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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

WILLIAM ANTHONY COLÓN,

Plaintiff

v.

RUBÉN BLADES, ROBERTO
MORGALO, MARTÍNEZ, MORGALO &
ASSOCIATES,

Defendants

CIVIL 07-1380 (JA)

RUBÉN BLADES,

Cross-Plaintiff

v.

ROBERTO MORGALO, in his personal
capacity, and as owner and member
of MARTÍNEZ, MORGALO &
ASSOCIATES, LLC; MARTÍNEZ,
MORGALO & ASSOCIATES, LLC,

Cross-Defendants

OPINION AND ORDER

This matter is before the court on motion for summary judgment filed by cross-defendants, Roberto Morgalo, in his personal capacity, and as owner and member of Martínez, Morgalo & Associates, LLC; Martínez, Morgalo & Associates, LLC, on June 28, 2010. (Docket No. 230) Cross-plaintiff, Rubén Blades, opposed cross-defendant’s motion on July 13, 2010. (Docket No. 233.) On August 18,

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5 2010, cross-defendants replied. (Docket No. 243.) For the reasons set forth
6 below, the motion for summary judgment is hereby DENIED.

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8 I. OVERVIEW

9 Cross-defendants argue that cross-plaintiff lacks standing to sue for breach
10 of contract and breach of fiduciary duty because the injuries alleged in the
11 amended cross claim were allegedly suffered only by Rubén Blades Productions
12 Inc. ("RBP"), and not by cross-plaintiff himself. (Docket No. 230, at 2.) According
13 to cross-defendants, all dealings between Martínez, Morgalo & Associates, LLC
14 ("MM&A"), and cross-plaintiff were done through RBP who is not a party in this
15 case. (Id. at 4.) They state that all moneys collected by MM&A as booking agents
16 of cross-plaintiff were done for RBP and not for cross-plaintiff in his personal
17 capacity. (Id.) Specifically, cross-defendants state that all monies received by
18 MM&A for the *Siembra* concert held on May 3, 2003 in Puerto Rico, where cross-
19 plaintiff and Willy A. Colón performed, were not transferred and paid to the artists
20 but to their respective companies, that is Elmallo, Inc. ("EMI") and RBP. (Id. at
21 5.); see Colon v. Blades, 2009 WL 2612523 at 5. Additionally, they claim that
22 RBP was the one who paid the taxes to the Commonwealth of Puerto Rico for the
23 money that was collected. (Id.) Moreover, cross-defendants argue that the loan
24 that cross-plaintiff allegedly took from Victor Manuel was not taken by him in his
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5 personal capacity and was paid with monies from RBP. (Id.) As to the out of
6 pocket expenses incurred by cross-plaintiff for the *Siembra* concert, cross-
7 defendants claim that they were fully reimbursed by RBP. (Id.) Thus, cross-
8 defendants posit that because cross-plaintiff did not suffer any type of
9 individualized harm he lacks standing to assert any of his claims and as a result
10 the amended cross-claim has to be dismissed. (Id. at 7.)

11
12 Cross-plaintiff counters that he is the proper party to this case. (Docket No.
13 233, at 3.) He argues that cross-defendants argument is disingenuous. (Id. at
14 4.) According to cross-plaintiff, if the cross-defendants believe that the cause of
15 action is not being prosecuted by the real party in interest, they should have
16 objected under Fed. R. Civ. P. 17(a). (Id. at 6.) He argues that determining
17 whether a party has standing comes into play when a court has to resolve an
18 actual case or controversy, while Rule 17(a) ensures that a judgment is entered
19 for or against the correct party. (Id.) Cross-plaintiff asserts that he has standing
20 to pursue his claims against cross-defendants. (Id. at 7.) However, he claims
21 that by cross-defendants claiming that RBP would be the ultimate recipient of any
22 damages that might be awarded, the inquiry in this case should not be whether
23 he has standing but rather whether he is the real party in interest pursuant to
24 Rule 17(a). (Id. at 8.) Although cross-plaintiff believes that an objection under
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5 Rule 17(a) is untimely and should be deemed waived, he submits that he is the
6 real party in interest to this case. (Id. at 8 & 9.) Thus, he argues that since the
7 merits of the amended cross claim have already been adjudicated and default
8 judgment has been rendered against MM&A, cross-defendants' motion for
9 summary judgment should be denied. (Id. at 7.)
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11 II. STANDARD OF REVIEW

12 A. Summary Judgment

13 Summary judgment is appropriate when "the pleadings, depositions,
14 answers to interrogatories and admissions on file, together with the affidavits, if
15 any, show that there is no genuine issue as to any material fact and that the
16 moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).
17 To succeed on a motion for summary judgment, the moving party must show that
18 there is an absence of evidence to support the nonmoving party's position.
19 Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has
20 properly supported its motion, the burden shifts to the nonmoving party to set
21 forth specific facts showing there is a genuine issue for trial and that a trier of fact
22 could reasonably find in its favor. Santiago-Ramos v. Centennial P.R. Wireless
23 Corp., 217 F.3d 46, 52 (1st Cir. 2000). The party opposing summary judgment
24 must produce "specific facts, in suitable evidentiary form," to counter the evidence
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5 presented by the movant. López-Carrasquillo v. Rubianes, 230 F.3d 409, 413 (1st
6 Cir. 2000) (quoting Morris v. Gov't Dev. Bank of P.R., 27 F.3d 746, 748 (1st Cir.
7 1994)). A party cannot discharge said burden by relying upon "conclusory
8 allegations, improbable inferences, and unsupportable speculation." Id.; see also
9 Carroll v. Xerox Corp., 294 F.3d 231, 236-37 (1st Cir. 2002) (quoting J. Geils
10 Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1251
11 (1st Cir. 1996)) ("[N]either conclusory allegations [nor] improbable inferences'
12 are sufficient to defeat summary judgment.").

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15 The court must view the facts in a light most hospitable to the nonmoving
16 party, drawing all reasonable inferences in that party's favor. See Patterson v.
17 Patterson, 306 F.3d 1156, 1157 (1st Cir. 2002). A fact is considered material if
18 it has the potential to affect the outcome of the case under applicable law.
19 Nereida-González v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993).

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21 Additionally, the facts must be supported by specific reference to the record,
22 thereby pointing the court to any genuine issues of material fact and eliminating
23 the problem of the court having "to ferret through the Record." Domínguez v. Eli
24 Lilly & Co., 958 F. Supp. 721, 727 (D.P.R. 1997); see also Carmona-Ríos v.
25 Aramark Corp., 139 F. Supp. 2d 210, 214-15 (D.P.R. 2001); Velázquez-Casillas
26 v. Forest Lab., Inc., 90 F. Supp. 2d 161, 163 (D.P.R. 2000). Failure to comply
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5 with this rule may result, where appropriate, in judgment in favor of the opposing
6 party. Morales v. A.C. Orsleff's EFTF, 246 F.3d 32, 33 (1st Cir. 2001).

7 B. Local Rule 56

8 In this court, Local Rule 56(b), previously Local Rule 311.12, requires a
9 motion for summary judgment to be accompanied by a separate, short and
10 concise statement of material facts that supports the moving party's claim that
11 there are no genuine issues of material fact in dispute. Davila v. Potter, 550 F.
12 Supp. 2d 234, 238 (D.P.R. 2007) (citing D.P.R. L. Civ. R 56). These facts are then
13 deemed admitted until the nonmoving party provides a similarly separate, short
14 and concise statement of material facts establishing that there is a genuine issue
15 in dispute. D.P.R. L. Civ. R 56(e); Morales v. A.C. Orsleff's EFTF, 246 F.3d at 33;
16 Ruiz Rivera v. Riley, 209 F.3d 24, 27-28 (1st Cir. 2000); Domínguez v. Eli Lilly &
17 Co., 958 F. Supp. at 727; see also Corrada-Betances v. Sea-Land Serv., Inc., 248
18 F.3d 40, 43 (1st Cir. 2001). "Additionally, the facts must be supported by specific
19 reference to the record, thereby pointing the court to any genuine issues of
20 material fact and eliminating the problem of the court having 'to ferret through
21 the Record.'" Pica-Hernández v. Irizarry-Pagán, 671 F. Supp. 2d 289, 293 (D.P.R.
22 2009) (quoting Domínguez v. Eli Lilly & Co., 958 F. Supp. at 727). "Any
23 statement of fact provided by any party which is not supported by citation to the
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5 record may be disregarded by the court, and any supported statement which is
6 not properly presented by the other party shall be deemed admitted.” Del Toro-
7 Pacheco v. Pereira-Castillo, 662 F. Supp. 2d 202, 210 (D.P.R. 2009). “Failure to
8 comply with this rule may result, where appropriate, in judgment in favor of the
9 opposing party.” Id. (citing Morales v. A.C. Orssleff's EFTF, 246 F.3d at 33;
10 Stepanischen v. Merch. Despatch Transp. Corp., 722 F.2d 922, 932 (1st Cir.
11 1983)). Also, “[t]he First Circuit has repeatedly held that the district court is
12 justified in deeming one party's submitted uncontested facts to be admitted when
13 the other party fails to file an opposition in compliance with Local Rule 56.”
14 González-Rodríguez v. Potter, 605 F. Supp. 2d 349, 357 (D.P.R. 2009) (citing
15 Fontanez-Nuñez v. Janssen Ortho LLC, 447 F.3d 50, 55 (1st Cir.2006); Torres-
16 Rosado v. Rotger-Sabat, 335 F.3d 1, 4 (1st Cir.2003); Corrada-Betances v. Sea-
17 Land Serv., Inc., 248 F.3d 40, 43-44 (1st Cir.2001)).
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21 After examining cross-defendants’ statement of uncontested facts and
22 cross-plaintiff’s opposition to those facts (Docket Nos. 231 & 233-1), I find there
23 are no genuine issues as to the following facts:
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- 25 1. Mr. Blades is of legal age and a resident of the United States.
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5 2. RBP is a Type S corporation under federal tax law and was incorporated
6 in the State of New York on January 23, 1986 with its principal place of business
7 in Boca Ratón, Florida.

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9 3. Mr. Morgalo is of legal age, married, and resident of the State of Florida.

10 4. From December 1999 until early 2000, MM&A performed booking duties
11 on behalf of Mr. Blades through RBP.

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13 5. RBP is managed by Shustek & Associates, LLC. Mr. Blades is an
14 employee and sole stockholder of RBP.

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16 6. All monies received by MM&A for the *Siembra* concert were not
17 transferred or paid to Mr. Colón and Mr. Blades but to their respective
18 corporations, EMI and RBP.

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20 7. Taxes for the concert proceeds were paid by RBP to the Commonwealth
21 of Puerto Rico.

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23 8. MM&A is and at all relevant times was a corporation organized under the
24 laws of the State Delaware and doing business in the State of New York.

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26 9. MM&A was organized in 1999 and its business purpose was to provide
27 booking and management agency services, including road managing for musical
28 artists.

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5 10. At all relevant times, Mr. Morgalo and MM&A were involved in the
6 business of promoting and representing performers of salsa and Latin music.

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8 11. As an agent, Mr. Morgalo acknowledged a duty of diligence and loyalty
9 to his clients, and a duty to let a client know when payments were received.

10 12. For their services MM&A received commissions.

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12 13. Mr. Morgalo served as President of MM&A from November 1999 until
13 January 2003.

14 14. MM&A has never been dissolved.

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16 15. No written letter or corporate resolution exists for the resignation of Mr.
17 Morgalo as President, or his substitution or discharge as officer of MM&A.

18 16. Arturo Martínez was Mr. Morgalo's business partner at MM&A.

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20 17. At all relevant times Mr. Morgalo was a majority shareholder (51%) and
21 owned a controlling interest in MM&A. Mr. Martínez owned 49% membership
22 interest.

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24 18. Mr. Morgalo had ongoing meetings on a daily basis with Mr. Martínez.
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5 19. On or about 2002, MM&A began negotiations for the performance of a
6 reunion concert between Mr. Blades and Mr. Colón to commemorate the album
7 *Siembra*.

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9 20. On or about January 22, 2003, MM&A acting as joint agent for Mr.
10 Blades and Mr. Colón, entered into an engagement contract with the firm of Dissar
11 Production/Ariel Rivas for one concert performance in San Juan, Puerto Rico, for
12 a total fee of \$350,000 that was to be divided among Mr. Colón and Mr. Blades.
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14 21. The engagement contract provided for one concert performance in San
15 Juan for a total fee of \$350,000 that was to be divided among Mr. Blades and Mr.
16 Colón.
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18 22. An "all-inclusive" fee means that the promoter does not pay for any
19 travel or concert expenses, other than those stipulated in the engagement
20 contract.
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22 23. Pursuant to the engagement contract payment of the agreed to fee
23 would be made to MM&A as agents for Mr. Blades and Mr. Colón.

24 24. MM&A was hired to act as managers for Mr. Blades and Mr. Colón with
25 respect to the *Siembra* concert in return for a commission, and as such, MM&A
26 acted as agents for both Mr. Blades and Mr. Colón and were to handle the
27 collection and the disbursement of all remuneration payable to the artists.
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5 25. Pursuant to the engagement contract, both Mr. Blades and Mr. Colón
6 were to be paid their full fee prior to traveling to San Juan.

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8 26. Mr. Morgalo admitted having done a previous show with Mr. Colón and
9 that all of his dealings with Mr. Colón and Mr. Blades were as an officer of MM&A.

10 27. During the first quarter of 2002, Mr. Morgalo acting as officer of MM&A,
11 negotiated on behalf of Mr. Blades with Ariel Rivas the booking of a show with
12 Danny Rivera to be performed in the Dominican Republic on March 16, 2002. The
13 show never took place.
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15 28. Mr. Morgalo acting as officer of MM&A, negotiated on behalf of Mr.
16 Blades with Mr. Rivas, the booking of a show with Cheo Feliciano in Puerto Rico.
17 The show was scheduled for December 7, 2002 and after it was cancelled by Mr.
18 Rivas, it was rescheduled for February 16, 2003.
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20 29. Mr. Rivas paid a deposit to MM&A in the amount of \$62,500 for the Cheo
21 Feliciano/Ruben Blades show to be held in Puerto Rico. Said show was cancelled
22 and never took place.
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24 30. The \$62,500 received for the Cheo Feliciano/Ruben Blades show was
25 applied as a credit toward the *Siembra* concert and said application is reflected in
26 one of the existing engagement contract versions.
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5 31. Only Mr. Blades could have authorized such transaction.

6 32. Mr. Blades did not authorize application of the \$62,500 as a credit
7 against the *Siembra* fee.
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9 33. The promoters paid the fee in full.

10 34. Mr. Colón received an up-front advance of \$62,500 from MM&A.

11 35. Mr. Blades received an up-front advance of \$68,000 from MM&A.

12 36. MM&A received a commission of \$35,000 for the *Siembra* concert.

13 37. MM&A paid an up-front advance of \$62,500 to Mr. Colón.

14 38. MM&A paid an up-front advance of \$68,000 to Mr. Blades.

15 39. On January 16, 2003 Mr. Morgalo received a warning order from the
16 U.S. Army to report to a base at Bethlehem, Pennsylvania on January 21, 2003.
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18 40. On or about January 16, 2003 Morgalo had a farewell party at his house.
19 Mr. Rivas attended said party and was informed by Mr. Morgalo that he had to do
20 everything with Mr. Martínez.
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22 41. Mr. Morgalo departed the United States on March 11, 2003.

23 42. The money paid in full by the promoters was used to settle other debts
24 of MM&A.
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5 43. On April 29, Mr. Martínez tried to commit suicide, of which Mr. Morgalo
6 subsequently learned.

7 44. MM&A was in financial distress.

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9 45. Mr. Morgalo procured and obtained an Economic Injury Disaster Loan
10 from the Small Business Association ("SBA").

11 46. The SBA loan was used to pay other loans.

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13 47. Mr. Morgalo wrote a letter to Mr. Martínez while in prison explaining his
14 intention to procure another SBA loan to solve the problems with Mr. Blades.

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16 48. Mr. Morgalo sought a loan available for military personnel to pay the
17 money that was owed to Mr. Blades.

18 49. Mr. Morgalo received a salary from MM&A.

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20 50. Mr. Morgalo did not observe corporate formalities, referring to the
21 manner of conducting business of MM&A as "flexible" and "informal leadership."

22 51. Mr. Morgalo loaned money to MM&A, some repaid, some not.

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24 52. Mr. Martínez did not have the power to override Mr. Morgalo's decisions.

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26 53. As to the *Siembra* concert, MM&A had no separate mind, will or
27 existence of its own.

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5 54. Once informed on January 16, 2003, of his mobilization, Mr. Morgalo
6 states he had no involvement with the business affairs of MM&A and that the last
7 thing on his mind at that time were the affairs of the business.

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9 55. According to Mr. Morgalo, once called to active duty Mr. Morgalo's
10 obligations and duties were to the United States of America and not to Mr. Blades
11 or Mr. Colón.

12 III. ANALYSIS

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14 As a general rule "shareholders . . . do not have standing to sue in their
15 personal capacities unless the alleged misconduct causes harm to them separate
16 and distinct from the injury inflicted upon the . . . corporation." Pagán v.
17 Calderon, 448 F.3d 16, 29 (1st Cir. 2006). "It is a basic principle of corporate law
18 that corporate rights of action are distinct from stockholders' rights. Where a
19 cause of action exists in favor of a corporation, and action must be brought by the
20 corporation itself in the corporate name, and cannot be brought by a stockholder
21 on his or her own behalf." F.C. Imports, Inc. v. First Bank of Boston, N.A., 816
22 F. Supp. 78, 87 (D.P.R. 1993) (citing In re Dein Host, Inc., 835 F.2d 402 (1st Cir.
23 1987)). This is true "[e]ven when all the stock of a corporation is owned by a sole
24 shareholder" Id. at 409. "Exceptions to the general rule exist if the injury
25 'is peculiar to [the stockholder] alone or 'if it is absolutely inconceivable that the
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5 corporation itself would pursue a claim for the misconduct.” TC Investments,
6 Corp. v. Becker, ___ F. Supp. 2d ____, 2010 WL 2593525, * 12 (D.P.R. June 28,
7 2010) (quoting Pagán v. Calderon, 448 F.3d at 28). In case that none of the
8 exceptions are met, “only the corporation, a receiver, or a stockholder acting
9 derivatively in the corporation’s name may sue to redress an injury to the
10 corporation.” Id. (citing Bishay v. Am. Isuzu Motors, Inc., 404 F.3d 491, 495 (1st
11 Cir. 2005)).

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14 Cross-plaintiff asserts that he has standing because he was the one who
15 suffered the injury alleged in the amended cross-claim. (Docket No. 233, at 7.)
16 He claims that having been initially blamed for the wrongful acts of MM&A and Mr.
17 Morgalo, and having suffered an economic loss from the nonpayment of the
18 *Siembra* concert funds, he has a personal stake in the outcome if this case. (Id.
19 at 9.) Also, cross-plaintiff claims that the injury suffered is traceable to Mr.
20 Morgalo’s unlawful and negligent conduct, and redressable by the requested relief.
21 (Id. at 10.)

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24 Cross-defendants riposte that cross-plaintiff failed to rebut the argument as
25 to his lack of standing claim and instead contest that he is the real party in
26 interest. (Docket No. 243, at 2.) They argue that cross-plaintiff ignores that RBP
27 is a corporation and that it was created to conduct business on behalf of its
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5 stockholders. (Id. at 4.) Cross-defendants thus insist that it was RBP and not
6 cross-plaintiff who suffered the alleged injury, and had a business relationship
7 with MM&A. (Id. at 5.) They claim that since the damages alleged in the
8 amended cross-claim belong only to RBP, cross-plaintiff does not have any
9 standing to assert them. (Id.) Cross-defendants are correct.
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11 Cross-plaintiff fails to show that the injury alleged in the amended cross-
12 claim is his alone. Aside from claiming that the injury was inflicted only upon
13 himself, cross-plaintiff does not take the time to explain how and why it only
14 affects him and not RBP. This sophomoric argument cannot lead me to
15 reasonably conclude that the alleged misconduct by cross-defendants only affects
16 cross-plaintiff and not RBP in any way. Furthermore, there is no indication that
17 it would have been totally inconceivable for RBP to pursue the damages asserted
18 by cross-plaintiff. Thus, cross-plaintiff does not have any standing to sue cross-
19 defendants in his personal capacity. Nevertheless, this does not mean that
20 amended cross-claim warrants dismissal.
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24 Rule 17(a) of the Federal Rules of Civil Procedure directs that an action has
25 to be "prosecuted in the name of the real party in interest." Lincoln Property Co.
26 v. Roche, 546 U.S. 81, 91 (2005) (quoting Fed. R. Civ. P. 17(a)(1)). Rule 17(a)'s
27 requirement "is based on the principle that the pleadings in a case 'should be
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5 made to reveal and assert the actual interest of the plaintiff, and to indicate the
6 interests of any others in the claim.” Agri-Mark, Inc. v. Niro, Inc., 190 F.R.D.
7 293, 295 (D. Mass. 2000) (quoting United States v. Aetna Cas. & Sur. Co., 338
8 U.S. 366, 382 (1949)). Moreover, Rule 17(a)(3) states that:
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10 The court may not dismiss an action for failure to prosecute in the
11 name of the real party in interest until, after an objection, a
12 reasonable time has been allowed for the real party in interest to
13 ratify, join, or be substituted into the action. After ratification, joinder,
or substitution, the action proceeds as if it had been originally
commenced by the real party in interest.

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15 Fed. R. Civ. P. 17(a)(3). “It has been held that Rule 17(a) serves the purpose of
16 protecting defendants `from facing a subsequent similar action brought by one not
17 a party to the present proceeding and to ensure that any action taken to
18 judgment will have its proper effect as *res judicata*.” Pabon-Lugo v. MONY Life
19 Ins. Co. of America, 465 F. Supp. 2d 123, 128 (D.P.R. 2006) (quoting Prevor-
20 Mayorsohn Carribean, Inc. v. Puerto Rico Marine Management, Inc., 620 F.2d 1,
21 4 (1st Cir. 1980)).
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23 Since cross-plaintiff does not have standing to sue cross-defendants, the
24 real party in interest in this case would have to be RBP. However, cross-plaintiff
25 believes otherwise. According to cross-plaintiff, the engagement contract was
26 executed in his name and for his benefit. (Docket No. 233, at 10.) He states
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5 that as beneficiary of the engagement contract he was entitled to one half of the
6 all-inclusive fee after the expenses were deducted. (Id.) Thus, he argues that he
7 has a legal right under Puerto Rico substantive law to enforce the claim in
8 question. (Id. at 11.) Specifically, cross-plaintiff claims that he is asserting his
9 right to be made whole by the agents that represented him, and failed to honor
10 their obligations converting funds paid by the *Siembra* promoters to settle other
11 debts. (Id. at 12.) In other words, cross-plaintiff claims that he is the real party
12 in interest because he is asserting his own rights, not the rights of RBP. (Id.)
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15 Although cross-plaintiff claims that the engagement contract was executed
16 on his behalf and for his benefit, the fact remains that the funds received for the
17 *Siembra* concert were paid to RBP. Also, it was RBP not cross-plaintiff which paid
18 the taxes for said funds to the Commonwealth of Puerto Rico. It is well settled
19 that “[a] real party in interest is one who, according to the substantive law,
20 possesses the right sought to be enforced and not necessarily the person who will
21 ultimately benefit from the recovery.” Bass v. Campagnone, 655 F. Supp. 1390,
22 1392 (D.R.I. 1987) (citations omitted). As stated above, there is nothing that
23 might suggest that the injury allegedly suffered by cross-plaintiff is separate and
24 distinct from any injury that RBP might have also suffered as a result of cross-
25 defendants’ actions. On the contrary, the fact that cross-plaintiff is RBP’s sole
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5 shareholder makes it even more difficult to find that he suffered some
6 particularized injury. He claims that in his dealing with MM&A he would determine
7 how much money was going to be charged and when payment was going to be
8 received. (Docket No. 233, at 11.) Cross-plaintiff's actions if anything defeat any
9 possibility for me to find that the rights that are sought to be vindicated are his
10 and not RBP's. Any reasonable person would find that in taking these actions
11 Cross-plaintiff and RBP's interests could be affected both positively and negatively.
12 Although cross-plaintiff claims that he is the ultimate beneficiary of recovery, he
13 conducted all of his businesses through RBP. Therefore, since RBP is the one who
14 possesses the right sought to be enforced, cross-plaintiff is not the real party in
15 interest.
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19 Although I conclude that cross-plaintiff does not have standing and is not
20 the real party in interest, I will not dismiss the amended cross-claim. I will allow
21 cross-plaintiff to amend the pleadings so that RBP may substitute him. Although
22 an amendment would have been preferable at the early stages of the case,
23 allowing it now will not require re-opening discovery, create additional costs, and
24 substantial changes to the course of the case. See Caribbean Parts Agency, Inc.
25 v. Hastings Mfg. Co., LLC, 262 F.R.D. 88, 90 (D.P.R. 2009); Maddalone v. Okada
26 Shosen, KK, 756 F.2d 886, 887 (1st Cir. 1985) (holding that pleadings can be
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5 amended whenever justice so requires). Also, the amendment must be allowed
6 because it will not cause any prejudice to cross-defendants. By permitting such
7 an amendment it will prevent a subsequent similar action against cross-
8 defendants. Furthermore, there is nothing that suggests that failing to name RBP
9 as the real party in interest was done in bad faith. If not for cross-defendants'
10 belated challenge to cross-plaintiff capacity to sue, cross-plaintiff would have still
11 been under the wrong impression that the real party in interest was him and not
12 RBP. See 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure
13 § 1542 (3d ed. 1990) (noting that failure to challenge a party's capacity either by
14 motion at a very early stage in the proceeding or in the responsive pleading may
15 result in a waiver of the defense). "Negligence is not, per se, a bar to a
16 substitution in the absence of any showing of prejudice." Maddalone v. Okada
17 Shosen, KK, 756 F.2d at 887. In cases such as the present one, "where an
18 honest mistake or inadvertent error is concerned, injustice is to be avoided by
19 allowing the real party in interest to be substituted into the action." Caribbean
20 Parts Agency, Inc. v. Hastings Mfg. Co., LLC, 262 F.R.D. at 92.
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26 IV. CONCLUSION
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5 For the reasons set forth above, cross-defendant's motion for summary is
6 DENIED in its entirety.

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At San Juan, Puerto Rico, this 2d day of September, 2010.

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S/ JUSTO ARENAS
Chief United States Magistrate Judge

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