STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-CV-2018-04

EMILE CLAVET,	)	
	)	
Plaintiff,	)	
	)	**COMBINED ORDER**
v.	)	**ON CROSS-MOTIONS FOR**
	)	**SUMMARY JUDGMENT**
KEVIN DEAN, et al.,	)	
	)	
Defendants.	)	

Pending before the Court are Defendants Kevin Dean and Cecile Dean's motion for partial summary judgment and Plaintiff Emile Clavet's motion for partial summary judgment. M.R. Civ. P. 56. Mr. Dean has also moved for voluntary partial dismissal of his Counterclaim. M.R. Civ. P. 41(a)(2). All motions are opposed. The Court heard oral argument on the motions on May 7, 2019. Clifford Ruprecht, Esq. represented Mr. Clavet and George Marcus, Esq. represented Mr. Dean and Mrs. Dean.

FACTS

Mr. Clavet and Mr. Dean own many companies together. Two of those companies—Blue Water Marina, LLC, and Covered Marina, LLC (the "Marina Companies")—owned a marina (the "Marina") in Texas. Blue Water Marina, LLC ("Blue Water") is a Maine LLC; Covered Marina, LLC ("Covered") is a Texas LLC. (Def's Supp'g S.M.F. ¶¶ 31-32.) Mr. Clavet and Mr. Dean each owned fifty percent of the membership interest in each of the Marina Companies and were both managers of each company pursuant to the operating agreements for those entities. (Def's Supp'g S.M.F. ¶¶ 33-34.) Ownership of the Marina was split between the two Marina Companies. (Def's Supp'g S.M.F. ¶ 36.) The Marina was the Marina Companies' only asset before the Marina was sold to a third party, TCRG Opportunity X, LLC ("TCRG"). As explained in more detail below,

mere days before Mr. Dean sold the Marina to TCRG for $7,900,000, Mr. Dean purchased Mr. Clavet's membership interests in those companies for $1,090,000.

On August 30, 2016, an agent for TCRG named Keith Donley contacted Mr. Dean to inquire about whether he would be interested in selling the Marina. (Pl's Supp'g S.M.F. ¶ 1, Def's Opp. S.M.F. ¶ 1.) Mr. Dean responded on September 9, 2016 with a proffered selling price of $8.5 million. (Pl's Supp'g S.M.F. ¶ 2.) On September 12, Mr. Donley told Mr. Dean to call him for an oral counteroffer and told him that he would provide a written counteroffer as soon as the legal descriptions for the property to be transferred were completed. (Pl's Supp'g S.M.F. ¶ 3.) The next day, on September 13, Mr. Dean spoke with TCRG's attorney, Carey Locke, about the legal descriptions of the property, the timing of the transaction, and other details. (Pl's Supp'g S.M.F. ¶ 4.)

The same day, September 13, Mr. Dean told Mr. Donley that he had spoken with Mr. Locke, they were working through the legal descriptions, the attorney was drafting an agreement, and that the Marina Companies would want to counter TCRG's counter-offer at $8 million to cover Mr. Donley's commission. (Pl's Supp'g S.M.F. ¶ 5.) On September 15, Mr. Dean asked Mr. Donley for an update on status, and Mr. Donley responded that he had sent a purchase agreement to TCRG's owner for review and signature. (Pl's Supp'g S.M.F. ¶ 6.) The next day, September 17, Mr. Donley texted Mr. Dean to say he had sent Mr. Dean an offer signed by TCRG's owner, and which had been drafted by Mr. Locke after Mr. Dean's conversation with him. (Pl's Supp'g S.M.F. ¶ 7.) At some point, Mr. Donley told Mr. Dean that TCRG was willing to pay $7.5 million for the Marina, although Mr. Dean could not remember what day Mr. Donley told him this. (Pl's Supp'g S.M.F. ¶ 8.) On September 16, Mr. Dean sent "comments and a counter" to Mr. Donley. (Pl's Supp'g S.M.F. ¶ 9.) The next day, September 17, Mr. Dean again contacted Mr. Donley to say that

certain noncontiguous assets could be excluded and that the Marina Companies "could take the $7.5m[illion] offer as is." (Pl's Supp'g S.M.F. ¶ 10.)

Sometime after that, but prior to September 22, Mr. Dean communicated two requests to TCRG: a purchase price of $7.9 million and that TCRG pay for the costs of surveys. (Pl's Supp'g S.M.F. ¶ 11.) On September 22, 2016, TCRG sent Mr. Dean a signed document labeled "Assets Purchase Agreement," (the "Agreement") which Mr. Clavet refers to as a "purchase and sale agreement" and Mr. Dean refers to as an "option to purchase." (Pl's Supp'g S.M.F. ¶ 12; Def's Opp. S.M.F. ¶ 12.) Whichever moniker is more apt is beside the point; the document is in the summary judgment record and speaks for itself.[1]

On September 27, 2016, Mr. Donley reached out to Mr. Dean to follow up on the "status" of the Agreement; Mr. Dean told Mr. Donley he was waiting on the drafting of a "small transfer of interests," i.e. his purchase of Mr. Clavet's interests in the Marina Companies. (Pl's Supp'g S.M.F. ¶ 21.) Mr. Dean signed the Agreement on September 30, 2016 and post-dated it to October 5, 2016. (Pl's Supp'g S.M.F. ¶ 13; Def's Opp. S.M.F. ¶ 13.)

Simultaneously, Mr. Dean was negotiating with Mr. Clavet to purchase Mr. Clavet's interests in the two Marina Companies. Mr. Dean texted Mr. Clavet on September 15, 2016 that a representative of American Bank (the "Bank") (which had extended a line of credit of around $330,000 for the Marina) "want[ed]" the two men and their wives to personally guarantee the line of credit in order to extend the line of credit for another year. (Pl's Supp'g S.M.F. ¶ 15.) Mr. Dean argues that this is materially different than saying that the Bank was "requiring" these personal guaranties. (Def's Opp. S.M.F. ¶ 17.) The text message is in the summary judgment record:

[1] Furthermore, Mr. Dean indisputably never apprised Mr. Clavet of the Agreement, thereby denying Mr. Clavet the opportunity to read the Agreement and decide for himself whether it should affect the price he would charge Mr. Dean for his interests in the Marina Companies. (Pl's Supp'g S.M.F. ¶ 14.)

> [The Bank] wants [our wives] and you to sign for line of credit renewal. He let me get it done the first time but I think last year's loss spooked him . . . If you don't want to do that then give me a price you want for your portion of the marina or figure a swap of other stuff.
>
> (Pl's Supp'g S.M.F. ¶ 15.)

The two men then discussed how to value Mr. Clavet's interests in the Marina Companies; Mr. Dean gave Mr. Clavet a lot of accurate information about the problems with the Marina;[2] Mr. Clavet asked Mr. Dean what he thought they were worth, and Mr. Dean suggested the Marina Properties were worth what they originally paid for them years earlier, $2.5 million, minus debt. (Pl's Supp'g S.M.F. ¶¶ 17-18.) By September 22, Mr. Dean told the men's corporate lawyer, Shawn Bell, that the two men had reached an agreement for Mr. Clavet to sell his interests in the Marina Companies to Mr. Dean. (Pl's Supp'g S.M.F. ¶ 20.) Mr. Clavet and Mr. Dean met on September 27, and by September 28, Mr. Bell had finished drafting documents for the sale of Mr. Clavet's interests in the Marina Companies to Mr. Dean. (Pl's Supp'g S.M.F. ¶¶ 22-23.) That same day, September 28, Mr. Clavet went into the office and signed the transfer documents without reviewing them and without meeting with Mr. Bell. (Pl's Supp'g S.M.F. ¶ 25; Def's Supp'g S.M.F. ¶ 44.)

In October 2013, Mr. Dean and Mr. Clavet executed a Buy/Sell Agreement that governed either party's sale of his interest in the Marina Companies (and another unrelated jointly owned company). (Def's Supp'g S.M.F. ¶¶ 39.) The Buy/Sell Agreement is part of the summary judgment

[2] It is undisputed that the Marina had operational issues that drove down its price as a business. (Def's Supp'g S.M.F. ¶¶ 37, 51-52, Mr. Clavet does not say so specifically but he probably would not quarrel with Mr. Dean's valuation of the Marina as a going concern. As it turned out, the Marina was worth much more than that to TCRG as real estate, as opposed to as a business. Mr. Clavet's quarrel is that Mr. Dean should have told Mr. Clavet about his negotiations with TCRG, whether Mr. Dean believed that the sale would consummate or not, so that Mr. Clavet could decide whether to factor those negotiations into his valuation of the Marina Companies. Mr. Clavet also disputes the notion that Mr. Dean did not believe the sale was going to happen.

record and the parties seem to agree that it applies to the sale of one man's interest to the other. Its materiality to the issues presented by the instant motions for summary judgment is disputed.

With his Answer to Mr. Clavet's Complaint, Mr. Dean filed a Counterclaim that alleged Mr. Clavet had used many of the businesses the two men owned in common for his own self-enrichment over the years or had pursued business opportunities individually that properly belonged to one of the jointly-owned businesses. Mr. Clavet moves for summary judgment on Mr. Dean's Counterclaim. Mr. Dean only opposes that motion as to one particular business deal; as to the rest of the allegations in the Counterclaim, Mr. Dean moves for their voluntary dismissal, without prejudice. For reasons explained below that motion is denied.

The one business deal that Mr. Dean pursues on its merits in the face of Mr. Clavet's motion for summary judgment on the Counterclaim is Mr. Clavet's development of a subdivision with his wife and her family (the "Charity Shores Subdivision"). In essence, the claim is that Mr. Dean and Mr. Clavet jointly owned a corporation called Diamond Properties, Inc. ("Diamond") and that the development of the Charity Shores Subdivision was a corporate opportunity that belonged to Diamond. What business Diamond has done, and does, is disputed by the parties and frankly very unclear. (Pl's Supp'g S.M.F. ¶¶ 63, 72; Def's Opp. S.M.F. ¶ 121.) The parties do agree that Diamond's most valuable asset is commercial property held for lease in Auburn. (Pl's Supp'g S.M.F. ¶ 72.)

It is undisputed that the land on which the Charity Shores Subdivision was developed was owned by Mrs. Clavet's family for over a hundred years, but that title was not definitively quieted in its favor until 1998. (Pl's Supp'g S.M.F. ¶¶ 97, 99-104.) Mrs. Clavet's mother and father (Mr. Clavet's in-laws) bought out the other heirs, planning to develop a subdivision, and Mrs. Clavet "bought into" the project at her parents' invitation. (Pl's Supp'g S.M.F. ¶ 106-109.) Mrs. Clavet,

her husband, and her parents formed an entity called Quahog Bay, LLC which subsequently developed the Charity Shores Subdivision and sold all the units therein. (Pl's Supp'g S.M.F. ¶¶ 110-111.) Mrs. Clavet's father was the de facto "general contractor" of the project, with Mrs. Clavet providing home office support. (Pl's Supp'g S.M.F. ¶¶ 112-113.) Mr. Clavet and Mrs. Clavet provided financial support. (Pl's Supp'g S.M.F. ¶¶ 115.) In other words, this was a "family project." (*See* Pl's Supp'g S.M.F. ¶¶ 116-118.) None of Mr. Dean and Mr. Clavet's jointly-owned companies put any resources into the project or participated in it in any way. (Pl's Supp'g S.M.F. ¶ 119.)

In his opposition motion, and at oral argument, Mr. Dean did not clearly articulate which counts of his counterclaim are implicated by this deal. In his reply memorandum, Mr. Clavet argues that only Count IV, which states a claim for usurpation of joint business opportunities, is germane[3] to his involvement in the development of the Charity Shores Subdivision. Mr. Dean did not claim otherwise at oral argument, instead leaving it to the Court to parse out which Counts it thought should survive summary judgment in light of his near-total abdication in opposition to Mr. Clavet's motion for summary judgment on the Counterclaim. The Court agrees with Mr. Clavet that only Count IV is implicated by the allegations that Mr. Dean has chosen to pursue.[4]

In terms of the Complaint, Mr. Clavet has moved for summary judgment in his favor on Count I (fraud), Count II (breach of fiduciary duty), Count III (negligent misrepresentation), Count IV (unjust enrichment), and for partial summary judgment as to Count VI (fraudulent transfer). Mr. Dean has moved for summary judgment in his favor as to Count I, Count II, and Count III as well as Count VII (aiding and abetting breach of fiduciary duty).

[3] Mr. Clavet nonetheless argues that the facts adduced at summary judgment entitle him to a judgment as a matter of law on the merits of this Count.

[4] Moreover, this is the only count for which Mr. Dean adduces evidence and raises argument in opposition to Mr. Clavet's motion for summary judgment on the Counterclaim. *See Savell v. Duddy*, 2016 ME 139, ¶ 18, 147 A.3d 1179 (plaintiff must establish prima facie case for every element of his cause of action to survive summary judgment).

STANDARD OF REVIEW

Summary judgment is granted to a moving party where "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). "A material fact is one that can affect the outcome of the case, and there is a genuine issue when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Lougee Conservancy v. CityMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774 (quotation omitted). A genuine issue exists where the jury would be required to "choose between competing versions of the truth." *MP Assocs. v. Liberty*, 2001 ME 22, ¶ 12, 771 A.2d 1040. "Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se*." *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 8, 8 A.3d 646 (quoting *Wightman v. Springfield Terminal Ry. Co*., 100 F.3d 228, 230 (1st Cir. 1996)).

DISCUSSION

I. Fraud

Mr. Clavet and Mr. Dean each move for summary judgment in his favor on Mr. Clavet's claim for fraud (Count I) and fraudulent misrepresentation (Count III). In Maine, to prevail on a fraud claim (i.e., fraudulent/ intentional misrepresentation), a plaintiff must prove the following elements by clear and convincing evidence:

> (1) A party made a false representation,
> (2) The representation was of a material fact,
> (3) The representation was made with knowledge of its falsity or in reckless disregard of whether it was true or false,
> (4) The representation was made for the purpose of inducing another party to act in reliance upon it, and
> (5) The other party justifiably relied upon the representation as true and acted upon it to the party's damage.

Barr v. Dyke, 2012 ME 108, ¶ 16, 49 A.3d 1280 (citing *Flaherty v. Muther*, 2011 ME 32, ¶ 45, 17 A.3d 640). Negligent misrepresentation is defined as:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Chapman v. Rideout, 568 A.2d 829, 830 (Me. 1990) (quoting Restatement (Second) of Torts § 552(1) (1977)).

An omission by silence may constitute the supplying of false information in proof of intentional misrepresentation. *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996) (emphasis in original). However, this is only true in certain circumstances: where the plaintiff proves either "(1) active concealment of the truth, or (2) a specific relationship imposing on the defendant an affirmative duty to disclose." *McGeechan v. Sherwood*, 2000 ME 188, ¶ 61, 760 A.2d 1068 (quoting *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995)). The "specific relationship" can take the form of either a fiduciary relationship or a duty imposed by statute. *Glynn v. Atl. Seaboard Corp.*, 1999 ME 53, ¶ 12, 728 A.2d 117 ("Where a fiduciary relationship exists between the parties, 'omission by silence may constitute the supplying of false information.'") (quoting *Binette*, 688 A.2d at 903) (citing *Brae Asset Funds. L.P. v. Adam*, 661 A.2d 1137, 1140 (Me. 1995); Prosser and Keeton on the Law of Torts § 106, at 738 (5th ed. 1984)). *See also Dickey v. Vermette*, 2008 ME 179, ¶ 18, 960 A.2d 1178 (Alexander, J., dissenting) (misrepresentation may be proved by omission where there is (1) active concealment of the truth, (2) a confidential/ fiduciary relationship, or (3) a statutory duty to disclose).

"[F]or purposes of *negligent* misrepresentation . . . although not every failure to disclose constitutes a misrepresentation, silence rises to the level of supplying false information when such failure to disclose constitutes the breach of a statutory duty" or a fiduciary duty. *Binette*, 688 A.2d at 903 (emphasis in original). *See also Glynn*, 1999 ME 53, ¶ 12, 728 A.2d 117. In other words, in

contrast to intentional misrepresentation, active concealment of the truth is insufficient to prove fraud by omission in the context of an action for negligent misrepresentation; a special relationship like a fiduciary duty or statutory duty to disclose must be proven. *See Binette,* 688 A.2d at 903.

Mr. Clavet argues that there is undisputed evidence of both affirmative misrepresentations and misrepresentations by omission. Principally, Mr. Clavet argues that Mr. Dean's failure to disclose his negotiations with TCRG for the sale of the Marina constitutes a false representation by omission in the context of Mr. Dean's purchase of Mr. Clavet's interests in the Marina Companies. Mr. Dean responds that he did tell Mr. Clavet about TCRG's offer and that Mr. Clavet said it sounded like a waste of time. (Def's Opp. S.M.F. ¶ 26.) Whether he did or did not, it is nonetheless undisputed that Mr. Dean did not inform Mr. Clavet of his subsequent discussions with Mr. Donley after his initial outreach on August 30, and never showed him the Agreement. (Def's Opp. S.M.F. ¶¶ 14, 26.)

In this case, there is no evidence that Mr. Dean took proactive steps to hide his negotiations with TCRG from Mr. Clavet. Mr. Dean just never told him about them, and Mr. Clavet never asked. More is required to demonstrate active concealment of the truth. *Kezer v. Mark Stimson Assocs.*, 1999 ME 184, ¶ 24, 742 A.2d 898 ("Active concealment of the truth connotes steps taken by a defendant to hide the true state of affairs from the plaintiff."). Thus, to prove liability in fraud through omission, Mr. Clavet must prove that Mr. Dean owed Mr. Clavet a fiduciary duty or statutory duty to disclose.

As explained in more detail below in the context of Mr. Clavet's claim for breach of fiduciary duty, Mr. Dean did not have a fiduciary or confidential relationship with Mr. Clavet with respect to Blue Water. Mr. Dean thus cannot be held liable in fraud to Mr. Clavet through his failure to disclose Mr. Dean's negotiation for the sale of the Marina as to that entity.

With respect to Covered, which is governed by Texas law, there is a factual question as to whether Mr. Dean had an informal fiduciary relationship with Mr. Clavet, which could give rise to liability in fraud by reason of Mr. Dean's omission. *Entm't Merch. Tech., LLC v. Houchin*, 720 F. Supp. 2d 792, 796-97 (D. Tex. 2010) (citing Tex. Bus. Orgs. Code. § 101.401) (other citations omitted). As explained in more detail below, this factual question remains unresolved, precluding an entry of summary judgment on Mr. Clavet's fraud claim with respect to his omission for Covered as well.[5]

Mr. Clavet argues that nonetheless there is evidence that Mr. Dean made an affirmative, knowingly false statement intended to induce Mr. Clavet to sell his interest to Mr. Dean at a deflated price: the September 15 text message that the Bank "wanted" the two gentlemen and their wives to personally guarantee the Marina's line of credit. Mr. Dean swears that this is an accurate representation of what the Bank had told him at some point and thus not a false statement. (Def's Opp. S.M.F. ¶¶ 36-37.) There is thus a dispute of fact on this point. Mr. Dean seems to make the further argument that the statement could never be actionable because he said the Bank "wanted," as opposed to would require, personal guaranties, and it is always the case that a financial institution would prefer to have personal guaranties on lines of credit. The Court rejects this argument. The factfinder will be entitled to decide for itself what Mr. Dean meant by the text message he sent to Mr. Clavet on September 15 and whether it was a lie. (Pl's Supp'g S.M.F. ¶ 15.)

[5] The Court does not rule that if Mr. Clavet prevails on his breach of fiduciary duty claim with respect to Covered that this necessarily results in Mr. Dean's liability for fraud as well. Mr. Dean claims that he never updated Mr. Clavet about his negotiations with TCRG because he never took TCRG's offer seriously himself until after the sale closed—eight days after he received the signed Agreement and two days after Mr. Clavet sold his interest in the Marina Companies to Mr. Dean. (Def's Opp. S.M.F. ¶ 26.) However far-fetched Mr. Dean's story may sound to the Court, fraud is subject to a higher standard of proof and the issue of Mr. Dean's knowledge as to the materiality of his negotiations with TCRG is a factual one that a fact-finder must decide. *See Barr*, 2012 ME 108, ¶ 16, 49 A.3d 1280 (representation must be made with knowledge or reckless disregard of its falsity). As explained below, the reasonableness of Mr. Clavet's reliance is likewise an unresolved factual issue precluding an entry of summary judgment in Mr. Clavet's favor on his claim of fraud.

Finally, there is a dispute of fact as to whether Mr. Clavet's reliance on Mr. Dean's representations was reasonable. *Barr*, 2012 ME 108, ¶ 16, 49 A.3d 1280; *Chapman*, 568 A.2d at 830. As Mr. Clavet conceded at the oral argument, to enter summary judgment in his favor, the Court would have to weigh the evidence and determine that it is so one-sided that even in light of his higher standard of proof no reasonable juror could find that Mr. Clavet's reliance was not reasonable. There is substantial evidence as to Mr. Clavet's sophistication and independence in his business dealings, and it is undisputed that Mr. Clavet took no steps to independently verify (1) whether there were any pending offers for the sale of the Marina and (2) whether the Bank was requiring (or would like) personal guaranties from him and his wife to renew the line of credit. At this stage, Mr. Dean is entitled to all reasonable inferences in his favor. *See Curtis v. Porter*, 2001 ME 158, ¶ 9, 784 A.2d 18. The factfinder must weigh the evidence and determine whether Mr. Clavet has proved to a clear and convincing standard that his reliance was reasonable.

In conclusion, there are multiple genuine issues of material fact as to whether Mr. Dean is liable to Mr. Clavet for intentional or negligent fraud. Both motions for summary judgment are denied as to Count I and Count III of the Complaint.

II. Breach of Fiduciary Duty

In Maine, a fiduciary duty arises at common law with "(1) the actual placing of trust and confidence in fact by one party in another, and (2) a great disparity of position and influence between the parties." *Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶ 18, 133 A.3d 1021 (quoting *Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 7, 54 A.3d 710). "To establish the element of disparity of position and influence, [the plaintiff] must demonstrate diminished emotional or physical capacity or . . . the letting down of all guards and bars." *Id.* (quoting *Ramsey*, 2012 ME

113, ¶ 9, 54 A.3d 710) (alteration in original). Maine courts "will not impose fiduciary duties based on arms-length business relationships alone." *Ramsey*, 2012 ME 113, ¶ 10, 54 A.3d 710.

Parties may also agree to the imposition (or elimination) of fiduciary duties in their performance of a contract. The LLC Acts of Maine and Texas explicitly allows for this. 31 M.R.S. §§ 1521(3), 1559(3); Tex. Bus. Orgs. Code Ann. §§ 101.401, 101.606. Fiduciary duties may also be imposed by statute. *See, e.g., Moore v. Me. Indus. Servs.*, 645 A.2d 626, 628 (Me. 1994); *Pianka v. Acadia Ins. Co*., No. CV-04-752, 2006 Me. Super. LEXIS 61, *5 (March 28, 2006) (clarifying that fiduciary duty of officer and director of corporation based on corporate law, not tort law) (citing 13-C M.R.S. §§ 831(1), 843(1)).

First, Mr. Clavet argues that the operating agreements for Blue Water and Covered provided for fiduciary duties between the parties. The operating agreements for the two LLCs are attached respectively as Exhibit 1 and Exhibit 2 to Mr. Dean's Affidavit and thus part of the summary judgment record.[6] M.R. Civ. P. 56(c). The language cited by Mr. Clavet comes nowhere near imposing fiduciary duties. It is a *limitation*[7] on the liability of the co-managers (i.e., Mr. Dean and Mr. Clavet), providing that "a Manager's duty of care in the discharge of [his] duties to the [LLC] and the other Members is limited to refraining from grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." (Blue Water Op. Agmt. Art. VII, § 6; Covered Op. Agmt. Art. Art. VII, § 6.) Mr. Dean claims that the transfer of Mr. Clavet's membership interests in the Marina Companies is not governed by the operating agreements in any event, but rather the subsequently-executed Buy/Sell Agreement, which is attached as Exhibit 3 to Mr. Dean's Affidavit. Mr. Clavet does not necessarily quarrel with this proposition, but points

[6] *See* Def's Supp'g S.M.F. ¶ 33. Hereafter the operating agreements, Dean Aff. Ex. 1 and Dean Aff. Ex. 2, are cited as Blue Water Op. Agmt. and Covered Op. Agmt., respectively.

[7] Indeed, if anything, this language insulates Mr. Dean from liability for negligent misconduct, such as that alleged in Count III of the Complaint (negligent misrepresentation).

out that that agreement is completely silent on the duties owed between the parties in their performance of that contract. The Court agrees. In sum, there is nothing in either operating agreement or the Buy/Sell Agreement imposing or restricting fiduciary duties between the parties.

Turning next to the common law, Mr. Clavet makes the earnest but implausible claim that a fiduciary relationship arose between these highly sophisticated businessmen who, the record reflects, have undertaken their own independent business dealings at least as often as they have chosen to work together. There is no evidence of a great disparity of position and influence between these very sophisticated and experienced businessmen. Moreover, there is no evidence whatsoever of diminished emotional or physical capacity or the letting down of all guards and bars by Mr. Clavet with respect to Mr. Dean. *See Oceanic Inn, Inc.*, 2016 ME 34, ¶ 18, 133 A.3d 1021; *Ramsey*, 2012 ME 113, ¶¶ 7, 9, 54 A.3d 710. As a matter of law, arm's-length business relationships cannot give rise to a fiduciary relationship. *Ramsey*, 2012 ME 113, ¶ 10, 54 A.3d 710.

Finally, at the oral argument, the Court sua sponte asked Mr. Clavet whether 31 M.R.S. § 1559(3) imposed a fiduciary duty on Mr. Dean as manager of Blue Water given the operating agreement's silence on the question of fiduciary duties owed by managers. By way of background, section 1559 of Maine's LLC Act, titled "Duties of Members and Other Persons," provides that "a member not involved in management does not have a fiduciary duty to the [LLC], or to any other member . . . solely by reason of being a member." 31 M.R.S. § 1559(3). At the trial court level, this language has been construed as meaning a manager who is involved in management of the company does owe fiduciary duties to the LLC, and possibly its members, unless those duties are waived in the LLC operating agreement. *See Cianchette v. Cianchette*, No. CV-16-249, 2018 Me. Super. LEXIS 13, at *39 (January 17, 2018); *Gleichman v. Scarcelli*, No. BCD-CV-17-11, 2019

Me. Bus. & Consumer LEXIS 8, *27-28 (March 7, 2019) (citing *id.*). The Law Court has yet to rule on this issue, although the Superior Court's order on summary judgment in *Cianchette* was appealed and argued before the Law Court and remains under advisement.

In response to the Court's question, Mr. Clavet was clear that the Court should not apply that construction of section 1559(3) in this case. Mr. Clavet pointed out that the Law Court will have the final say on this issue, and even advocated for the proposition that section 1559(3) cannot be construed as giving rise to default fiduciary duties for LLC member-managers. Given the unsettled state of the law on this issue, the Court is not inclined to apply a statutory construction neither side is advocating for, notwithstanding the stare decisis that has developed at the trial court level. *See Gatz Props., LLC v. Auriga Capital Corp*., 59 A.3d 1206, 1218-20 (Del. 2012) (rebuking trial court for construing identical statutory language in Delaware's LLC Act where neither party was advocating for such a construction). The Court thus concludes that for purposes of the instant motions section 1559(3) does not impose fiduciary duties on the parties as co-managers of the Marina Companies with respect to each other or the Companies themselves.

Instead, Mr. Clavet argued that this Court should conclude that a "limited fiduciary duty" arose between Mr. Dean and himself solely in the context of Mr. Clavet's sale of his membership interests in the Marina Companies to Mr. Dean. Mr. Clavet conceded that the doctrine of a "limited fiduciary duty" is novel under Maine law, and argued that the Court should look to the persuasive authority of the Appellate Division of the Supreme Court of New York and adopt such a doctrine for the purposes of this case. *See Salm v. Feldstein*, 20 A.D. 3d 469 (N.Y. App. Div. 2005); *Blue Chip Emerald, LLC v. Allied Partners, Inc*., 299 A.D. 2d 278 (N.Y. App. Div. 2002) (overruled in part by *Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 952 N.E.2d 995, 1001-02 (N.Y. 2011)). The cases cited are factually distinguishable and not controlling on this Court; but

more fundamentally, they do not apply a "limited fiduciary duty" doctrine. In each case, the court holds that a fiduciary duty existed between the parties *by virtue of their relationship* under the common law and statutory law of New York, and that the failure to disclose the existence of third-party offers or negotiations in the context of a buy-out of one part's interest was a breach of that duty. *Salm*, 20 A.D. 3d at 470; *Blue Chip Emerald, LLC*, 299 A.D. 2d at 279 (citing *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 575; *Meinhard v. Salmon*, 164 N.E. 545). In other words, the grounds for the finding of a fiduciary duty were entirely distinct from the circumstances constituting the breach. The cases do not stand for the proposition that a limited fiduciary duty or duty to disclose arises between the parties by virtue of one party's purchase of the other's interest in a company while negotiating the sale of that company (or its assets) to a third-party. They merely stand for the uncontroversial proposition that where one party is a fiduciary, it must disclose third-party offers and negotiations before buying out the other party's interest.

Put simply, either Mr. Dean owed a fiduciary duty to Mr. Clavet, or he did not. If he did, the New York cases cited stand for the proposition that Mr. Dean's failure to disclose his negotiations with TCRG was a breach of that duty as a matter of law. *Salm*, 20 A.D. 3d at 470; *Blue Chip Emerald, LLC*, 299 A.D. 2d at 279. The cases do not support Mr. Clavet's novel theory that a limited fiduciary duty arose between Mr. Dean and Mr. Clavet, solely in the context of the buyout, that obligated Mr. Dean to disclose his negotiations with TCRG.

In sum, Mr. Clavet has not identified a contractual, common-law, or statutory source of Mr. Dean's fiduciary duty to him under Maine law. Mr. Dean is thus entitled to summary judgment in his favor on Count II of the Complaint as it concerns Blue Water.

The issue as it relates to Covered is a bit more complex, because Covered is a Texas LLC.[8] Texas distinguishes between "formal" and "informal" fiduciary relationships. The former is identified as a matter of law; whether the latter exists is a factual question. *Entm't Merch. Tech., LLC v. Houchin*, 720 F. Supp. 2d 792, 796-97 (D. Tex. 2010). Formal fiduciary relationships "are those for which the fiduciary duties are owed as a matter of law, including the relationship between attorney and client, partners, in trustee relationships, or between directors of a corporation and its stockholders." *Entm't Merch. Tech., LLC*, 720 F. Supp. 2d at 796 (accord *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998)); *see also Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355, 395-96 (Tex. App. 2012) (majority member/ manager of LLC owes formal fiduciary duty in purchase of minority member's interest).[9] "An informal fiduciary relationship may also give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic or purely personal one." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997) (overruled in part on other grounds by *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 336 n.7 (Tex. 2011). However, "not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005) (quoting *Schlumberger Tech. Corp.*, 959 S.W.2d at 177). "[W]hile a fiduciary relationship or confidential relationship may arise

[8] The parties neglected to brief the issue of whether Maine law, Texas law, or both apply to this lawsuit, and instead seem to argue that they are entitled to prevail on summary judgment regardless of which jurisdiction's law is applied. The parties cite authority from Maine, Texas, and several other jurisdictions. Each operating agreement has an unhelpful "choice-of-law" provision that provides that the agreement "shall be governed by and construed in accordance with the laws of" the state in which the Company was organized—Texas for Covered; Maine for Blue Water—"or, to the extent that the Company does business in States other than" the state of organization, "in accordance with the laws of those States to the extent applicable." (Blue Water Op. Agmt. Art. XVI, § 7; Covered Op. Agmt. Art. XVI, § 7.) For purposes of this motion, in the absence of argument either way from any party, the Court assumes that Maine law applies in the case of Blue Water and Texas law applies to Covered.

[9] Mr. Clavet argues that *Allen* is dispositive of his case—inferentially supporting the notion that he would agree Texas law applies to Covered. However, *Allen* is distinguishable because the defendant was (1) the majority member of the LLC and (2) its sole manager. *Allen*, 367 S.W.3d at 391. *Allen* was very clear that as a general proposition, members of a LLC do not owe each other fiduciary duties. *Id.* at 389-90. Here, Mr. Clavet and Mr. Dean (1) own equal fifty-percent membership interests in Covered and (2) are both managers under the operating agreement.

from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from the agreement made the basis of the suit." *Willis v. Donnelly*, 199 S.W.3d 262, 277 (Tex. 2006).

Texas's LLC Act does not have a provision analogous to 31 M.R.S. § 1559(3), discussed above. It merely provides that the operating agreement for the LLC "may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, . . . or other person has to the company or to a member or manager of the company." Tex. Bus. Orgs. Code Ann. § 101.401. *Cf.* 31 M.R.S. § 1521(3)(A). "No Texas court has held that fiduciary duties exist between members of a limited liability company as a matter of law." *Entm't Merch. Tech., LLC*, 720 F. Supp. 2d at 797 (citations omitted); *see also Allen*, 367 S.W.3d at 389-90. However, "[w]hether such a fiduciary relationship exists is typically a question of fact." *Entm't Merch. Tech., LLC*, 720 F. Supp. 2d at 797.

The Court acknowledges that Mr. Clavet does not specifically argue that a different legal standard applies to Mr. Dean's actions with regard to Blue Water and Covered. Instead, Mr. Clavet argues that a "limited fiduciary duty" arose in the context of Mr. Dean's simultaneous negotiations for the purchase of the Marina Companies from Mr. Clavet and sale of the Marina to TCRG regardless of which jurisdiction's law is applied. The Court concluded above that this theory is unsupported under Maine law. While Texas law likewise does not seem to recognize the doctrine of limited fiduciary duty Mr. Clavet argues for in this case, under Texas law, a fiduciary duty may nonetheless arise as a factual matter "from the circumstances of a particular case," although it must be based on a relationship that predates "the agreement made the basis of the suit." *Willis*, 199 S.W.3d at 277.

Much of the evidence adduced by Mr. Clavet in support of the imposition of a limited fiduciary duty on Mr. Dean in the context of the agreement made the basis of this suit—that is, Mr. Dean's purchase of Mr. Clavet's membership interests in the Marina Companies—strikes the Court as bearing on the question of whether an informal fiduciary relationship arose between Mr. Dean and Mr. Clavet with respect to Covered. Mr. Clavet sometimes refers to Mr. Dean as his partner—a characterization that Mr. Dean disputes.[10] (Pl's Supp'g S.M.F. ¶ 18, Def's Opp. S.M.F. ¶ 18.) In his own motion for summary judgment, Mr. Clavet emphasizes the parties' relationship and long course of dealing as evidence that a duty arose on Mr. Dean's part to disclose his negotiations with TCRG to Mr. Clavet. (Pl's Mot. Summ. J. 11.) Under Maine law, this course of dealing is insufficient to meet the common law standard for a fiduciary duty to arise. However, under Texas law, this is sufficient evidence to generate a factual issue as to whether an informal fiduciary relationship arose between the parties. *Entm't Merch. Tech., LLC*, 720 F. Supp. 2d at 797; *Willis*, 199 S.W.3d at 277.

In conclusion, while no fiduciary duty arose between the parties under Maine law, there is a factual question whether an informal fiduciary duty arose between the parties under Texas law in the circumstances of this case. Neither party is entitled to summary judgment in his favor on Count II of the Complaint as it concerns Covered.

III. Unjust Enrichment and Fraudulent Transfer

To be entitled to the remedy of unjust enrichment, a party must prove (1) that it conferred a benefit on the other party; (2) that the other party had "appreciation or knowledge of the benefit;"

[10] Mr. Clavet does not argue—nor do the facts support the proposition—that Mr. Dean and Mr. Clavet were "partners" in the sense that their various joint enterprises were "the association of 2 or more persons to carry on as co-owners of a business for profit. . . ." 31 M.R.S. § 1022(1); *see also id.* § 1044. A factfinder could nonetheless be convinced that the men were and had been "partners" in the colloquial sense, which could give rise to an informal fiduciary relationship under Texas law.

and (3) that the "acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value." *Howard & Bowie, P.A. v. Collins,* 2000 ME 148, ¶ 13, 759 A.2d 707 (citing *June Roberts Agency v. Venture Properties,* 676 A.2d 46, 49 (Me. 1996)). "[T]he most significant element of the doctrine of [unjust enrichment] is whether the enrichment is unjust." *Howard & Bowie,* 2000 ME 148, ¶ 14, 759 A.2d 707. "[T]he remedy of unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when on the grounds of fairness and justice, the law compels the performance of a legal and moral duty to pay." *Nadeau v. Pitman,* 1999 ME 104, ¶14, 731 A.2d 863. Therefore, the existence of a contractual agreement "precludes recovery on a theory of unjust enrichment." *June Roberts Agency, Inc.,* 676 A.2d at 49 n. 1. "As a further limitation, to pursue unjust enrichment in equity, the plaintiff must lack an adequate remedy at law." *WahlcoMetroflex, Inc. v. Baldwin,* 2010 ME 26, ¶ 22, 991 A.2d 44 (applying Delaware law).

Multiple factual disputes preclude an entry of summary judgment on Mr. Clavet's count for unjust enrichment. First, without finding facts relative to Mr. Dean's knowledge, intent, and motivations with respect to his simultaneous negotiations for the purchase of Mr. Clavet's interests in the Marina Companies and sale of the Marina to TCRG, it is impossible to conclude that Mr. Dean's enrichment is unjust: the "most significant element" of the remedy. *Howard & Bowie,* 2000 ME 148, ¶ 14, 759 A.2d 707. Second, while Mr. Clavet has not sued Mr. Dean for breach of contract under either LLC operating agreement or the Buy/ Sell Agreement, these contracts nonetheless give rise to a "contractual relationship" between the parties. The Court reserves ruling on whether this contractual relationship forecloses Mr. Clavet from pursuing unjust enrichment as a remedy at trial. Finally, Mr. Clavet may have a legal remedy in tort if he prevails in his claims

for fraud or breach of fiduciary duty at trial. Mr. Clavet is entitled to the remedy of unjust enrichment only if his legal remedies are inadequate.

Mr. Clavet concedes that genuine factual disputes preclude an entry of summary judgment in his favor on his fraudulent transfer count, and instead asks for the Court to rule on the issue of Mrs. Dean's liability in the event that a fraudulent transfer is found. Such a ruling is outside of the scope of the function of a summary judgment motion. *See* M.R. Civ. P. 56(a). Mrs. Dean's liability for the purported fraudulent transfer will be determined at trial.

IV. Mrs. Dean's Liability for Aiding and Abetting

Because Mr. Dean did not owe Mr. Clavet any fiduciary duty with respect to Blue Water, Mrs. Dean is likewise entitled to summary judgment on Count VII of the Complaint with respect to that company. The Court also grants Mrs. Dean summary judgment in her favor on this Count with respect to Covered, notwithstanding the outstanding factual issue of whether Mr. Dean owed Mr. Clavet fiduciary duties with respect to that claim. The summary judgment record shows that Mrs. Dean's involvement in this matter is limited to being the transferee of the Marina Companies in an allegedly fraudulent transfer; her liability, if any, will be established pursuant to that cause of action, stated in Count VI. The facts that have been established distinguish this case from the allegations that survived the defendants' motion to dismiss in *Cohen v. Bowdoin*, 288 A.2d 106, 110 (Me. 1972).

V. Mr. Dean's Counterclaim

At the outset, the Court denies Mr. Dean's motion for partial voluntary dismissal.[11] Mr. Dean cites no authority in support of his motion other than M.R. Civ. P. 41(a)(2), which merely

[11] Mr. Clavet filed a late response opposing Mr. Dean's motion for voluntary partial dismissal. The Court exercises its discretion under M.R. Civ. P. 6(b)(2) and allows the late-filed opposition, finding that Mr. Clavet's filing was untimely by reason of excusable neglect.

provides that "an action *shall not* be dismissed at the [counterclaim] plaintiff's instance save upon such terms and conditions as the court deems proper." (emphasis added). Mr. Dean is forthright that he wants five of the claims pleaded in his Counterclaim dismissed because through discovery he learned that he was not damaged by Mr. Clavet's purported misfeasance to the extent he alleged in his pleading. Mr. Dean offers nothing in opposition to Mr. Clavet's legal arguments as to why the undisputed facts show he is entitled to a judgment as a matter of law on those claims. Voluntary dismissal without prejudice cannot be an end-run around a counterclaim-plaintiff's burden on summary judgment. *See Savell v. Duddy*, 2016 ME 139, ¶ 18, 147 A.3d 1179 (plaintiff must establish prima facie case for every element of his cause of action to survive summary judgment). The Court concludes as a matter of law that Mr. Dean has failed to carry his burden on summary judgment and that under the undisputed facts Mr. Clavet is entitled to judgment as a matter of law on all counts of the Counterclaim based on Agency Billing, LLC; the "U-Store-It" storage facility; the two mobile home parks in Unity, Maine and Corinth, Maine; the Getchell Agency; and Grace Street Services, LLC.[12]

Mr. Dean substantively opposes Mr. Clavet's motion for summary judgment as to the Counterclaim count for usurpation of joint business opportunities stated against Mr. Clavet with respect to Mr. Clavet's participation in the development of the Charity Shores Subdivision. Mr. Dean claims that this was a corporate opportunity properly belonging to Diamond.[13]

[12] "The language permitting a court to specify the 'terms and conditions' of dismissal provides a court with the discretion to dismiss a case with or without prejudice." *Green Tree Servicing, LLC v. Cope*, 2017 ME 68, ¶ 16, 158 A.3d 931 (quoting M.R. Civ. P. 41(a)(2)). "A dismissal with prejudice operate[s] as an adjudication on the merits." *Bank of N.Y. v. Dyer*, 2016 ME 10, ¶ 11, 130 A.3d 966 (quotation omitted) (alteration in original). The Court would act well within its discretion in granting Mr. Dean's motion and nonetheless dismissing these claims with prejudice. Such a ruling is unnecessary because Mr. Clavet prevails on summary judgment in any event.

[13] Mr. Dean seems to concede that a cause of action for usurpation of a corporate opportunity only lies with respect to Diamond, and not the many LLCs the men own together.

The corporate opportunity doctrine prevents a director or officer of a corporation from personally taking advantage of a corporate opportunity without first disclosing the opportunity to the corporation. "[T]he determination of whether an opportunity is a 'corporate opportunity' is a question of law . . . ." *Ne. Harbor Golf Club, Inc. v. Harris*, 1999 ME 38, ¶ 10, 725 A.2d 1018.

> Even if the opportunity to engage in a business activity, in which the officer or director becomes involved, is not learned of through her connection to the business of the corporation, nevertheless, such an opportunity may be considered a corporate opportunity if the officer or director knows it is closely related to a business in which the corporation is engaged or expects to engage.

Id. ¶ 11 (quotation omitted). "A party who challenges the taking of a corporate opportunity has the burden of proof," subject to certain exceptions not applicable here. *Ne. Harbor Golf Club v. Harris*, 661 A.2d 1146, 1151 (Me. 1995) (quoting Principles of Corporate Governance § 5.05 (May 13, 1992)).

When the plaintiff has the burden to prove an essential element at trial and it is clear that the defendant would have been entitled to a directed verdict at trial if the plaintiff presented nothing more than was before the court at the summary judgment hearing, then the defendant is entitled to summary judgment. *Webb v. Haas*, 1999 ME 74, ¶ 18, 728 A.2d 1261 (citing *H.E.P. Dev. Group, Inc. v. Nelson*, 606 A.2d 774, 775 (Me. 1992)). Mr. Dean has failed to adduce prima facie evidence of any element of the corporate opportunity doctrine. First, there are no facts in the summary judgment record as to what role Mr. Clavet holds at Diamond. There is one fact from which it might be reasonable to infer that Mr. Clavet and Mr. Dean are shareholders of Diamond. (Pl's Supp'g S.M.F. ¶ 60.) The corporate opportunity doctrine only applies to officers and directors of corporations, and there are no facts in the summary judgment record that Mr. Clavet was either. *See Ne. Harbor Golf Club, Inc.*, 1999 ME 38, ¶ 10, 725 A.2d 1018.

Furthermore, it is undisputed that Mr. Clavet did not come to learn of this corporate opportunity by reason of his involvement with Diamond; this means Mr. Dean must prove that Mr. Clavet knew the opportunity was closely related to a business in which the corporation is engaged or expected to engage. Based on the summary judgment record, not even Mr. Dean knows what business Diamond is engaged in. (Def's Opp. S.M.F. ¶ 121.) There are very few facts, disputed or otherwise, that address what business Diamond Properties engages in. The facts in the summary judgment record are that Diamond Properties: (1) owns commercial property held for lease in Auburn, (2) owns one or more lots in a subdivision in Old Orchard Beach, and (3) "may have been the entity through which" Mr. Clavet and Mr. Dean developed a condominium project. (Pl's Supp'g S.M.F. ¶¶ 63, 72; Def's Opp. S.M.F. ¶ 121.) The inadequacy of the record on this point alone entitles Mr. Clavet to summary judgment on this issue. *See Webb*, 1999 ME 74, ¶ 18, 728 A.2d 1261. Assuming that this is the extent of Diamond's business activities, based on the undisputed facts about the development and the corporation, as a matter of law, the development of the Charity Shores Subdivision is not closely related to a business in which the corporation is engaged or expects to engage. *Ne. Harbor Golf Club, Inc.*, 1999 ME 38, ¶ 10, 725 A.2d 1018.

Finally, Mr. Clavet is entitled to summary judgment on this count for a more fundamental reason. The corporate opportunity doctrine is grounded on the principle that "[c]orporate officers and directors bear a duty of loyalty to *the corporations* they serve." *Ne. Harbor Golf*, 661 A.2d at 1148 (emphasis added). The owners of a corporation are its shareholders; Mr. Dean is not Diamond. Maine's leading cases on the corporate opportunity doctrine were brought by the corporation, not a single dissatisfied shareholder. *See id.*; *see also Ne. Harbor Golf Club, Inc.*, 661 A.2d 1146. Mr. Dean has not suffered any individualized injury separate and apart from the alleged injury to the corporation; his claim is thus properly characterized as a derivative, as opposed to

direct claim. Leaving aside the technical and procedural requirements for initiating the "extraordinary process" of a derivative action, *see Voisine v. Berube*, 2011 ME 137, ¶¶ 4-6, 38 A.3d 310 (citing 13-C M.R.S. §§ 751-758), which were indisputably not complied with in this case, Mr. Dean is not the right person to "step into the shoes" of the corporation and pursue this action given his own personal, as opposed to corporate, interest in the result. *See* M.R. Civ. P. 23B (derivative plaintiff must be situated to "fairly and adequately represent the interests of the members similarly situated in enforcing *the right of the association*.") (emphasis added). *See also Spickler v. York*, 566 A.2d 1385, 1390 (Me. 1989) ("In a shareholder's derivative suit, the wrong complained of is to the corporation, and the shareholder is merely a nominal plaintiff"); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984) (citation omitted) (Fed. R. Civ. P. 23.1 "intended to prevent shareholders from suing in the place of the [company] in circumstances where the action would disserve the legitimate interests of the company or its shareholders."); *Fere v. Erickson & Sederstrom, P.C.*, 718 N.W.2d 501 (Neb. 2006) (derivative plaintiff "owes the [company] his undivided loyalty" uncolored by ulterior motives, personal interests, or a personal agenda); *see also* M.R. Civ. P. 23B (derivative plaintiff must be situated to "fairly and adequately represent the interests of the members similarly situated in enforcing *the right of the association*." (emphasis added)).

In conclusion, Mr. Clavet is entitled to summary judgment on Count IV of Mr. Dean's Counterclaim for at least three reasons: (1) he has failed to adduce evidence of the elements of the claim, (2) on the evidence that is in the record, the Charity Shores Subdivision was not a corporate opportunity properly belonging to Diamond, and (3) if it were, Diamond, not Mr. Dean, would be the proper party to pursue the claim, and Mr. Dean lacks standing to pursue the claim derivatively on behalf of the corporation.

CONCLUSION

Based on the foregoing the entry will be:

1. Defendants Kevin and Cecile Dean's motion for partial summary judgment is granted in part and denied in part. Defendants' motion is granted as to Count II of the Complaint with respect to Blue Water Marina, LLC and as to Count VII. Mr. Dean's motion is otherwise denied.
2. Plaintiff Emile Clavet's motion for partial summary judgment is granted in part and denied in part. Mr. Clavet's motion is granted with respect to all counts of Mr. Dean's Counterclaim. Mr. Clavet's motion is otherwise denied.

The Clerk is instructed to enter this Order on the docket for this case incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

June 3, 2019
DATE

/s
JUSTICE MURPHY
BUSINESS AND CONSUMER COURT