

EMILE CLAVET

Plaintiff

v.

**FINDINGS AND ORDER FOR  
ENTRY OF JUDGMENT**

KEVIN DEAN, et al

Defendants

This matter came before the Court for a bench trial on September 10-12, and 16, 2019. Plaintiff Emile Clavet is represented by Attorney Clifford Ruprecht, and Defendants Kevin Dean and Cecile Dean are represented by Attorneys George Marcus, David Johnson and Daniel Rosenthal. The parties elected to make their closing arguments in writing. The Court has reviewed the evidence from trial, has considered the parties' written submissions (the last of which was received on November 18, 2019) and issues the following findings and order for entry of Judgment.

**FINDINGS**

The Plaintiff's Complaint brought seven counts but the Court in a prior Order dismissed Count VII for aiding and abetting breach of fiduciary duty against Cecile Dean. Count V for constructive trust was withdrawn by Plaintiff in his Post-Trial Brief, pg. 2. Counts remaining for decision are: Count I for fraud; Count II for breach of fiduciary duty; Count IV for unjust

enrichment; Count VI for fraudulent transfer, and a claim for punitive damages. Little argument was presented in either brief filed by Plaintiff on his Count III claim for negligent misrepresentation. The Court interprets this as Plaintiff having brought Count III as an alternative claim to Count I.

The case centers around the September 2016 purchase by the Defendants of the Plaintiff's membership interests in two entities they jointly owned, Blue Water, LLC and Covered Marina, LLC (hereinafter the "Marinas"). The parties have a long history of running multiple businesses in Maine and later in Texas. These businesses have included real estate development, hotels, a storage facility, a car wash, two small insurance entities, and the utility Electricity Maine. They began their business ventures with almost no money, but after reinvesting proceeds of sales of businesses into other businesses, they became very successful. Over the years they have been friends as well as business partners, and their families and children were friends as well. While they had the ability to run businesses without the other person, and were legally permitted to compete with each other, it is clear to the Court that they were most successful when they worked jointly. Although they have different strengths and qualities, Mr. Clavet and Mr. Dean are both very intelligent and savvy businessmen. As counsel for Mr. Dean put it, "In every way Emile was Kevin's equal and peer in business matters." [Defendants' Post-Trial Brief, pg. 3]. The parties disagree as to whether before this dispute arose they had already stopped being good friends and had begun to "unwind" their businesses as a result, or whether it is the dispute at the center of this lawsuit that irrevocably changed their friendship and made it impossible for them to continue working together as business partners. <sup>1</sup>

<sup>1</sup> Also pending in this Court is BCD-CV-18-49 which was referred by the Court to a Special Master, Eric Purvis. In that case the parties seek, in part, a judicial dissolution and/or dissociation. In a recent teleconference the parties agreed to a briefing and hearing procedure on that matter. The Court informed the parties that it would issue this

For over 10 years the parties owned the Marina properties which were located on the gulf coast of Texas. They agree that the properties never provided reliable cash flow, and were very difficult to insure. Periodically they would discuss selling the Marinas for these reasons. Mr. Dean, who has roots in Texas, was the party who managed the Marinas, and he employed his sister and her husband to run the properties day to day. The parties seem to agree that the Marinas would only be valuable if they could sell to “the right kind of buyer”, namely someone interested in developing the properties. When brokers would call Mr. Dean with a prospective buyer, he would ask whether the buyer wanted cash flow or a development project, as only a development made economic sense. They paid \$2.5 million dollars to purchase the properties, and under the two LLC agreements they each had 50 percent membership interests.

In September of 2016 a broker for a company called TCRG called Mr. Dean to discuss buying the Marinas. The Court has reviewed the chronology and summary of testimony in Exhibit A attached to Plaintiff’s Post-Trial Brief, and finds that it accurately sets out documented communications between the parties along with proper citations to the trial record.<sup>2</sup> The Court finds, based in part on the evidence summarized in that exhibit, that Mr. Dean breached a number of legal duties which he owed to Mr. Clavet. Because of the interrelation between fraudulent misrepresentation and breach of fiduciary duty under Maine law, and because the factual findings that the Court must make on both claims significantly overlap, the Court will analyze Counts I and II together.

Order without consideration of the recommendations made by Mr. Purvis, and would do so without delaying either case.

<sup>2</sup> Defendants take issue with a number of assertions made about Mr. Dean’s conversations with Mr. Clavet, during the month of September of 2016 in particular. Mr. Dean claims that they first talked about the TCRG offer at the end of August 2016 and that Mr. Clavet’s response was to say that the offer from Mr. Donley was a “waste of time.” Mr. Clavet denies this conversation ever occurred and argues further that if it did there was all the more reason for Mr. Dean to supplement that information once he understood that Mr. Donley’s offer was a bona fide offer for a substantial sum.

**Counts I and II: Fraud and Breach of Fiduciary Duty**

In order to prevail on Count I, the Plaintiff must prove by clear and convincing evidence each of the following: 1) that Mr. Dean made a false representation of a material fact; 2) that he did so with knowledge of its falsity or in reckless disregard of whether it is true or false; 3) that he did so for the purpose of inducing another to act or refrain from acting in reliance on it; and 4) Mr. Clavet justifiably relied upon the representation as true and acted upon it; and 5) that Mr. Clavet was damaged by it. *Cianchette v. Cianchette*, 2019 ME 87, ¶ 20, 209 A.3d 745.

In this Court's Combined Order on Cross Motions for Summary Judgment, the Court held that an omission by silence can constitute the supplying of false information as proof of intentional misrepresentation, but only in circumstances when there exists a special relationship such as a fiduciary relationship, which imposes on the defendant an "affirmative duty to disclose." *Glyn v. Atl. Seaboard Corp.*, 1999 ME 53, ¶ 12, 728 A.2d 17. In that case the Law Court stated, "Where a fiduciary relationship exists between the parties, 'omission by silence may constitute the supplying of false information,'" *Id.* (quoting *Binette v. Dyer Library Assoc.*, 688 A.2d 898, 903). *See also Brown v. Oral Surgery Associates*, 2003 ME 11, ¶ 22, 819 A.2d 1014.

As the parties know, the Combined Order was issued just hours before the Law Court announced its decision in *Cianchette*. The Court in light of that decision granted Mr. Clavet's Motion for Revision in part and found as follows: "Pursuant to statute, as a manager, Mr. Dean was a fiduciary to Blue Water and its other member – Mr. Clavet – during all times relevant to this lawsuit." *Order on Motion for Reconsideration and Revision*, Aug. 2, 2019 pg. 7.

The Court finds after considering all the trial evidence that Mr. Dean intentionally omitted material information which he had a duty under Maine law<sup>3</sup> to provide to the other member of Blue Water, LLC, Mr. Clavet. That information consisted of the inquiries and communications from TCRG that began on August 30, 2019 and which soon turned into an offer from Mr. Donley for TCRG to purchase the Marinas for the sum of 8.0 million dollars. That offer changed to 7.5 million dollars no later than September 13, 2019, just two days before Mr. Dean emailed Mr. Clavet to tell him that their wives needed to provide personal guarantees in order to have a line of credit, “and 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.” Joint Exh. 4.

The purchase and sale agreement between Mr. Dean and TCRG was completed on September 30, 2019. Mr. Clavet, on that same day, and completely in the dark about the agreement between Mr. Dean and TCRG, signed over his membership interests in the Marina properties to Mr. Dean. Joint Exh. 6, Trial II/26.

The sale of the Marina properties to TCRG was not completed until February of 2017. Tr., V.IV at 165-176. However, Mr. Clavet still was not told about the sale of the properties to TCRG until months went by. It was not until Mr. Dean had to disclose to Mr. Clavet that they

<sup>3</sup> In their post-trial arguments and pre-trial motions, the parties argued extensively about the differences between Maine law, which they agree governs Blue Water, LLC and Texas law, which they agree governs Covered, LLC. The Court has reviewed its prior orders regarding Texas law, and has reviewed the cases cited by the parties in their post-trial filings, including *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d, 355, 393-396 (Tex. App, 2012) and Texas cases that interpreted and applied that case in different factual contexts. Plaintiff argues that *Allen* stands for the proposition that Texas recognizes a “formal” fiduciary duty in the LLC context under the “special facts” doctrine. Defendants emphasize that *Allen* applies only to LLC’s managed by a majority-owner, and not to LLC’s that are equally owned. Plaintiffs note that Defendants cannot point to any post-*Allen* case where the duty was not applied on the grounds that ownership was equally shared. The Court is reluctant, for reasons it hopes are obvious to the parties, to resolve this question of Texas law when the Texas courts appear not to have done so. However, the Court agrees with Plaintiff that if it finds by clear and convincing evidence that there was a breach of fiduciary duty under Maine law as to Blue Water, along with proof of the other elements of intentional misrepresentation as to Mr. Dean’s purchase of Blue Water, and that if the breach caused Mr. Clavet to relinquish his interests in both LLC’s, the remaining issue becomes the measure of damages for Plaintiff’s loss. [See, Plaintiff’s Post-Trial Reply Brief, pg. 15.

both had been named in a lawsuit brought by TCRG regarding the closing process on Marinas purchase by TCRG, that Mr. Dean let Mr. Clavet know that he had to go to Texas to be deposed as he had been sued as well. The Court finds that this conduct, together with evidence that Mr. Dean directed office staff to send mail addressed to Mr. Clavet about the lawsuit to Mr. Dean's sister instead of Mr. Clavet, supports Mr. Clavet's position that Mr. Dean had no intention of disclosing the sale until facts and circumstances compelled him to do so. Prior disclosure would have revealed to Mr. Clavet that Mr. Dean had timed and manipulated his buyout of the Marina interests from Mr. Clavet in order to keep the proceeds of the sale to TCRG for himself. At the time Mr. Dean made the contract with TCRG to sell the Marinas for 7.5 million dollars, he was simultaneously persuading Mr. Clavet to sell him his membership interests in those properties for a significantly lower price. Obviously, in order to legally sell the Marinas by himself, he had to own them by himself.

Mr. Dean's secret negotiations with TCRG, together with the timing of the communications, all add up to clear and convincing evidence of the supplying of false information in the form of "omission by silence" and also constitutes a violation of Mr. Dean's fiduciary duty to Mr. Clavet. They also add up to clear and convincing evidence that the information was intentionally withheld "for the purpose of inducing" Mr. Clavet to refrain from acting in reliance upon it. Any co-owner in Mr. Clavet's position would have wanted to know about the offer that TCRG made to Mr. Dean. The Court further finds by clear and convincing evidence that these omissions were material, if for no other reason but that there is such a substantial difference between the sales price of 7.5 million dollars to TCRG, and the purchase price of Mr. Clavet's interest for 2.5 million dollars by Mr. Dean. As stated by Mr. Clavet's counsel, after years of failing to find the right buyer for the marinas, "It was highly material to

know that there was in fact a buyer who had offered 7.5 million dollars and that Kevin was actively negotiating toward a price of \$8 million or very close to it.”

Defendants argue further that Mr. Clavet cannot prove “reasonable reliance” because he never asked follow up questions to Mr. Dean about the initial inquiry from TCRG. As noted previously, Mr. Clavet denies ever being told about that inquiry. However, the Court agrees with Plaintiff’s argument that if in fact Mr. Clavet was told *something* about the inquiry, this was all the more reason for Mr. Dean to update Mr. Clavet with the more material information that was withheld, namely that the inquiry almost immediately became an offer that was substantial and bona fide. The Court also notes that the parties had, throughout their course of dealings, relied upon one another to stay informed about material matters, even if one or the other took the lead on certain projects. The documented communications between the parties at the critical times were frequent, mutual and cordial, and it would have been a very simple matter for Mr. Dean to update Mr. Clavet on his ongoing negotiations with TCRG. Given the history between the parties, the fact that Mr. Dean was the only owner in possession of this information, along with his efforts to misdirect Mr. Clavet’s attention toward the fiction that the bank was demanding that their wives would have to personally guarantee the continuing line of credit, the Court finds clear and convincing evidence of “reasonable reliance” on the part of Mr. Clavet.

***Count IV: Unjust Enrichment***

The parties agree as to what are the elements for unjust enrichment under Maine law, but disagree as to whether the existence of a contractual relationship precludes any recovery under a claim for unjust enrichment.

In Maine, in order to recover for unjust enrichment a Plaintiff must prove the following: 1) that Plaintiff conferred a benefit on the defendant; 2) the defendant appreciated or had knowledge of the benefit; and 3) that the defendant's acceptance or retention of the benefit under the circumstances makes it inequitable for the defendant to retain the benefit without payment of its value. *Estate v. White*, 521 A.2d 1180, 1183 (Me. 1987).

The Court agrees with the Defendants that under Maine law, if there is a contractual relationship, the remedy of unjust enrichment is precluded. "The 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 performance of a legal and moral duty to pay.'" *Nadeau v. Pitman*, 1999 ME 104, ¶ 14, 731 A.2d 863 (quoting *Paffhausen v. Balano*, 1998 ME 47, ¶ 6, 708 A.2d 269) (emphasis added).

The Court agrees with the Defendants that the essence of the parties' legal relationship is contractual, and further agrees with the statement made by Defendants' counsel as follows: "Without the LLC agreements, Emile (sic) and Clavet would not have been co-members or co-managers of the Marinas; Kevin would not owe Emile the duties that Emile says he owes; and there would be no basis for Emile's assertions that Kevin has been enriched unjustly." Defendants' Post-Trial Brief, pg. 29.

The Court concludes as a matter of law that the existence of the parties' contractual relationship precludes recovery by Plaintiff under a theory of unjust enrichment.<sup>4</sup> *Id.*

<sup>4</sup> Plaintiff also seems to recognize that if the Court awards damages for fraudulent misrepresentation and/or breach of fiduciary duty, that any damages awarded for unjust enrichment would be duplicative of those damages. See the heading in Plaintiff's Post-Trial Brief, pg. 19: "Plaintiff is Entitled to Compensatory damages *or* to Disgorgement."



**Count VI: Fraudulent Transfer**

In order to prevail on his Count VI claim for Fraudulent Transfer, Plaintiff must prove by clear and convincing evidence that Mr. Dean transferred his membership interests to his wife Cecile “with the actual intent to hinder, delay or defraud any creditor” of Mr. Dean. 14 M.R.S. § 3575(1)(A); *Morin v. Dubois*, 1998 ME 160, ¶ 3, 713 A2d 956. The evidence on this claim centers on why Mr. Dean transferred his interests in the Marinas to his wife within weeks after Mr. Clavet sold his interests in the Marinas to Mr. Dean.

While this fact is undisputed, what is in dispute is Mr. Dean’s actual intent at the time he transferred his interest in the Marinas to his wife. Plaintiff claims that he made the transfer to hinder or defraud him, while Defendants claims that he made the transfer for estate planning purposes.

Plaintiff has brought this claim under 14 M.R.S. § 3575(2) which sets out a number of factors that courts are to consider in determining what the statute refers to as the “actual intent” of the debtor.<sup>5</sup> These factors include whether the transfer was made to an insider; whether the debtor retained possession or control of the property transferred after the transfer; whether it was disclosed or concealed; whether before it was made the debtor was sued or threatened with suit; whether it was of substantially all of the debtor’s assets; whether the debtor absconded; whether the debtor removed or concealed assets; whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; and whether the debtor transferred the essential

<sup>5</sup> The Defendants claim that Mr. Dean is not a “debtor” of Mr. Clavet’s for purposes of this analysis but the Court notes that the definitions section of the statute broadly defines a debtor as “a person who is liable on a claim.” 14 M.R.S. §§ 3572(5) and (6).

assets of a business to a lienor who had transferred the assets to an insider of the debtor. While some of these factors may be generated by the evidence, some clearly are not. The more important issue given the trial record presented is whether the factors that are generated constitute clear and convincing evidence of Mr. Dean's "actual intent" at the time he made the transfer to his wife.

Attorney Shawn Bell testified that he understood based on his conversations with Mr. Dean that the transfer to Mrs. Dean was done just after the parties closed on the "Spark" transaction, and that the parties put money in escrow as they were concerned about "potential litigation". Tr., V.II. at 12. While Mr. Bell described the transfer as "an asset protection option" it is not particularly clear to the court what potential creditors Mr. Bell was describing, and whether those creditors were creditors who might have claims based on the Spark transaction,<sup>6</sup> or whether he was referring specifically to Mr. Clavet as the creditor who was being harmed by the transfer. Mrs. Dean was not called by either party as a witness for trial, and so the Court is left to try and reconcile Mr. Bell's statements about what he "believed" to be Mr. Dean's intent with Mr. Dean's denials.

The Court concludes that this evidence falls short of constituting clear and convincing evidence of Mr. Dean's actual intent at the time the transfer was made. Therefore, the claim in Count VI will be denied for that reason.

<sup>6</sup> If Mr. Dean's intent was to shield himself from Electricity Maine creditors, the Court would have to question whether Mr. Clavet would have standing to ask the Court to provide a remedy to him as part of the claim he is making in this case.

**Remedies for Fraudulent Misrepresentation and Breach of Fiduciary Duty**

In assessing damages for these claims, the Court must decide at the outset what Mr. Clavet sold to Mr. Dean. Defendants claim that what was sold was only Mr. Dean's "membership" interests while Plaintiff insists that what was sold was the value of the LLC assets that the Marina entities owned. The Court would note, however, that while the attorneys may disagree on what was sold, the parties themselves agreed that Mr. Clavet sold his half interest in the Marina companies, but they agreed to value it as the amount that they had actually paid for the Marina properties; that is, the parties agreed to treat the value of the assets as a proxy for the value of their membership interests, and Defendants have failed to persuade the Court that their agreement should carry no legal weight.

The Court has reviewed the parties' arguments regarding remedies, and the cases cited by them. A case from the First Circuit, *Janigan v. Taylor*, 344 F.2d 781 (1st Cir. 1965), is very similar factually to this case, and the First Circuit lays out persuasively how damages should be calculated under the facts presented here. The defendant in *Janigan* purchased plaintiffs' stock, which represented virtually all of the outstanding stock of the company, for \$40,000. Not long after, he sold it for \$700,000. In deciding to sell the stock, the plaintiffs relied upon a statement the defendant admitted he made at a directors' meeting about the condition of the company. The District Court found the representation to be "consciously and materially false and . . . that plaintiffs relied on it." *Id.* at 784. Damages were awarded to Plaintiff in the amount of Defendant's net profits.

The Defendant appealed the finding of misrepresentation and the measure of damages. The First Circuit upheld the finding of misrepresentation, and had the following to say about the measure of damages:

With respect to damages we draw a distinction between cases where, by fraud, one is caused to buy something that one would not have bought or would not have bought at that price, and where by fraud one is induced to convey property to the fraudulent party. In the former case the damages are to be reckoned solely by the “difference between the real value of the property at the date of its sale to the plaintiffs and the price paid for it, with interest from that date, and in addition, such outlays as were legitimately attributable to the defendant’s conduct, but not damages covering the “expected fruits of an unrealized speculation.”

On the other hand, if the property is not bought from, but sold to the fraudulent party, future accretions not foreseeable at the time of the transfer, even on the true facts, and hence speculative, are subject to another factor, viz., that they accrued to the fraudulent party . . . . However, there can be no speculation but that the defendant actually made the profit and, once it is found that the profit was the proximate consequence of the fraud, whether foreseeable or not. It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them.

*Id.* at 786 (citing *Sigafus v. Porter*, 179 U.S. 116 (1900) and *Marcus v. Otis*, 168 F. 2d 649, 660 (2d Cir. 1948)).

In this case the Court finds that the profit Mr. Dean made and kept to himself at the time TCRG purchased the Marina properties was the “proximate consequence” of the fraudulent misrepresentation that Mr. Clavet has proven by clear and convincing evidence. In *Janigan*, the Court cautioned that there are “limits” to this principle, but there can be no credible concern here about the foreseeability of the damages in the form of profit Mr. Dean made from the sale to TCRG. While the original purchase price to be paid by TCRG changed, the new figure was known to Mr. Dean at the time the fraudulent misrepresentation was made, and the essentials needed to calculate the net profit are laid out in the settlement statement.

The Court will therefore award to Mr. Clavet damages based upon the calculations set out on pages 35-36 of Plaintiff’s Post Trial Brief. It represents the difference between, as Plaintiff’s counsel put it on pg. 29 of his Post-Trial brief, “value represented v. actual value based on the true state of affairs” and the Court has relied upon *Janigan* in concluding that this is the most

sound approach to take in this case. It is undisputed that Mr. Dean and Mr. Clavet agreed to value the Marina properties at 2.5 million dollars, and the Court has found the parties agreed that what was actually sold were the assets held by the LLC's. The total net proceeds are then determined by the amount payable by TCRG at closing in the amount of \$7,977,680.27 (calculated as the contract price plus TCRG's share of pro-rated items, Plaintiff's Exh. 10 and Tr. I/96-97) minus the settlement charges of \$670,317.21 which do not take into account Mr. Dean's decision to pay his sister Debbie Dean \$150,000 from the closing proceeds.<sup>7</sup> The Court finds that the parties had agreed that the credit line balance would be paid off when Mr. Dean purchased the Marinas from Mr. Clavet, and the Court will therefore deduct \$320,000 from those proceeds. The Court will then apply a credit to Mr. Dean for what he actually did pay to Mr. Clavet in the amount of \$977, 500. This results in damages in the amount of \$2,516,181.53 that the Defendants will be ordered to pay the Plaintiff.

The Court declines to reduce Plaintiff's damages by deducting intercompany items as the course of dealings between the parties indicates that they did not themselves consider those figures when they valued their various companies, and the Court finds Mr. Clavet's testimony credible on this issue as it is consistent with their past practices. Tr. IV/285L 18-24; III.141-142. In addition, the Court would have to engage in speculation about how and when the parties might have chosen to reconcile their obligations if Mr. Clavet had been included in the TCRG transaction. That would violate the principle that the calculation of damages must be based on reasonable certainty. The Court has concluded that this level of certainty can be achieved by relying upon evidence of the actual agreement between the parties as to what they had explicitly agreed was the value of the property, what should be paid in the way of debt when ownership

<sup>7</sup> The Court has concluded that given the factual findings made, it would be unjust to permit Mr. Dean to siphon off some of the damages that resulted from the fraudulent misrepresentation that has been proven here.

was transferred to Mr. Dean, along with the standard costs incurred at the closing of the sale to TCRG.

The Court further rejects Defendants' arguments regarding the cash payments made by Mr. Dean to Mr. Clavet. The Court finds Mr. Wolverton's testimony to be credible in this regard when he stated that he saw no indication that Mr. Clavet was intentionally trying to hide money that he had received from Mr. Dean in order to pay taxes. The evidence is that the money Mr. Clavet received in 2016 was duly reported, and the amount he received in 2017 was as well. Tr. III/75: 15-76. The Defendants' theory is not supported by credible evidence in the record.

### ***Punitive Damages***

In Maine punitive damages may only be awarded if the Court finds by clear and convincing evidence that the defendant acted with actual or implied malice. *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985).

The Court finds in this case that Mr. Dean has convinced himself that he deserved to keep the profits of his fraudulent scheme. He implied that he was a better businessman than Mr. Clavet, that he worked longer hours than Mr. Clavet, and that the nature of their relationship had somehow changed that in his view justified concealing the true value of the Marina properties from the person who owned the other half of the LLC's. Mr. Dean told Attorney Bell that he did not tell Mr. Clavet about the TCRG transaction because he worked harder than Mr. Clavet. It is impossible to know exactly how intense this resentment was at the time the fraudulent transaction unfolded, or if it has become even more extreme as a result of this litigation. However, it is clear to the Court that at all pertinent times Mr. Dean had no appreciation or respect for the legal reality that he and Mr. Clavet owned the Marina assets equally, and his

scheme to defraud Mr. Clavet of his rightful share of the proceeds of the sale to TCRG can only be described as brazen. He had multiple opportunities over a period of months to correct the fraud and come clean with Mr. Clavet but decided not to do so. His conduct would never have come to light but for litigation that was brought against him and Mr. Dean that arose from the TCRG closing, and he kept Mr. Clavet in the dark about that litigation until he had no other choice but to tell him. The difference between the amount Mr. Dean paid Mr. Clavet for the Marina assets and the amount he tried to pocket for himself from the TCRG sale is significant. All of this in the view of the Court constitutes clear and convincing evidence of actual malice on the part of Mr. Dean.

The Court is expected to weigh aggravating and mitigating factors in determining the amount of damages to award, and the Law Court has indicated that ratios between actual damages and punitive damages can be considered. The Court considers Mr. Dean's obvious work ethic and his commitment to his family to be mitigating factors. In addition, the harm here is clearly economic. On the other hand, the infliction of the economic injury here was significant, and was done intentionally. The Plaintiff suggests that the award of punitive damages affirmed by the Law Court in *Cianchette v. Cianchette*, 2019 ME 87, 209 A.3d 745, is closely analogous and notes that the ratio of the punitive damages to the tort liability assessed against one Defendant in that case was 7.04, but the Court sees a number of differences between what the jury must have concluded in *Cianchette* and what the Court has found here. The Court must also consider the ability of Mr. Dean to pay any punitive damages, and finds that he has such ability based on his other business ventures and property.

In considering all of these factors, the Court has concluded that an award of punitive damages in the amount of \$750,000 is justified in this case.

The entry will be:

Judgment is entered for Plaintiff on Counts I and II for Fraudulent Misrepresentation and Breach of Fiduciary Duty in the amount of \$2,516,181.53. Count III for negligent misrepresentation is dismissed given the Judgment entered on Count I. Judgment is entered for Defendants on Counts IV for Unjust Enrichment and VI Fraudulent Transfer. Count V was withdrawn by Plaintiff. Punitive Damages are awarded to Plaintiff in the amount of \$750,000. Plaintiff shall have interest and his costs.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

January 8, 2020

**Date**

/s

**Justice M. Michaela Murphy  
Business and Consumer Court**



