**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**WILLIAM F. SHEA, LLC, et al.,**

**Plaintiffs,**

**v.**

**Case No. 2:10-cv-615**
**JUDGE GREGORY L. FROST**
**Magistrate Judge Norah McCann King**

**BONUTTI RESEARCH, INC., et al.,**

**Defendants.**

## OPINION AND ORDER

This matter is before the Court on the Motion for Judgment on the Pleadings of Counterclaim Defendants William F. Shea, LLC; William F. Shea; and Hawk Healthcare, LLC (ECF No. 48), Bonutti Research Inc.'s Memorandum in Opposition to Motion for Judgment on the Pleadings (ECF No. 57), Reply Memorandum of Counterclaim Defendants William F. Shea, LLC; William F. Shea; and Hawk Healthcare, LLC in Support of their Motion for Judgment on the Pleadings (ECF No. 61), Bonutti Research, Inc.'s Motion for Leave to File, *Instanter*, Surreply to Motion for Judgment on the Pleadings (ECF No. 63), and Plaintiffs' Memorandum in Opposition to Defendant's Motion for Leave to File Surreply to Motion for Judgment on the Pleadings (ECF No. 66). For the reasons that follow, the Court **GRANTS** the Motion for Judgment on the Pleadings of Counterclaim Defendants William F. Shea, LLC; William F. Shea; and Hawk Healthcare, LLC and **DENIES** Bonutti Research, Inc.'s Motion for Leave to File, *Instanter*, Surreply to Motion for Judgment on the Pleadings.

## I. Background

Defendant Bonutti Resarch Inc. ("BRI") is a corporation that was formed by Peter M. Bonutti, M.D., an orthopedic surgeon and inventor. Dr. Bonutti has pioneered various types of orthopedic products, including minimally invasive total knee replacements. Dr. Bonutti formed BRI to assist in the development, manufacture, and distribution of his technology. Dr. Bonutti has license agreements with several major manufacturing firms, has founded and is the owner or principal of several business entities, possesses a portfolio of medical patents and technologies, and is a leading innovator in his field.

In 2003, BRI entered into a Consultant Agreement with William F. Shea LLC ("Shea LLC"). BRI hired Shea LLC and its principal William F. Shea ("Shea") to act as its business advisor; to help BRI find and develop opportunities to license its technology to manufacturers of orthopedic devices; and to grow BRI's intellectual property, ideas, technologies, and business concepts. BRI paid Shea a thirty thousand dollar retainer fee, fifteen thousand dollars per month, and up to twenty-five percent of each deal he brokered for BRI. The relationship resulted in an income of approximately twelve million dollars for Shea LLC and approximately one hundred million dollars for BRI.

On June 7, 2010, Shea LLC and Avon Equity Holdings, LLC ("Plaintiffs") commenced this action against BRI, Dr. Bonutti and four other Bonutti entities, (*i.e.*, Unity Ultrasonic Fixation, LLC, the Bonutti 2003 Trust, Joint Active Systems, Inc., and MarcTec, LLC), in the Franklin County, Ohio Court of Common Pleas, seeking royalty fees purportedly owed to Shea LLC under the Consultant Agreement and seeking to have Avon Equity Holding LLC's allegedly wrongfully terminated interest in Unity restored or compensated. (ECF No. 3.)

Plaintiffs filed claims for breach of contract, breach of fiduciary duty, and unjust enrichment. Defendants removed the case to this Court based on diversity jurisdiction on July 7, 2010. (ECF No. 2.)

On August 18, 2010, BRI answered the complaint and filed counterclaims against Shea LLC, Shea, and Hawk Healthcare LLC (another Shea affiliate) ("Counterclaim Defendants"). Specifically, BRI filed a claim against Shea LLC and Shea for breach of fiduciary duty; against Shea and Hawk Healthcare LLC for aiding and abetting Shea LLC's breach of fiduciary duty; against Shea LLC for breach of contract; and, against Shea LLC for breach of the implied covenant of good faith and fair dealing. (ECF No. 9.)

Also on August 18, 2010, Dr. Bonutti and the four other Bonutti entities named as defendants in this action filed a motion to dismiss for lack of personal jurisdiction. (ECF No. 11.) On January 7, 2011, this Court granted that motion. (ECF No. 46.)

On January 14, 2011, the Counterclaim Defendants moved for judgment on the pleadings on BRI's breach of fiduciary duty and aiding and abetting the breach of fiduciary duty counterclaims. (ECF No. 48.) That motion is ripe for review.

On March 8, 2011, BRI filed a motion to file a surreply *instanter*. (ECF No. 63.) The Counterclaim Defendants filed a memorandum in opposition to that motion. (ECF No. 66.) The time has passed for BRI to file a reply memorandum. Thus, that motion too is ripe for review.

## II. BRI's Motion

### A. Standard

The Local Civil Rules of this Court permit the filing of a motion and memorandum in support, a memorandum in opposition, and a reply memorandum. S. D. Ohio Civ. R. 7.2(a)(1),

(2). The Rule specifically states that "[n]o additional memoranda beyond those enumerated will be permitted except upon leave of court for good cause shown." S. D. Ohio Civ. R. 7.2(a)(2).

**B. Discussion**

BRI moves to file a surreply, offering as good cause for doing so the fact that the Counterclaim Defendants cite to *Kuroda v. SPJS Holdings*, No. 4030-CC, 2010 WL 925853 (Del. Ch. March 16, 2010) for the first time in their reply brief and BRI "has not had a chance to respond to it." (ECF No. 63 at 2.) The Counterclaim Defendants argue that BRI's request should be denied because its asserted justification does not constitute good cause. This Court agrees.

As the Counterclaim Defendants accurately explain, they did not raise new arguments in their reply brief, and instead, merely cited to an additional case to rebut two counter-arguments made by BRI and to further support their original arguments. *See Power Marketing Direct, Inc. v. Wilburn Moy*, No. 2:08-cv-826, 2008 U.S. Dist. LEXIS 94997, *4 (S.D. Ohio Nov.20, 2008) (denying motion for leave to file surreply because "Plaintiff was responding in the reply memorandum to the argument Defendants raised in the memorandum in opposition").

First, the Counterclaim Defendants relied upon *Kuroda* as support for their argument that under Delaware law, a fiduciary relationship requires "superiority" or "domination" by one party over the other. The Counterclaim Defendants first made this argument in their motion. In its memorandum in opposition, BRI contested the argument, claiming that Delaware law does not require superiority, but only requires trust and confidence. In their reply, the Counterclaim Defendants cited *Kuroda* as additional authority to support their proposition that trust and confidence are not enough, but that BRI must also show superiority.

Second, the Counterclaim Defendants relied upon *Kuroda* as support for their contention that a bargained-for commercial relationship between sophisticated parties does not give rise to fiduciary duties under Delaware law. The Counterclaim Defendants also made this argument in their motion, relying heavily on *Dynamis Therapeutics, Inc. v. Alberto-Culver Int'l, Inc.*, No. 09-773-GMS, 2010 U.S. Dist. LEXIS 100 (D. Del. Sept. 22, 2010). In its memorandum in opposition, BRI countered that *Dynamis* was inapplicable because the relationship in *Dynamis* "bears no resemblance to the advisory and consulting relationship between Shea and BRI." (ECF No. 57 at 8.) In their reply, the Counterclaim Defendants cited *Kuroda* to support the rule they claim was set out in *Dynamis*, (*i.e.*, that commercial relationships between sophisticated parties do not give rise to fiduciary duties), applies equally to a consulting relationship with a trusted consultant.

Consequently, the Court concludes that BRI has failed to offer good cause to file a surreply. The Court, therefore, **DENIES** BRI's Motion for Leave to File, *Instanter*, Surreply to Motion for Judgment on the Pleadings. (ECF No. 63)

## III. Counterclaim Defendants' Motion

### A. Standard

The Court reviews motions made under Federal Rule of Civil Procedure Rule 12(c) in the same manner it would review a motion made under Federal Rule of Civil Procedure 12(b)(6). *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006). Accordingly, to survive a motion for judgment on the pleadings a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly* , 550 U.S. 544, 570 (2007). To be considered plausible, a claim must be more than

merely conceivable. *Id.* at 556; *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, Ohio, 502 F.3d 545, 548 (6th Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (clarifying the plausibility standard articulated in *Twombly*). The factual allegations of a pleading "must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555.

**B. Discussion**

BRI has alleged counterclaims against Shea LLC and Shea for breach of fiduciary duty and against Shea and Hawk Healthcare LLC for aiding and abetting Shea LLC's breach of fiduciary duty. Shea LLC and Shea argue that they are entitled to judgment on the pleadings because neither is a fiduciary and because the Consultant Agreement governs the parties' rights and obligations toward each other, not the fiduciary duty doctrine. Shea additionally argues that he cannot be held liable for a breach of fiduciary duty as the principal of Shea LLC because Shea LLC did not owe or breach any fiduciary duty to BRI.

BRI contends that it has set forth plausible claims for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty but asks that, if the Court finds that it did not, it be granted permission to amend the complaint to attempt to rehabilitate those claims. BRI also argues that even if this Court dismisses its breach of fiduciary duty claim, it should still be entitled to rely on that claim as a defense to Shea LLC's breach of contract claim against BRI.

The parties agree that Delaware law governs this dispute based upon a choice of law provision in the Consultant Agreement. The Sixth Circuit has noted that a court "need not inquire into choice-of-law issues" when the parties do not dispute which state law applies.

*Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670, 674 n.2 (6th Cir. 1999) (citations omitted). Thus, this Court will apply the law of Delaware to BRI's counterclaims.

**1. Breach of Fiduciary Duty**

In Delaware, breach of fiduciary duty claims are routinely heard in the Chancery Court, which is a court of equity. *Liquidation Trust of Hechinger Inv. Co. of Del., Inc. v. Fleet Retail Fin. Grp.*, 327 B.R. 357, 544 (D. Del 2005) (citing *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163 (Del. Ch. 2002)); *Clark v. Teeven Holding Co., Inc.*, 625 A.2d 869, 875 (Del. Ch. 1992) (Chancery "still retains jurisdiction to hear nearly all the claims for breach of a fiduciary duty"). The Delaware Court of Chancery describes the nature of the fiduciary relationship as follows:

> A fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person to protect the interests of another. The relationship connotes a dependence. A fiduciary relation implies a condition of superiority of one of the parties over the other.

*Cheese Shop Int'l, Inc. v. Steele*, 303 A.2d 689, 690 (Del. Ch. 1973), *rev'd on other grounds*, 311 A.2d 870 (Del. Ch. 1973) (internal citations omitted). The traditional relationships recognized by Delaware as "special" are express trustees and corporate officers and directors. *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604-05 (Del. Ch. 1987).

> Delaware has recognized several other relationships which also carry the "special" nature of a fiduciary relationship, including: general partners; administrators or executors; guardians; and, in special circumstances, joint venturers or principles and their agents. [*McMahon*, 532 A.2d] at 605 (citations omitted). The existence of a principal/agent relationship does not, in and of itself, give rise to a fiduciary relationship. *Maull v. Stokes*, 68 A.2d 200, 202 (Del. Ch. 1949).

*Metro Ambulance, Inc. v. Eastern Medical Billing Inc.*, No. 13929, 1995 Del. Ch. LEXIS 84, * (Del. Ch. July 5, 1995).

"The Court of Chancery generally does not apply fiduciary duty doctrine to ordinary commercial transactions[.]" *Addy v. Piedmonte*, No. 3571-VCP, 2009 Del. Ch. LEXIS 38, at *58 (Del. Ch. March 18, 2009).

> [I]t is vitally important that the exacting standards of fiduciary duties not be extended to quotidian commercial relationships. This is true both to protect participants in such normal market activities from unexpected sources of liability against which they were unable to protect themselves and, perhaps more important, to prevent an erosion of the exacting standards applied by courts of equity to persons found to stand in a fiduciary relationship to others.

*Wal-Mart Stores, Inc. v. AIG Life Ins. Co.* ("*Wal-Mart Stores I*"), 872 A.2d 611, 627 (Del. Ch. 2005), *rev'd in part on other grounds*, 901 A.2d 106 (Del. 2006) ("*Wal-Mart Stores II*"). Therefore, "[b]argained-for commercial relationships between sophisticated parties do not give rise to fiduciary duties." *Addy*, 2009 Del. Ch. LEXIS 38, at *58 (citing *Prestancia Mgmt. Grp., Inc. v. Va. Heritage Found., II LLC*, 2005 Del. Ch. LEXIS 80, at *23-24 (Del. Ch. May 27, 2005)). "In addition, [the Delaware Chancery] Court is chary of expanding the scope of fiduciary duty to a broad set of commercial relationships which traditionally has been regulated by normal market conditions, rather than the scrupulous concerns of equity for persons in special relationships of trust and confidence." *Id.* at 58-59 (citing *Wal-Mart Stores I*, 872 A.2d at 628).

BRI argues that its claim survives the Counterclaim Defendants' motion for judgment on the pleadings because, first, the determination of whether one is a fiduciary is a fact driven inquiry, and therefore, not an appropriate decision to be made at the pleadings stage. BRI next argues that if this Court were to make the fiduciary relationship determination at this stage in the proceedings, BRI has sufficiently alleged each element necessary to establish such a relationship.

Initially, the Court finds BRI's argument that it is inappropriate to determine whether Shea and/or Shea LLC are fiduciaries at the pleadings stage is without merit. Delaware law is

replete with cases making just such a determination, including the cases cited to this Court by BRI. *See e.g.*, *Wal-Mart Stores I*, 872 A.2d 61; *O'Malley v. Boris*, No. Civ.A. 15735-NC, 2002 WL 453928 (Del. Ch. March 18, 2002).

With regard to the pleading of the fiduciary duty claim, BRI was required to allege a relationship wherein it reposed trust and confidence in Shea LLC and Shea and that Shea LLC and Shea were in positions of superiority over BRI. *See Cheese Shop Int'l, Inc.*, 303 A.2d at 690. Shea LLC and Shea do not complain that BRI has failed to sufficiently plead the trust and confidence element of its claim. Rather, these two counterclaim defendants contend that BRI has not, and cannot, plead a relationship that reflects the superiority element of its breach of fiduciary duty claim.

In response, BRI argues that the Delaware courts do not uniformly require superiority, and that, even if the courts did require superiority, BRI clearly alleged it. (ECF No. 57 at 17) (citing ECF No. 9, at ¶ 50: "Shea held himself out as having superior knowledge of the medical device, pharmaceutical, rehabilitation, and other industries, of the protection and management of confidential information, and the administration of business and transactional matters, which all served as predicates for reposing him with special trust and confidence[.]"). BRI's arguments are not well taken.

BRI fails to cite the Court to any Delaware case that did not require superiority to be pleaded in a breach of fiduciary duty claim, and this Court finds none that inform the factual situation before it. As the Court explained *supra*, "[a] fiduciary relation implies a condition of superiority of one of the parties over the other." *Cheese Shop Int'l, Inc.*, 303 A.2d at 690; *see also Wal-Mart I*, 872 A.2d at 624-25 ("A fiduciary relationship implies a dependence, and a

condition of superiority, of one party to another."); *N.S.N. Int'l Indus., N.V. v. E.I. DuPont de Nemours & Co.* ("*DuPont*"), No. 12902, 1994 Del. Ch. LEXIS 46, at *18 (Del. Ch. March 31, 1994) (fiduciary relationship exists "when one party maintains a degree of superiority over the other"). Thus, the fact that one party reposes trust in the other does not, by itself, create a fiduciary relationship. As the Chancery Court has explained, "imposing fiduciary relationships between contracting parties whenever 'trust' is alleged would create a fiduciary relationship every time fraud is alleged, as reliance (*i.e.*, trust) is a necessary element of fraud." *Prestancia Mgmt. Grp.*, 2005 Del. Ch. LEXIS 80, at *24, fn. 50.

With regard to BRI's pleading of superiority, BRI alleged that Shea held himself out as having superior knowledge of the relevant medical industries and business matters and of the protection and management of confidential information. BRI argues that this allegation, and other similar ones alleged in the counterclaim, unequivocally set forth the element of superiority required in a breach of fiduciary duty claim. As Shea LLC and Shea correctly point out, however, BRI's argument related to this allegation misses the mark. Delaware courts do not focus on the fact that one party has superior knowledge in a particular area but instead on the inequality of power, authority, or control between the parties. Indeed, the Chancery Court refers to the superiority requirement interchangeably as the "domination" requirement. *See Wal-Mart Stores I*, 872 A.2d at 624-25 (a fiduciary relationship "generally requires 'confidence reposed by one side and domination and influence exercised by the other.' "); *Addy*, 2009 Del. Ch. LEXIS 38, at *56 ("A fiduciary relationship requires 'confidence reposed by one side and domination and influence exercised by the other.' "); *Prestancia Mgmt. Group, Inc.*,2005 Del. Ch. LEXIS 80, at *23 (same); *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, No. 20456, 2004 Del. Ch.

LEXIS 119, at *39 (Del. Ch. Aug. 3, 2004) (same). Therefore, having specialized knowledge and experience alone does not make one a fiduciary.

> Indeed, many ordinary contractual relationships involve trust in the specialized knowledge or skill of one party to the agreement -- for example, replacing brake pads or heart valves. This would be a broad, and unsuitable, expansion of [the Chancery] Court's jurisdiction and the principles of fiduciary duty.

*Prestancia Mgmt. Group, Inc.*, 2005 Del. Ch. LEXIS 80, at *24 fn. 50.

Thus, to establish a fiduciary relationship, the parties' relationship needs to be one of unequal power, which is not present here. Indeed, the parties' relationship cannot be pleaded as one of unequal power. This is because BRI and Shea LLC negotiated a comprehensive commercial contract that benefits both parties to the tune of millions of dollars for Shea LLC and tens of millions for BRI. In this situation there can be no condition of superiority. As the *DuPont* court explained, the "equality of power between the parties" is evidenced by the agreements they made:

> The agreements evidence a bargained-for exchange between the parties pursuant to which each party received some benefit. They do not evidence or imply a condition of superiority of one of the parties over the other. Rather, NSN and Rank were obligated to develop certain technologies for DuPont, DuPont was obligated to remunerate NSN and Rank for this development, and NSN, Rank and DuPont were obligated to cooperate, together, to submit proposals to the United States government.

1994 Del. Ch. LEXIS 46, at *19. Like the agreements in *DuPont*, the Consultant Agreement here evidences a bargained-for exchange between the parties pursuant to which each party received some benefit. Shea LLC was obligated to market the technologies developed by BRI for which BRI would contract with third parties and would remunerate Shea LLC. This agreement does not evidence or imply a condition of superiority of Shea LLC over BRI.

While it seems clear to the Court that the transaction before it is a garden-variety

commercial contract negotiated by two sophisticated parties–the type of relationship to which the Delaware Court of Chancery generally does not apply the fiduciary duty doctrine–the Court is mindful of the fact that normal business dealings, such as between a business advisor and his or her client, can sometimes take on aspects of a fiduciary relationship. For example, "[a]gents are fiduciaries when they are authorized to 'alter the legal relations between the principal and third persons . . ." *See Wal-Mart Stores II*, 901 A.2d at 113 (citing Restatement (Second) Agency 12 (1958) and *O'Malley v. Boris*, 742 A.2d 845 (Del. 1999)). The *Wal-Mart Stores I* court explained that a business transaction between an advisor or broker and his or her client may indicate a fiduciary relationship when the advisor or broker possesses the power to bind the client contractually. 872 A.2d at 627 ("normal business dealings (such as that of an insurance broker and its client) can sometimes take on certain aspects of a fiduciary relationship, as, for example, where the broker agrees to act as agent for the customer with power to bind the customer contractually").

In the case *sub judice*, however, Shea LLC and Shea had absolutely no power to contractually bind BRI. Section 9 of the Consultant Agreement states that Shea LLC "is in no respect an agent, partner, employee or legal representative of any Bonutti Affiliate or member of the Bonutti Group and shall have no power or authority to bind any Bonutti Affiliate or member of the Bonutti Group or to assume or create any obligation or responsibility, express or implied, on behalf, or in the name of any Bonutti Affiliate or member of the Bonutti Group unless authorized to do so in writing or in a separate agreement." (ECF No. 34 at 8.) While the parties dispute whether Shea LLC acted as an agent regardless of this contractual language, there is no dispute that neither Shea LLC nor Shea could bind BRI to third parties contractually.

BRI also argues that the "extraordinary sums" it paid to Shea LLC required it and Shea to deal in an honest way with BRI and not to engage in self dealing. However, as the Chancery Court has recognized, entering into a contractual relationship carries with it the right to expect honest dealings, an "expectation, one imagines, attends every contractual undertaking." *McMahon*, 532 A.2d at 605. However, "[t]here is no basis in [the] developed law [of Delaware] to accord that expectation the status of 'special trust' that would render the legal remedy for breach of contract inadequate." *Id.* (citation omitted).

BRI relies on *Legatski v. Bethany Forest Assoc., Inc.*, C.A. No. 03C-10-011-RFS, 2006 WL 1229689 (De Sup. Ct. April 28, 2006) for the proposition that another factor weighing in favor of a finding of fiduciary duty is that "BRI fully aligned its interests with Shea's." (ECF No. 57 at 13.) This Court, however, finds *Legatski* inapposite. The *Legatski* court relied heavily on the fact that "Plaintiffs gave total control over to Defendants, and therefore created a special relationship" that was worthy of fiduciary status. *Id.*, at *6. The court warned that:

> The ruling on the fiduciary relationship argument should not be read too broadly. It is driven by and limited to the unique facts of this case. Truly arm's length contracts do not create claims based on alleged breaches of fiduciary relationships.

*Id.*, at *6, fn 4. *Legatski* does not inform an equal relationship like the one in the instant action.

Additionally, the Court notes that another reason the normal business dealings between Shea LLC, Shea, and BRI do not take on the aspects of a fiduciary relationship is the comprehensive twenty-five page[1] contract negotiated by the parties that defines their

[1]In its last Opinion and Order issued in this case, the Court referred to this document as a sixteen page contract. (ECF No. 46 at 8.) The Court, however, did not include the four exhibits attached to the Agreement, which also include bargained-for provisions and account for an additional nine pages. Therefore, the Consultant Agreement is more accurately defined as a twenty-five page document.

relationship. *See Prestancia Mgmt. Grp., Inc.*, 2005 Del. Ch. LEXIS 80, at *23 (noting that the "contract between VHF and Prestancia is comprehensive" and that "there are no allegations that the negotiations were one-sided" as two of the reasons for dismissing the breach of fiduciary duty claim). In this case, BRI's claims against Shea LLC for breach of fiduciary duty and for breach of contact[2] are based on the same alleged conduct, *i.e.*, improper competition, undisclosed conflicts of interest, and breaches of confidentiality. The Counterclaim Defendants accurately compare BRI's allegations:

> Shea LLC breached its fiduciary duties by "improperly competing with BRI," and breached the Consultant Agreement because it "was obligated to not compete with BRI" and "breached this obligation."

(ECF No. 48 at 6) (quoting ECF No. 9 at, ¶¶ 51, 69-70).

> Shea LLC breached its fiduciary duties by "failing to adequately or timely disclose conflicts of interest," and breached the Consultant Agreement by failing to "inform Bonutti and BRI of conflicts of interest"

*Id.* (quoting ECF No. 9 at, ¶¶ 54, 63).

> Shea LLC breached its fiduciary duties by "failing to properly maintain [as confidential BRI's confidential and proprietary intellectual property, ideas, techniques, and business concepts and strategies] . . . [and] misusing and misappropriating [BRI's] confidential and proprietary intellectual property, ideas, techniques, and business concepts and strategies," and breached the Consultant Agreement by "fail[ing] to protect and otherwise misus[ing] BRI's confidential and proprietary intellectual property, including patents and trademark, ideas, techniques, and business concepts and strategies"

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[2]The Counterclaim Defendants argue that even if this Court were to find that Shea LLC and/or Shea were fiduciaries, they are still entitled to dismissal of the breach of fiduciary claim against them because the Consultant Agreement governs the parties' relationship causing the fiduciary duty claim to be superfluous. The Court, however, concludes that neither Shea LLC nor Shea are fiduciaries to BRI. Consequently, the Court declines to address the argument that the Consultant Agreement prohibits a fiduciary duty claim in any more detail than it does here, *i.e.*, as an additional factor supporting the Court's conclusion that Shea LLC and Shea are not fiduciaries.

*Id.*, at 6-7 (quoting ECF No. 9 at, ¶¶ 52-53, 66).

Implying any additional or inconsistent duty to the parties' bargained-for contractual relationship "would nullify the parties' express bargain." *Related Westpac LLC v. JER Snowmass LLC*, No. 5001-VCS, 2010 Del. Ch. LEXIS 158, at *31 (Del. Ch. July 23, 2010). Thus, if BRI is arguing that Shea LLC failed to comply with its contractual agreement, that claim is properly filed as a breach of contract claim. To the extent that BRI attempts to argue that Shea LLC failed to uphold a duty that is inconsistent with or additional to the parties' contractual agreement, that claim would nullify the parties' express bargain. *See id.*, at *28 ("When, as the parties here did, they cover a particular subject in an express manner, their contractual choice governs and cannot be supplanted by the application of inconsistent fiduciary duty principles that might otherwise apply as a default.").

Consequently, while some cases have found certain aspects of a commercial relationship to implicate fiduciary duties, applying those cases here would require such a broad reading of them as to engulf in fiduciary duties an ordinary commercial relationship. *Wal-Mart Stores I*, 872 A.2d at 625 ("Furthermore, while some cases in Delaware have found certain aspects of a commercial relationship to implicate fiduciary duties, these cases should not be read so broadly as to engulf in fiduciary duties ordinary commercial relationships.").

Based on the foregoing, the Court concludes that imposing fiduciary duties upon Shea LLC, which is a party to an ordinary commercial transaction, would impose "unexpected sources of liability" upon Shea LLC "against which [it was] unable to protect [itself]." *Wal-Mart Stores I*, 872 A.2d at 627. It would also require turning a blind eye to the Chancery Court's repeated warning that "[i]t is vitally important that the exacting standards of fiduciary duties not be

extended to quotidian commercial relationships" so "to prevent an erosion of the exacting standards applied by courts of equity to persons found to stand in a fiduciary relationship to others." *Id.* Thus, BRI has failed to set forth a claim against Shea LLC for breach of fiduciary that is plausible on its face.

The Court also concludes that BRI's breach of fiduciary duty claim against Shea individually for the alleged breaches of fiduciary duty committed while acting on behalf of his company Shea LLC also fails to state a claim that is plausible on its face. While an officer of a corporation can be held liable in certain circumstances for participation in the torts of his company, that principle applies only where the company has committed a tort in the first place. *See Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC*, No. 3658-VCS, 2009 WL 1124451, at *12 (Del. Ct. Ch. April 20, 2009). As the Court has explained, however, BRI has no claim against Shea LLC for breach of fiduciary duty, and therefore, BRI has no claim against Shea either.

Accordingly, the Court **GRANTS** the Motion for Judgment on the Pleadings of Counterclaim Defendants William F. Shea, LLC; William F. Shea; and Hawk Healthcare, LLC as it relates to BRI's breach of fiduciary duty claim for relief.

**2. Aiding and Abetting a Breach of Fiduciary Duty**

Under Delaware law a claim for aiding and abetting a breach of fiduciary duty requires a "legally sufficient underlying claim for breach of fiduciary duty[.]" *Madison Realty Co. v. AG ISA, LLC*, No. 18094, 2001 Del. Ch. LEXIS 37, at *21, fn. 19 (Del. Ch. Ct. April 17, 2001). Because BRI's underlying fiduciary duty claim cannot survive the Counterclaim Defendants' motion for judgment on the pleadings, BRI's aiding and abetting claim necessarily fails as well.

*See id.* ("The plaintiffs' claim against Angelo Gordon for aiding and abetting AGGP's breaches of fiduciary duty must also be dismissed because there is no legally sufficient underlying claim for breach of fiduciary duty against AGGP.") Therefore, BRI has failed to allege a claim for aiding and abetting a breach of fiduciary duty that has facial plausibility.

Accordingly, the Court **GRANTS** the Motion for Judgment on the Pleadings of Counterclaim Defendants William F. Shea, LLC; William F. Shea; and Hawk Healthcare, LLC as it relates to BRI's aiding and abetting a breach of fiduciary duty claim for relief.

**3. Request to Amend**

BRI requests permission to amend its counterclaims if the Court grants the Counterclaim Defendants' motion for judgment on the pleadings. Although Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires," a district "court need not grant leave to amend . . . where amendment would be 'futile.' " *Miller v. Calhoun Cty*, 408 F.3d 803, 817 (6th Cir.2005) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "Amendment of a complaint is futile when the proposed amendment would not permit the complaint to survive a motion to dismiss." *Id.* (citing *Neighborhood Dev. Corp. v. Advisory Council on Historic Pres.*, 632 F.2d 21, 23 (6th Cir. 1980)).

In the case *sub judice*, amendment would be futile because, as the Court explained in detail above, neither Shea LLC nor Shea possess the requisite superiority or domination over BRI to be considered a fiduciary. Indeed, the relationship between Shea LLC and BRI was one of equal power wherein each party negotiated a comprehensive twenty-five page contract that defined the parameters of their relationship. Therefore, the Court concludes that any amendment to BRI's breach of fiduciary duty and aiding and abetting a breach of fiduciary duty claims

would be futile and BRI's request to do so is denied.

**4. Counterclaims as Defenses**

BRI contends that, "[e]ven if BRI's breach of fiduciary duty claim were superfluous (which it is not, . . . ), Shea's fiduciary breaches would still be a viable and important defense to Shea's [breach of contract] claim against BRI." (ECF No. 57 at 27.) The Court, however, does not dismiss BRI's fiduciary duty claim because it was superfluous; in other words, the Court does not dismiss because, even though Shea LLC and Shea are fiduciaries, BRI's claim is redundant to the breach of contract claim. Instead, the Court dismisses the breach of fiduciary duty claim because Shea LLC and Shea are not fiduciaries to BRI, and therefore, owed no fiduciary duty to BRI. Consequently, Shea LLC and Shea could not have breached any fiduciary duty and BRI cannot rely upon "Shea's fiduciary breaches" as a defense.

## IV. Conclusion

For the reasons set forth above, the Court **GRANTS** the Motion for Judgment on the Pleadings of Counterclaim Defendants William F. Shea, LLC; William F. Shea; and Hawk Healthcare, LLC (ECF No. 48) and **DENIES** Bonutti Research, Inc.'s Motion for Leave to File, *Instanter*, Surreply to Motion for Judgment on the Pleadings (ECF No. 63).

**IT IS SO ORDERED.**

**/s/ Gregory L. Frost**
**GREGORY L. FROST**
**UNITED STATES DISTRICT JUDGE**