is are you induced
7 to - - - to pursue that opportunity by some fraudulent
8 means. That's - - - that's what - - - that's what the
9 difference is. And - - - and why - - - and whether you can
10 recover under those circumstance. Not just any
11 circumstance where you choose among a variety of - - - of
12 options and - - - and you know what there is to know.

13 MR. MAZZOLA: If - - - I - - - I think what the
14 court - - - I think what the - - - the opinions have said,
15 they say if you are induced to pursue something under
16 fraud, that's one aspect of it. But you don't get any
17 further unless you have damages, and in this case, there
18 just simply aren't any damages. Putting aside the question
19 as to what the circumstances were.

20 JUDGE STEIN: It seems like we're going in a
21 circle here.

22 MR. MAZZOLA: Yeah. We - - - we may very well
23 be. We're going back to damages because we don't believe
24 Chipotle or Mr. Ells was - - - fraudulently induced anyone
25 to do anything. But that not - - -

1 JUDGE STEIN: But if he was and then - - - and
2 then - - - if he could prove that he was damaged, the
3 question is should he have an opportunity to - - -

4 MR. MAZZOLA: Well, Your Honor, those are a lot
5 of ifs. I mean if he could prove that, and if he could
6 prove that, well, certainly then. But - - - but in this
7 instance, there are no damages alleged, they're just simply
8 not there. The court's very - - - this court's been very
9 consistent throughout the years. You've got to have an
10 out-of-pocket loss, and nominal damages just don't do it.
11 And in this case, the pleadings all reflect - - -

12 JUDGE RIVERA: Can you infer that he put money
13 into the negotiations to enter the agreement or to - - - to
14 solicit the business of Ells? Are those damages that he
15 could get?

16 MR. MAZZOLA: I - - - I think the court allows
17 that you could establish inferred damages or inference of
18 damages.

19 JUDGE RIVERA: Um-hum.

20 MR. MAZZOLA: But when you look at the cases that
21 discuss inference of damages, you know, those cases, the
22 damages sort of smack you right in the face. We're talking
23 about the Black v. Chittenden case. That's the bowling
24 alley case. A guy goes off and he buys a bowling alley,
25 and the bowling alley doesn't work. You know, there's

1 something wrong with the alley itself. That's a very
2 simple, clear, obvious inference of damages.

3 JUDGE RIVERA: Um-hum.

4 MR. MAZZOLA: So what did he put into this?
5 Well, we know he hired a lawyer to negotiate it. That's
6 not an inference of damage. And quite frankly, Your Honor,
7 that cuts against him because he goes in with eyes wide
8 open. He hired his own counsel to negotiate this deal and
9 to - - - and to assist him as to whether or not he should
10 make this decision. So - - -

11 JUDGE RIVERA: But he puts in money and time and
12 effort to producing a concept that specific to Chipotle
13 after Elms reaches out to him and says yes, I have an
14 interest.

15 MR. MAZZOLA: But he was getting paid for that.
16 So - - -

17 JUDGE RIVERA: He was paid - - - I'm sorry. He's
18 paid before he enters the agreement? Is that what you're
19 saying?

20 MR. MAZZOLA: Well, people do it all the time.
21 They - - - they - - -

22 JUDGE RIVERA: Well, no. I'm asking you.

23 MR. MAZZOLA: No. No.

24 JUDGE RIVERA: You're saying he's paid before he
25 entered the agreement?

1 MR. MAZZOLA: No.

2 JUDGE RIVERA: I don't remember that from the
3 amendment.

4 MR. MAZZOLA: No. He wasn't paid before he
5 entered the agreement. But - - -

6 JUDGE RIVERA: Okay.

7 MR. MAZZOLA: - - - people invest time and energy
8 in all sorts of things. And - - -

9 JUDGE RIVERA: No. But I'm asking you about what
10 might be inferred from the complaint. I'm just asking you
11 can't you infer that from the complaint?

12 MR. MAZZOLA: I don't think you can infer that.

13 JUDGE RIVERA: Why not?

14 MR. MAZZOLA: Because that's something that
15 everyone does. Everyone puts time and effort into
16 something that they go off and sell. And they go off and -
17 - -

18 JUDGE RIVERA: Are you saying because he would
19 have to do that with anyone else?

20 MR. MAZZOLA: He had to do that with anyone else.

21 JUDGE RIVERA: So he - - - he can't get
22 reimbursed or he can't get damages for having put whatever
23 money it took to - - -

24 MR. MAZZOLA: No. No, Your Honor, because - - -

25 JUDGE RIVERA: Excuse me.

1 MR. MAZZOLA: Okay.

2 JUDGE RIVERA: To - - - to provide the kind of
3 plan that was designed specific to Chipotle?

4 MR. MAZZOLA: No. I don't think so.

5 JUDGE RIVERA: Chipotle, excuse me.

6 MR. MAZZOLA: I don't - - - I don't think so,
7 Your Honor, because all that effort is entirely subsumed in
8 everything he's always going to do. He always does that.
9 And - - -

10 JUDGE RIVERA: Because he was shopping around.

11 MR. MAZZOLA: It - - - it was in the price.

12 JUDGE RIVERA: Because this is the process he was
13 going to - - - through.

14 MR. MAZZOLA: It was in the price. So he's - - -

15 JUDGE RIVERA: It's not unique to your client.
16 Is that what you mean?

17 MR. MAZZOLA: I - - - I think that's one answer,
18 but I also think the better or the different answer is that
19 it's - - - it's all entirely subsumed in it. So when he -
20 - - he was paid for his services. He negotiated his
21 salary. He had negotiated the terms with Mr. - - -

22 JUDGE RIVERA: But isn't that agreement for him
23 joining and then - - -

24 MR. MAZZOLA: But that's right - - -

25 JUDGE RIVERA: - - - and then working on the

1 launch?

2 MR. MAZZOLA: That's right. But when he
3 negotiated that price, presumably, he - - -

4 JUDGE RIVERA: I see.

5 MR. MAZZOLA: - - - considered the time and
6 effort he put into developing the concept.

7 JUDGE RIVERA: Why - - - why are you going to
8 presume that?

9 MR. MAZZOLA: Because - - -

10 JUDGE RIVERA: Why can't you infer it the other
11 way? It's a motion to dismiss.

12 MR. MAZZOLA: I think - - -

13 JUDGE RIVERA: It's just on the complaint.

14 MR. MAZZOLA: You - - - you - - - theoretically,
15 you could, but I think the law suggests, I think logic
16 tells you, when - - - when parties negotiate a price,
17 there's a meeting of the minds as to the price, and it
18 includes those efforts that you put into the project as you
19 go off and sell it.

20 JUDGE WILSON: I want to go back to one thing
21 that you - - - that you responded to Judge Stein when she
22 asked you hypothetically, assume that he was fraudulently
23 induced and you referred to the fact that he's an at-will
24 employee. If - - - if his allegation is he would never
25 have signed the agreement in the first place, why can you

1 rely on the fact that the - - - the agreement says he's at
2 will?

3 MR. MAZZOLA: Because, Your Honor, he's - - -
4 he's always an at-will employee.

5 JUDGE WILSON: But he was induced to - - - to
6 enter into the agreement by fraud.

7 MR. MAZZOLA: But that doesn't change anything,
8 and we don't agree that he was induced to enter into any
9 agreement.

10 JUDGE WILSON: Well, I understand you don't
11 agree.

12 MR. MAZZOLA: Yeah.

13 JUDGE WILSON: All right.

14 MR. MAZZOLA: We just simply don't agree that.
15 And - - - and even if there was some sort of inducement in
16 it, I think the law's still pretty straightforward in this
17 state that these are at-will employees. And absent - - -
18 absent some special obligation or duty on behalf of Mr.
19 Ells, there was no obligation to share any information.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. MAZZOLA: Okay.

22 CHIEF JUDGE DIFIORE: Mr. Kaiser.

23 MR. KAISER: Yes. Very quickly, Your Honor.

24 CHIEF JUDGE DIFIORE: Yes.

25 MR. KAISER: Counsel made the point that it was

1 an employee at will. And if you leave a job, any of us who
2 are in jobs and leave, we could suffer - - - suffer
3 reputational loss, and that's the nature of employment.
4 You go from one place to another, people could - - - that
5 may be true, and we may suffer damages in leaving an
6 employment at will.

7 But the question here is is there a carve-out
8 here from that employment at will doctrine because of the
9 fraud alleged? So if, in fact, there is fraud, and if, in
10 fact, it's demonstrated, then in this case, under these
11 circumstances, it would be a category of damages where it
12 wouldn't otherwise be recoverable damages if it was just an
13 employment at will situation. And as far as the - - - I
14 just wanted to very quickly talk about - - -

15 JUDGE ABDUS-SALAAM: Do you agree, counsel, even
16 if this is a fraudulently induced employment that he could
17 bring that claim as long as he does have some damages?
18 Even if he is an employee at will?

19 MR. KAISER: Yes. He can bring the claim if he
20 has some damages, which we think he has here. Which leads
21 me to my last, very quick point, which is we had - - -
22 counsel had discussions about what the damages were and - -
23 - and Your Honor was asking what can you infer those out-
24 of-pocket expenses and - - - and he did - - - as he
25 mentions, he had an attorney, he did lots of things. He -

1 - - he specifically tailored this to Chipotle. So there
2 are damages there.

3 But all of this is - - - we're talking about
4 without a record as to what those damages are. Certainly,
5 from a pleading - - - a notice pleadings standard, we will
6 see if this should go forward as to exactly what the nature
7 of those damages was, including some of those out-of-pocket
8 expenses that were tailored to Chipotle to offer this up to
9 Chipotle.

10 JUDGE RIVERA: So you're arguing that's another
11 class of damages?

12 MR. KAISER: Another class. Yes. That's another
13 - - -

14 JUDGE RIVERA: What he put into it to, indeed,
15 get Ells to offer him.

16 MR. KAISER: And also, by the way, what he put
17 into some of the other specialized service platforms that
18 he offered to some of these other alternative business
19 opportunities that he - - -

20 JUDGE RIVERA: But - - - but I mean - - -

21 MR. KAISER: - - - then had to walk away from.

22 JUDGE RIVERA: Post - - - post-Ells reaching out
23 to him?

24 MR. KAISER: Well - - -

25 JUDGE RIVERA: He's doing that anyway.

1 MR. KAISER: Well, he's doing that anyway. But
2 he's - - - but then he's walking away from that, right,
3 because of the reliance on the omission.

4 JUDGE STEIN: But are - - - are you saying that
5 all a plaintiff has to do is say I have been damaged,
6 period?

7 MR. KAISER: But he doesn't say that here. No,
8 Your Honor.

9 JUDGE STEIN: Okay.

10 MR. KAISER: But what - - - what he says here,
11 there - - - I - - - I would say the notice pleadings
12 require something more than that.

13 JUDGE STEIN: How much more? Tell us what - - -
14 what there is more that gets us over that.

15 MR. KAISER: Specifically here - - -

16 JUDGE RIVERA: For fraud.

17 MR. KAISER: - - - he identifies - - -

18 JUDGE RIVERA: For fraud.

19 MR. KAISER: For fraud. Specifically here, he,
20 by name, identified these other business opportunities in
21 the pleadings and talked about the progress of those
22 discussions that he then walked away from to pursue
23 Chipotle.

24 JUDGE FAHEY: But see what the problem is,
25 though, it's the actual nature of the damages rather than

1 the identification of possible damages. In the context of
2 a tort, we're always talking actual damages, and it's hard
3 for me to identify those. That's why - - -

4 MR. KAISER: Well, the actual damages that are
5 pled, meaning - - - and when I say actual - - -

6 JUDGE FAHEY: By actual I mean calculable.

7 MR. KAISER: Calculable damages are the lost
8 business opportunities that are calculable once you have a
9 record to calculate them. But they are pled. They are
10 clearly pled in the pleadings, and reputational loss, which
11 is pled. Now, you know, more than that, you know, would we
12 - - - we would contend would be - - - you would be going -
13 - - moving from a notice pleading standard on damages to a
14 more particularized pleading standard which we do not
15 believe would be consistent with New York State Law
16 generally on pleading damages beyond, you know, in the
17 context of a fraudulent inducement - - -

18 JUDGE RIVERA: So - - - so your position is these
19 other business opportunities, going to do discovery and
20 someone from any of these entities going to say yes, we
21 were ready and definitely - - -

22 MR. KAISER: Right.

23 JUDGE RIVERA: - - - going to enter an agreement
24 - - -

25 MR. KAISER: And/or - - - and - - -

1 JUDGE RIVERA: - - - regardless of the terms?

2 MR. KAISER: No. And - - - and - - - well, you
3 know, these - - - these entities could come and say, yeah,
4 sure, we had - - -

5 JUDGE RIVERA: So it - - - so if the discovery
6 proved that they said, well, we weren't sure, we liked it,
7 we need to talk to him more.

8 MR. KAISER: And if we're - - -

9 JUDGE RIVERA: Is that enough?

10 MR. KAISER: And if we're back before a court,
11 you know, on a summary judgment motion - - -

12 JUDGE RIVERA: No, no. I understand that.

13 MR. KAISER: - - - you know, then maybe he
14 doesn't prove those damages. But we - - - but I - - -
15 well, it's beyond the scope of this proceeding.

16 JUDGE RIVERA: Yes.

17 MR. KAISER: But, yes. I think it's certainly a
18 provable category of damages. Whether he proves it or not
19 is - - - is for another day.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. KAISER: Thank you. Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: You're welcome.

23 (Court is adjourned)


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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Connaughton v. Chipotle Mexican Grill, Inc., No. 46 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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