

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-16-249

TUCKER CIANCHETTE, et al.,

Plaintiffs

v.

ERIC CIANCHETTE, et al.,

Defendants

STATE OF MAINE
Cumberland, ss. Clerk's Office

JAN 12 2018
2:45 pm
RECEIVED

ORDER

This case arises from an attempt by Tucker Cianchette to buy out the interests of his father and stepmother, Eric Cianchette and Peggy Cianchette, in PET LLC, a family corporation that owns the Casco Bay Ford car dealership.¹ Tucker contends that Eric and Peggy breached an agreement to sell their interests in the LLC and that, after a second purchase and sale contract was agreed, Eric and Peggy breached that agreement as well. Tucker also has asserted claims against Eric and Peggy in connection with the management of PET LLC.

For their part, Eric and Peggy respond that they had the right to terminate the purchase agreement, that no enforceable subsequent agreement was reached, and that Tucker's other claims fail as a matter of law. Eric and Peggy have also asserted counterclaims against Tucker on their behalf and on behalf of PET LLC for alleged breaches of Tucker's obligations to the LLC.

Before the court are (1) a motion for summary judgment by Eric, Peggy, PET LLC, and Cianchette Family LLC seeking dismissal of all of the claims asserted in the complaint filed by plaintiffs Tucker and CBF Associates LLC, (2) a motion for summary judgment by Tucker seeking

¹ The Cianchettes will subsequently be referred to by their first names in this order.

dismissal of all of the counterclaims asserted by Eric, Peggy, and PET LLC, (3) two motions to strike filed by defendants, and (4) two motions to strike filed by plaintiffs.

The court will first address the various motions to strike.

Defendants' Motions to Strike

Defendants are seeking to strike Tucker's November 13, 2017 affidavit and Sean Rankin's November 10, 2017 affidavit, both submitted in opposition to defendants' motion for summary judgment.

Motions to strike are not permitted in connection with summary judgment. *See* M.R.Civ.P. 56(i). By its terms the rule applies to motions seeking to strike assertions, denials or qualifications in Rule 56(h) statements. In the court's view this rule should not be circumvented by instead moving to strike underlying affidavits. The court will, however, review defendants' arguments in determining whether and to what extent the court can consider the contents of Tucker's November 13, 2017 affidavit and Sean Rankin's November 10 affidavit in connection with the pending motions for summary judgment.²

With respect to defendants' objections to the Rankin affidavit, some of the statements objected to are hearsay or appear to lack foundation but are nevertheless admissible not for the truth but for Rankin's state of mind and as a basis for Rankin's statements that Androscoggin Savings Bank was willing to finance Tucker's purchase because various financing contingencies

² Defendants argue that the jurats of Tucker's November 13 affidavit and Rankin's affidavit do not distinguish between statements on information and belief and statements based on personal knowledge. While the court agrees that defendants are entitled to raise foundation and hearsay objections – some of which the court agrees are valid – it rejects defendants' objections based on the wording of the jurats. If the court were to rely on the language of jurats, four of the affidavits submitted by defendants (Eric's October 20 and November 13 affidavits and Peggy's October 23 and November 13 affidavits) suffer from the same infirmities. Indeed, the jurats of those four affidavits would be entitled to even less weight because they nowhere state that the affidavits in question are based on personal knowledge.

had either been met or had been waived by the Bank. The court will, however, disregard Rankin's assertion as to the state of Eric and Peggy's knowledge and his assertions that Eric and Peggy seemed unwilling to close and that the sellers' counsel was unresponsive prior to the closing. The Rankin affidavit does not provide any foundation for those statements.³

With respect to defendants' objections to Tucker's November 13 affidavit, the court agrees that some of his statements lack foundation or appear to be based on hearsay. However, to the extent that his statements are based on written communications that are annexed to his affidavit, the court understands that there is an agreement between the parties that all the written communications are admissible and the court will therefore consider the written communications even if Tucker's knowledge of some of those communications may be second-hand. For purposes of summary judgment, the court will disregard Tucker's statements as to his belief that Eric and Peggy never intended to sell and only rehired him as a subterfuge because those statements represent inferences on his part. However, based on the other evidence offered by plaintiffs, the court concludes that there is sufficient evidence from which a trier of fact could draw those inferences. *See, e.g.*, Plaintiffs' November 13, 2017 Statement of Additional Material Facts submitted in opposition to defendants' motion for summary judgment ¶¶ 235-36, citing Peggy Deposition at 234-35.

Plaintiffs' Motion to Strike

Plaintiffs are seeking to strike the November 20, 2017 affidavit of George Marcus and a "Statement of Additional Undisputed Material Facts" appended to defendants' Reply Statement of Material Facts.

³ Plaintiffs have, however, offered other evidence that Eric and Peggy's counsel was unresponsive. *See* Plaintiffs' November 13, 2017 SMF ¶ 28.

With respect to plaintiffs' motion to strike the affidavit of George Marcus, the principle that parties should not be able to circumvent Rule 56(i) by moving to strike an underlying affidavit is equally applicable. As with defendant's motion to strike, however, the court will nevertheless review plaintiffs' arguments in determining whether and to what extent it can consider assertions in the Marcus affidavit.

The problem with the Marcus affidavit is that the court understands that the parties had agreed that Marcus would not be a witness at the trial and accordingly there is a serious question whether defendants are entitled to rely on his affidavit as admissible evidence at the summary judgment stage. Plaintiffs are entitled to raise this issue.⁴

There is, however, no dispute that the emails and other communications attached to the Marcus affidavit are admissible according to the parties' agreement. At least two of those are already in the summary judgment record. Exhibits S and V to Tucker's November 13, 2017 affidavit. As far as the court can tell, the only additional information in the Marcus affidavit consists of assertions with respect to telephone calls with counsel for Tucker on December 29, 2015, January 26, 2016, and January 28, 2016 and a voicemail message left for Tucker's counsel on January 27, 2016. The telephone call to Tucker's counsel on January 26 is referred to in Exhibit M to Tucker's November 13, 2017 affidavit, the content of the January 28 telephone call is set forth in Marcus Exhibit C, and the January 27 voicemail is referred to in Exhibit S to Tucker's November 13, 2017 affidavit. The court will therefore consider the Marcus exhibits and will disregard the remaining assertions in the Marcus affidavit.⁵

⁴ The court also agrees that the tone of defendants' opposition to plaintiffs' motion to strike the Marcus affidavit and the adjectives used (e.g., "disingenuous" and "scurrilous") are entirely uncalled for.

⁵ Those assertions are not material to the outcome of defendants' motion for summary judgment.

Plaintiffs' motion to strike the statement of additional material facts appended to defendants' reply statement is granted. Rule 56(h)(2) provides that a party *opposing* summary judgment may submit a statement of additional material facts that the opponent contends raise disputed issues for trial. Rule 56 nowhere authorizes a *moving* party to submit additional material facts after opposition papers have been filed and the party opposing summary judgment no longer has any further opportunity to respond.

Summary Judgment

Summary judgment should be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In considering a motion for summary judgment, the court is required to consider only the portions of the record referred to and the material facts set forth in the parties' Rule 56(h) statements. *E.g., Mahar v. StoneWood Transport*, 2003 ME 63 ¶ 8, 823 A.2d 540. The facts must be considered in the light most favorable to the non-moving party. *Id.* Thus, for purposes of summary judgment, any factual disputes must be resolved against the movant. Nevertheless, when the facts offered by a party in opposition to summary judgment would not, if offered at trial, be sufficient to withstand a motion for judgment as a matter of law, summary judgment should be granted. *Rodrigue v. Rodrigue*, 1997 ME 99 ¶ 8, 694 A.2d 924.

The Underlying Agreements

Central to the claims in this action are two agreements. The first is the PET LLC Agreement, appended as Exhibit A to the complaint. That agreement was formed between Peggy, Eric, and Tucker (PET stands for "Peggy Eric Tucker") as the vehicle for their purchase of the

Casco Bay Ford car dealership in 2013. Eric owned a 34% interest in PET LLC, and Peggy and Tucker each owned a 33% interest. Peggy was the designated Manager of the LLC.

The second agreement is a November 16, 2015 purchase and sale agreement for the sale of Eric and Peggy's membership interests in PET LLC to Tucker. This agreement (the "Membership P&S") is appended to the complaint as Exhibit B. If consummated, it would have transferred sole ownership of the Casco Bay Ford dealership to Tucker.

The November 16, 2015 Membership P&S required Tucker to make a \$150,000 non-refundable deposit by November 18, 2015 and provided in section 2.5 that the closing "shall take place on January 31, 2016." Section 2.5 further provided as follows

Notwithstanding the foregoing, provided that the Buyer has pursued completion of the contingencies contained in section 6(a) and further provided that the satisfaction of such contingencies are reasonably in progress, Buyer shall have the right to extend the Closing Date for not more than thirty (30) days by giving written notice of such extension to Sellers prior to the initial Closing Date, provided that the purchase price shall increase by \$1,000 for each calendar day the Closing does not occur after January 31, 2016.

Section 4.5 of the Membership P&S provided that Tucker would furnish certain details of the financing for the purchase to Eric and Peggy and further stated:

If Sellers, in their sole discretion, are not satisfied that the Buyer has sufficient funding to close on this transaction, the Sellers may terminate this contract without penalty by providing Buyer with written notice of termination on or prior to December 15, 2015.

On December 15, 2015 – the deadline set forth in section 4.5 above – Eric, Peggy, and Tucker executed an agreement titled "Purchase and Sale Contingency Agreement" that extended Eric and Peggy's right to terminate the contract pursuant to section 4.5 to January 15, 2016. A copy of the

Purchase and Sale Contingency Agreement is annexed to Tucker's November 13, 2017 affidavit as Exhibit G.⁶

Article 6 of the November 16, 2015 Membership P&S set forth certain contingencies applicable to the obligations of both Tucker as the Buyer and Eric and Peggy as the Sellers. Among other things, it provided:

Sellers' obligations under this Agreement are contingent upon Buyer having obtained from Ford Credit the release of any personal guarantees . . . given by either of the Sellers in regard to Casco Bay Ford's floor plan financing facilities and any other personal guarantees which either Seller has given in regard to PET or Casco Bay Ford to any person, including but not limited to vendors, Ford Motor Company, governmental entities, and other credit providers.

Membership P&S section 6.2. Another provision of the agreement, section 6.3, provided that the obligations of both Buyer and Seller were contingent upon the closing of a separate agreement by which the car dealership real estate, separately owned by Cianchette Family LLC,⁷ would be purchased by Tucker or his assignee. The Real Estate Purchase and Sale agreement, dated November 17, 2015 and executed by Tucker and by Eric as Manager of Cianchette Family LLC, is annexed to the complaint as Exhibit C. It also called for a closing by January 31, 2016. Tucker assigned the real estate contract to CBF Associates LLC.

Plaintiffs' Claims for Breach of the November 16, 2015 Membership P&S Agreement and November 17 Real Estate Purchase Agreement

Tucker claims that defendants breached the November 16 Membership P&S Agreement and the November 17 Real Estate purchase and sale agreement by failing to close even though

⁶ Exhibits to Tucker's November 13, 2017 affidavit will subsequently be referred to in the following form: "Tucker Ex. ____."

⁷ Eric is the manager of Cianchette Family LLC. The other member is the trustee of the First Cianchette Family Trust, of which the beneficiaries are Eric and Peggy's children excluding Tucker.

Tucker had met or was prepared to meet all of the purchase conditions. These claims are the subject of counts I and IV of the complaint.

Defendants' motion for summary judgment on these claims is based on the contention that Eric and Peggy had a right to terminate the agreement under sections 4.5 and 6.2 as set forth in a January 28 letter from their counsel stating that Eric and Peggy were exercising their right to terminate "effective immediately." Tucker Ex. V.

Section 4.5

The first issue with respect to defendants' right to terminate under section 4.5 is whether that right had been extended beyond January 15 (the deadline as extended under the December 15, 2015 Purchase and Sale Contingency Agreement referred to above). On that issue the undisputed facts demonstrate that in exchange for not exercising their right to terminate at that time, defendants' counsel sent a proposed Amendment to the Purchase and Sale Contingency Agreement extending the deadline to February 15, which was signed by Tucker and which Tucker's counsel treated as binding on Eric and Peggy as well as on Tucker. *See* Tucker Ex. H; Marcus Ex. D (asking for confirmation that upon receipt of the extension Eric and Peggy would not invoke section 4.5).

Although it appears that Eric and Peggy never signed Exhibit H, the court concludes that under the circumstances it is undisputed that Tucker knew that Eric and Peggy were not merely making a proposal but were making a binding offer which, once accepted, was sufficient to modify the deadline under section 4.5. *See, e.g., RDP Technologies Inc. v. Cambi AS*, 800 F.Supp. 2d 127, 141 (D.D.C. 2011). This is true notwithstanding the existence of a separate provision in the Membership P&S that no modifications of the agreement may be made except in a writing signed

by both parties. *See Granger Northern Inc. v. Cianchette*, 572 A.2d 136, 139 (Me. 1990) (contract provision permitting only changes in writing may itself be subsequently modified by the parties).

Accordingly, as of January 28 Eric and Peggy still had the right to terminate under section 4.5. In addition, the court interprets the language of section 4.5 (“If Sellers, in their sole discretion, are not satisfied that the Buyer has sufficient funding . . .”) as allowing Eric and Peggy to terminate based on a subjective belief that Tucker’s financing was inadequate. If at all possible, contract language should be interpreted to provide that the standard in determining whether a condition has been satisfied is that of an objectively reasonable person. Restatement 2d of Contracts § 228; *Pearce Associates LLC v. Perry*, 2008 ME 181 ¶ 17, 960 A.2d 1166. In this instance, however, the court is constrained to find that the unambiguous language provides Eric and Peggy with a right to terminate based on a subjective belief that Tucker’s financing was inadequate.⁸

However, there is still a disputed issue for trial on Eric and Peggy’s right to terminate under section 4.5. Although they were entitled to terminate based on a subjective belief that the financing was inadequate, there is a strong argument that they were required to exercise that clause in good faith. *See* Restatement 2d of Contracts § 228 cmt. a. Even though Maine does not generally recognize an implied duty of good faith in contract cases, none of the relevant decisions have turned on contractual provisions that allowed one party to exercise certain rights based on a subjective belief. *See, e.g., Camden National Bank v. Crest Construction Inc.*, 2008 ME 113 ¶ 18, 952 A.2d 213; *Haines v. Great Northern Paper Inc.*, 2002 ME 157 ¶ 15, 808 A.2d 1246.⁹

⁸ Plaintiffs do not argue that the “sole discretion” language is ambiguous, nor have they offered parol evidence that would generate a disputed issue of fact as to whether the parties intended that an objective standard be used. *Compare Guntert v. City of Stockton*, 43 Cal.App.3d 203, 211, 213 (1974).

⁹ The contract at issue in *Haines* contained a provision allowing Great Northern, in its sole judgment, to limit the number of users of its forest lands to 1993 levels. 2002 ME 157 ¶ 2. However, that provision was not the source of the dispute.

In *Diversified Foods Inc. v. First National Bank*, 605 A.2d 609, 612-14 (Me. 1992), the Law Court concluded that a provision allowing the defendant banks to determine the inventory eligible for financing in their “sole discretion” did not require *objective* good faith. Under the UCC, subjective good faith was required, but there was no evidence that the banks had not acted for valid business reasons. 605 A.2d at 614. In *First NH Banks Granite State v. Scarborough*, 615 A.2d 248, 250-51 (Me. 1992), the Court noted that it had not extended the UCC’s requirement of “objective good faith” beyond its statutory scope but it appeared to consider the issue of subjective good faith in noting that there was no evidence in the case that the Bank had acted “without honesty in fact.”

Where a contract provision grants one party a discretionary right to terminate for a specified reason, therefore, it follows that the right to terminate based on a subjective belief must be exercised in good faith.¹⁰ Moreover, in other contexts Maine law recognizes that discretion can be abused and that where discretion has been granted, it must be exercised in good faith. *E.g.*, *Gay v. Gay’s Supermarkets, Inc.*, 343 A.2d 577, 580 (Me. 1975); *Wight v. Mason*, 134 Me. 52, 59, 180 A. 917, 920 (1935).

Even bypassing whether a subjective good faith requirement is implicit in section 4.5, that section gave Eric and Peggy the right to terminate if they were “not satisfied that the Buyer has sufficient funding.” They did not have the unilateral right to terminate for other reasons. Allowing Eric and Peggy to terminate even if they did not believe Tucker’s funding was inadequate would rewrite the contract by converting section 4.5 into a right to terminate at any time for any reason. As a result, if Eric and Peggy terminated not because they were dissatisfied as to the sufficiency of Tucker’s financing but for another reason entirely, they would not have been entitled to invoke

¹⁰ This is consistent with case law requiring that “termination for convenience” clauses be invoked in good faith. *See Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1540-41 (Fed. Cir. 1996).

section 4.5. In part, this ties back into the issue of good faith – because evidence that Eric and Peggy did not have a good faith belief that Tucker’s financing was inadequate would support an inference that they improperly decided to terminate for other reasons.

In this case, there is evidence which, construed in Tucker’s favor, would allow a jury to find that termination was not based on concern about financing. The day before the termination notice was sent, counsel for Eric and Peggy informed Tucker’s counsel that termination would be invoked unless Tucker agreed to amend the purchase and sale agreement in various respects. Tucker Exhibit S. The subsequent notice of termination (Tucker Ex. V) specifically references Tucker’s unwillingness to accept those amendments, rather than concern about financing, as precipitating the termination notice.¹¹ Moreover, in the negotiations toward a subsequent agreement after the failure of the November 16, 2015 Membership P&S, there is evidence that Eric and Peggy focused exclusively on obtaining further releases and did not raise any concerns with respect to financing. *See* Tucker Ex. Y.

Tucker has also offered evidence sufficient to create a disputed issue of fact on his claim that Eric and Peggy never intended to sell their membership interests and were just leading Tucker on, eventually using section 4.5 as an excuse to cancel. This follows both from certain deposition testimony, *see* Plaintiffs’ November 13, 2017 SAMF ¶¶ 235-36, and from the entire series of events, which, construed in the light most favorable to Tucker, could be found to support an inference that Eric and Peggy never planned to sell and were using the proposed sale as a method to divest Tucker of his 33% interest in PET LLC.

¹¹ In this context, it is also relevant that while the January 28 termination notice referred to both sections 4.5 and 6.2, it did not specifically mention financing but instead referred “among other things, and without limitation, [to] the failure to obtain personal releases from Ford.”

Finally, there is also evidence that Eric and Peggy did not have any basis for a good faith belief that Tucker's financing was inadequate. The summary judgment record contains evidence that prior to the termination notice, counsel for Eric and Peggy was provided with information that the SBA had approved a guarantee of Androscoggin Bank's loan to Tucker and that financing was in place. *E.g.*, Plaintiffs' SAMF ¶¶ 93, 124, 125, 128, 136. Knowledge of counsel may be imputed to the client. *Orlandella v. O'Brien*, 637 A.2d 105, 106 n.1 (Me. 1994). This is certainly true when the lawyer who had received the information with respect to financing is also the lawyer who communicated the January 28 termination notice.

As far as the court can tell, the only arguably pertinent information that was not communicated to Eric and Peggy or their counsel was that Androscoggin Bank was prepared to proceed without any subordination agreement from Ford. However, considering the facts in the light most favorable to Tucker, a jury could find that Eric and Peggy's reliance on that issue is an after-the-fact attempt to justify a termination made for other reasons, given evidence that they never attempted to make any inquiry whether the subordination issue actually presented a financing problem. Plaintiffs' November 13, 2017 SAMF ¶ 142.

Absence of Necessary Releases

As noted above, section 6.2 of the Membership P&S made the sale contingent on obtaining the release of personal guarantees given by Eric or Peggy to Ford Credit with respect to Casco Bay Ford floor plan facilities and any other personal guarantees given by Eric or Peggy to any other entity in connection with Casco Bay Ford. It appears to be undisputed that Eric had given a personal guarantee to Ford Credit with respect to Casco Bay Ford's floor plan facility, and the

summary judgment record contains evidence that a draft release from Ford Credit was provided to defendants in December 2015. Plaintiffs' November 13, 2017 SAMF ¶ 156.

The draft release from Ford Credit was only a release as to any future obligations that might arise from the date of the closing, not a release of obligations that might have existed prior thereto. *See* Defendants' October 23, 2017 SMF ¶ 23, citing Talia Ex. 5. In contrast, section 6.2 of the Membership P&S called for the release of “*any* personal guarantees given . . . in regard to Casco Bay Ford's floor plan financing facilities” (emphasis added). The court interprets that language as calling for a complete release. However, there is evidence that prior to the closing neither Eric nor Peggy nor their counsel ever raised that issue or suggested that the draft Ford Credit release provided in December was inadequate. Plaintiffs' November 13, 2017 SAMF ¶¶ 161-62

On January 27, 2016 counsel for Eric and Peggy informed counsel for Tucker that Eric and Peggy were prepared to terminate unless Tucker agreed to certain amendments, one of which involved releases “from Ford and Androscoggin.” Tucker Exhibit S. The request for a release from Androscoggin was new. Whether the request for a release from “Ford” was intended to mean Ford Credit is uncertain. Counsel for Tucker appears to have understood that reference to mean Ford Motor Co. instead of Ford Credit, and counsel for Eric and Peggy did not disabuse him of that understanding. *See* Tucker Exs. T, V. There is no evidence that either Seller had given any personal guarantees to Ford Motor Co., and therefore it does not appear that a release from Ford Motor Co. was required under section 6.2 of the Membership P&S.

The only specific basis given in Eric and Peggy's January 28 notice of termination (Tucker Ex. V) was the failure to obtain personal releases from “Ford” – again creating uncertainty as to whether Eric and Peggy were relying on something that was not a condition of the purchase and sale agreement.

Regardless of what was stated in the notice of termination, Eric and Peggy now rely on Tucker's failure to obtain a complete release from Ford Credit. Although they are correct that the required release had not been obtained as of January 28, they are not entitled to summary judgment on that basis. This is because – contrary to the apparent assumption in the January 28 notice of termination – they had no contractual right to terminate the contract before closing based on inadequacy of releases. Only section 4.5 allowed Eric and Peggy to exercise a right of termination – if based in good faith on concerns about Tucker's financing – at any point before the closing. Section 6.2, including the requirement of a complete release from Ford Credit, was a contingency which had to be satisfied at the closing, but it did not provide for a right of early termination.

The non-occurrence of a contract condition or contingency may discharge obligations under a contract but only “when the condition can no longer occur.” Restatement 2d of Contracts § 225(2). In this case it appears that a satisfactory Ford Credit release could not have been obtained by the January 31 closing deadline. However, Tucker had the right to extend that deadline by 30 days under section 2.5 – a provision that expressly referenced obtaining releases under section 6.2. Tucker contends that he would have exercised his right to extend the closing deadline if he had been advised that the Ford Credit release was not satisfactory. Plaintiffs' November 13, 2017 SAMF ¶ 108.

There is evidence that a satisfactory Ford Credit release was later obtained. *Id.* ¶¶ 169-70. While there may be disputed issues of fact as to whether that release could have been obtained within the 30-day extension period, *but see* Tucker Ex. Y (suggesting that Ford Credit would need approximately four weeks to process a complete release of Eric's personal guarantee), the facts construed in the light most favorable to Tucker leave open the possibility that the section 6.2 contingency could have been satisfied.

Accordingly, there are disputed issues of fact which preclude summary judgment for defendants on counts I and IV of the complaint based on either section 4.5 or section 6.2 of the Membership P&S.

Plaintiffs' Claims for Breach of Subsequent Contract for the Sale of the Dealership

As noted above, after the sale contemplated by the November 16, 2015 Membership P&S fell through, Tucker alleges that the parties reached a subsequent agreement for his purchase of the Casco Bay Ford dealership and associated real estate and that Eric and Peggy breached that deal as well. These claims are the subject of counts II and V of the complaint.

Although they deny that a subsequent agreement was ever reached, Eric and Peggy apparently acknowledge that there are disputed issues of fact on that issue. They have, however, moved for summary judgment with respect to Tucker's subsequent agreement claim because they contend that that claim is barred pursuant to the Statute of Frauds. Specifically, Eric and Peggy contend that since the sale of the dealership was contingent on the sale of the underlying real estate¹² and since a contract for the sale of real estate has to be memorialized in a writing to be enforceable, Tucker cannot enforce a subsequent purchase agreement even if it were found that one had been reached.

Maine's statute of frauds, 31 M.R.S § 514, provides in relevant part as follows:

[N]o action shall be maintained . . . upon any contract for the sale of lands . . . unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereto lawfully authorized; but the consideration thereof need not be expressed therein, and may be proved otherwise.

¹² See Membership P&S section 6.3.

In this case Tucker has offered evidence that after the original purchase of the dealership failed to close because of Eric and Peggy's January 28 notice to terminate the contract, there was a subsequent meeting between Tucker and Peggy at which agreement was reached to reinstate the purchase and sale contract with a closing date to be scheduled around the end of April subject to several new conditions – that an adequate release from Ford Credit be obtained, that a new release from Androscoggin Bank be obtained, and that Tucker return to work at Casco Bay Ford on March 14, 2016.¹³ See Plaintiffs' SAMF ¶¶ 187-92.

Tucker has also offered evidence that the subsequent agreement – reinstating the original purchase and sale agreement with a new closing date and the additional conditions – is reflected in several emails annexed to his affidavit as Exhibits Y-AA. Emails may constitute writings sufficient to satisfy the statute of frauds. *McClare v. Rocha*, 2014 ME 4 ¶¶ 1, 11, 12, 86 A.3d 22. Moreover, if the essential elements of an agreement are set forth in writing, the remaining details or particulars need not be. So long as one or more writings identify the parties to the contract, the real estate in question, and in some cases the purchase price, the statute of frauds is satisfied even if there remains a dispute over whether an agreement was ultimately reached. See *McClare*, 2014 ME 4 ¶¶ 18- 19.

In this case the essential elements are set forth in the original purchase and sale contracts which Tucker contends were revived by the subsequent March agreement, as allegedly reflected in Tucker Exhibits Y-AA. Defendants, however, point out that the real estate in question had to be conveyed by Cianchette Family LLC (of which Eric was the Manager), and none of the emails subsequent to the failure of the original purchase and sale agreement were signed by Eric.

¹³ There is evidence that Tucker had been fired from Casco Bay Ford on February 4 but defendants informed him later that day that the firing was revoked and that he was instead placed on administrative leave. Tucker Ex. X.

At the outset, it would appear that Eric's signature on the original real estate purchase and sale agreement would alone be sufficient to satisfy the Statute of Frauds because, according to Tucker, that same agreement was reinstated with a later closing date subject to certain additional conditions. However, even if a signed writing by Eric subsequent to the failure of the original deal would otherwise be required, defendants are not entitled to summary judgment based on the statute of frauds.

Specifically, an email authored by Peggy on March 11, 2016 reads in pertinent part as follows:

Spoke with dad. Here is what he has agreed to.

We will close on Ford's designated month end as long as the releases are in place.

.....

You will return to work Monday and we will get a new p&s drawn up.

.....

Dad wants a decision today with a commitment to be at work by Monday at the latest.

Let me know thanks

Tucker Ex. Y. Tucker contends that this constituted an offer which he accepted at a meeting on March 13.

Whether a writing is sufficient under the statute of frauds is ordinarily an issue of law. *Brown Development Corp. v. Hemond*, 2008 ME 146 ¶ 12, 956 A.2d 104. In this case, if Eric had signed Tucker Ex. Y, the court would conclude that Tucker Ex. Y, plus the original purchase and sale documents and the other March emails, would satisfy the statute of frauds. Based on the language of Tucker Ex. Y ("Spoke with Dad. Here is what he has agreed to"), there is at least a

factual issue whether Eric had authorized Peggy to convey the offer or proposal in question. If so, while there apparently remain disputed issues as to whether a subsequent agreement was ultimately reached, the statute of frauds would not bar Tucker's claim that a subsequent contract was agreed and that it too was breached.

Alternatively, even if Exhibit Y and the other March emails allegedly reviving the purchase and sale agreement were not sufficient to satisfy the statute of frauds, Tucker has still generated a factual dispute for trial on his subsequent agreement claim. This is because Tucker has offered evidence that a significant condition of the alleged subsequent agreement was that he return to work at Casco Bay Ford – allegedly because there was no General Manager to replace him and because he was needed as the “Ford Fii” designee under the dealership's agreement with Ford Motor Co. – which Tucker contends brings this case within the “part performance” exception to the statute of frauds.

Under the part performance doctrine, the transfer of the Casco Bay dealership real estate may be enforced – even without a sufficient writing – if Tucker proves by clear and convincing evidence that an oral contract existed, that Tucker acted in partial performance of his contractual obligations under the oral contract, and that Eric made misrepresentations that induced Tucker's partial performance. *Sullivan v. Porter*, 2004 ME 134 ¶¶ 11, 17, 861 A.2d 625. In this connection Tucker contends that he provided partial performance by complying with the condition that he return to work at the dealership and that defendants misrepresented their willingness to revive the purchase and sale agreement solely in order to persuade him to return to work until they could find a General Manager to replace him. Whether or not Tucker can provide the necessary proof

to prevail at trial,¹⁴ he has offered sufficient evidence to generate a disputed issue for trial with respect to partial performance.

Plaintiffs' Claims for Specific Performance

Count III of Tucker's complaint seeks the equitable remedy of specific performance of the November 16, 2015 Membership purchase and sale agreement and the accompanying real estate purchase agreement. Count VI of the complaint seeks specific performance of the subsequent agreement allegedly reached in March 2016 to sell the dealership and associated real estate. Defendants' primary argument is that Tucker and CBF Associates will not prevail on either of their breach of contract claims, but they also contend that because Tucker is seeking money damages on those claims and has designated expert testimony as to damages, specific performance is not available.

In this case, part of the contract that plaintiffs are trying to enforce concerns the sale of real estate, which is typically enforceable through specific performance. However, the court understands that plaintiffs are primarily pursuing their claim for breach of contract in counts I, II, IV, and V by seeking damages for the loss of a commercial opportunity rather than because of the uniqueness of the real estate involved.

In any event, one of the elements of a claim for specific performance is a showing that no adequate remedy at law is available. *E.g.*, *McIntyre v. Plummer*, 375 A.2d 1083, 1084 (Me. 1977). If plaintiffs are seeking money damages, they are necessarily not arguing that they do not have an adequate remedy at law.¹⁵ A plaintiff may be entitled in its complaint to seek damages and

¹⁴ *Sullivan v. Porter* states that "meaningful" partial performance, as well as inducement of that performance through misrepresentation, must be proven by clear and convincing evidence at trial. 2004 ME 134 ¶ 17.

¹⁵ To obtain relief in the form of specific performance, plaintiffs would presumably have to pay the specified purchase price and meet the other conditions of the purchase and sale agreement.

specific performance in the alternative, but discovery has now closed in this case. Plaintiffs have not argued in their motion for summary judgment that they are dropping their claims for monetary relief in counts I, II, IV, and V. They are not entitled to seek monetary damages at trial and switch to a request for specific performance if they are unsatisfied with the monetary damages awarded.

Accordingly, the court agrees with defendants that plaintiffs cannot proceed at trial on both a damage claim and a specific performance claim and further agrees that plaintiffs, by continuing to pursue money damages, have already functionally acknowledged that they have an adequate remedy at law.

Accordingly, the court grants defendants' motion for summary judgment dismissing counts III and VI of the complaint.

Tucker's Claim of Fraud in the Inducement

In count VII of his complaint Tucker alleges that Eric and Peggy never intended to go through with a sale of the Casco Bay Ford dealership and associated real estate, that they fraudulently misrepresented their intent to sell him the dealership, and that he justifiably relied on those misrepresentations. Although the complaint characterizes this as a claim of "fraud in the inducement," Tucker is not seeking to avoid any contractual obligations but is instead bringing a cause of action for tortious misrepresentation seeking money damages for the financial losses that Tucker suffered in reliance on the alleged misrepresentations.¹⁶

¹⁶ Unless Tucker also prevails on his claims that defendants breached the original or subsequently revived agreement to sell him the dealership and associated real estate, it appears that the financial losses that Tucker could recover if he prevails on count VII would be limited to the non-refundable deposit and the financial expenses (attorneys' fees, financing costs, and the like) that he incurred in unsuccessfully pursuing the acquisition of Casco Bay Ford.

Although the summary judgment record also contains contrary evidence, Tucker has offered sufficient evidence to demonstrate the existence of a disputed issue for trial in support of his fraudulent misrepresentation claim. Defendants, however, argue that a claim of fraudulent misrepresentation cannot be based on promises of future action even if there is no intent to perform, citing a line of Law Court cases ending with *Shine v. Dodge*, 130 Me. 440, 443, 157 A. 318, 319 (1931).

Since *Shine v. Dodge* was decided in 1931, section 530(1) of the Restatement 2d of Torts, published in 1977, promulgated a contrary principle: “A representation of the maker’s own intention to do or not to do a particular thing is fraudulent if he does not have that intention.” Moreover, although not overruling *Shine*, the Law Court has issued two subsequent decisions that have upheld fraudulent misrepresentation claims based on promises of future performance. *Boivin v. Jones & Vining Inc.*, 578 A.2d 187, 188-89 (Me. 1990); *Wildes v. Pens Unlimited Co.*, 389 A.2d 837, 840-41 (Me. 1978). This court has previously concluded that the proposition in *Shine* upon which defendants rely is no longer good law, *Bernier v. Hanson*, 2008 Me. Super. LEXIS 184 (Superior Court, Cumberland County, order issued Sept. 3, 2008), and will adhere to that ruling under the circumstances presented in this case. The same conclusion was reached by the U.S. District Court in *Veilleux v. National Broadcasting Co.*, 8 F.Supp.2d 23, 32-33 (D.Me. 1998) (Brody, J.).

Accordingly, defendants’ motion for summary judgment on count VII is denied.

Securities Fraud Claims

In count VIII of Tucker’s complaint, he alleges that Eric and Peggy’s membership interests in PET LLC were securities as defined by Maine’s law relating to the purchase and sale of

securities, 32 M.R.S. § 16102(28), and that Eric and Peggy’s allegedly false representations form the basis for a claim to recover damages under 32 M.R.S. §§ 16501 and 16509(2). These statutes are also at issue with respect to Eric and Peggy’s counterclaims against Tucker, which allege that he engaged in unlawful conduct in connection with the purchase of a security and assert liability under 32 M.R.S. § 16509(3).

Eric and Peggy point out that section 16509(2) provides that a person is liable to the purchaser “if the person *sells* a security” (emphasis added) by means of an untrue statement of a material fact. They argue that they did not sell their membership interests to Tucker and that Tucker’s primary claim is based on their failure to sell. Accordingly, they argue that there can be no liability under § 16509(2).

Similarly, in response to Eric and Peggy’s counterclaim, Tucker points out that section 16509(3) provides that a person is liable to the seller “if the person *buys* a security” (emphasis added) by means of an untrue statement of a material fact. Tucker argues that he did not buy Eric and Peggy’s membership interests because they would not sell and he therefore cannot be held liable under §§ 16509(3).

In order to distinguish why he can go forward with his securities claim but Eric and Peggy cannot, Tucker relies on the definition of a “sale” in § 16012(26) which defines “sale” as including a “contract of sale.” Since a contract of sale was reached, even though never consummated, Tucker argues that the putative sellers may be held liable.

The solution to this issue is found in the remedies that are statutorily available to purchasers and sellers under § 16509. If a violation is found, purchasers may recover (1) the consideration paid for the security, less the amount of income received on the security, upon tender of the security to the seller or (2) if the purchaser no longer has the security, actual damages consisting

of the amount a purchaser would have received by tendering the security less the value received when the purchaser disposed of the security. § 16509(2)(A) and (2)(C). Sellers may recover (1) the security and any income received on the security after the sale, upon tender of the purchase price or (2) damages equaling the difference between the price of the security when sold and the value the security would have had in the absence of the purchaser's untrue statements of material fact. § 16509(3)(A) and (3)(C). In each case purchasers and sellers would be also entitled to recover interest, costs, and reasonable attorney's fees.

All of the purchaser's remedies and all of the seller's remedies are premised on a purchase and sale having taken place.¹⁷ Accordingly, Eric and Peggy are entitled to summary judgment on Tucker's securities fraud claim, and Tucker is entitled to summary judgment on Eric and Peggy's securities fraud counterclaim.

Tucker's Claims Against Eric and Peggy involving the Management of PET LLC

Tucker has asserted a claim against Eric and Peggy based on alleged violations of the PET LLC Agreement (Count IX) and a claim against Peggy for breach of fiduciary duty based on alleged violations of her duties as the Manager of PET LLC (Count X).

With respect to count IX, Eric and Peggy argue that Tucker, as a Member of the LLC, does not have any right to bring a direct action against Eric and Peggy because the recovery he seeks would belong to the LLC rather than to Tucker and can only be sought through a derivative action. With respect to count X, Peggy argues that she is immunized because Tucker's fiduciary duty

¹⁷ It can be argued that Tucker has paid consideration – in the form of his non-refundable deposit of \$150,000 – for securities he has been unable to purchase and that he is therefore entitled to seek recovery of that consideration under § 16509(2)(A). However, consideration is recoverable under § 16509(2)(A) upon tender of the securities, and no tender is possible here because no sale took place.

claims merge with his contract claims for breach of the LLC Agreement and the latter can only be brought as derivative claims.

Derivative vs. Direct Claims

Eric and Peggy rely on 31 M.R.S. §§ 1631 and 1632, which provide that a direct action can only be brought with proof of an injury that is not solely the result of an injury suffered by the LLC and that otherwise a member may bring a derivative action for injury to the company by following the procedures set forth in 31 M.R.S. §§ 1632-36.

The court concludes, however, that PET LLC constitutes a “closely held limited liability company” within the meaning of 31 M.R.S. § 1637(1) and that Tucker’s claims that Eric and Peggy have breached the LLC Agreement therefore fall within 31 M.R.S. §§ 1637(2) and 1637(3).

Those provisions provide as follows:

2. Limitation on derivative actions. Except to the extent ordered by the court in an action under subsection 3, paragraph A, sections 1632 to 1636 do not apply to a closely held limited liability company.

3. Exception to limitation on derivative actions. If justice requires:

A. A derivative action commenced by a member of a closely held limited liability company may be treated by a court as a direct action brought by the member for the member’s own benefit; and

B. Recovery in a direct or derivative action by a member of a closely held limited liability company may be paid directly to the plaintiff or to the closely held limited liability company if necessary to protect the interests of creditors and of other members.

Thus, in the case of a closely held LLC, § 1637(2) dispenses with all of the prerequisites for a derivative action set forth in §§ 1632-36 unless those are specifically ordered by the court. Moreover, under § 1637(3)(A) a derivative action may be treated as a direct action “if justice requires.” In determining whether justice requires such treatment, courts have considered whether

the claims involve oppressive action by majority shareholders against the interests of minority shareholders or alleged breaches of fiduciary duty owed to minority shareholders. *See, e.g., 2 O’Neal and Thompson’s Close Corporations and LLCs* § 9:26 (3d ed.) at n.35 (reviewing cases which, taken together, “represent judicial acceptance of what may be termed an individual cause of action for oppression of minority shareholders”); *id.* § 9:49; *Banyan Investment Co. LLC v. Evans*, 2012 Utah App. 333 ¶¶ 3, 18-19, 292 P.3d 698; *Schumacher v. Schumacher*, 469 N.W.2d 793, 797-99 (N.D. 1991).

In *Beaudry v. Harding*, 2014 ME 126 ¶ 5, 104 A.3d 134, the Law Court stated that a member of an administratively dissolved LLC may not bring a direct action when the harm alleged was not personal to him. *Beaudry*, however, is distinguishable because that case did not involve any claim that there had been oppressive conduct or breaches of fiduciary duty by majority members. The plaintiff in *Beaudry* was instead attempting to sue a lawyer who had previously represented the LLC for professional negligence. 2014 ME 126 ¶ 3. The Law Court in *Beaudry* had no reason to consider the applicability of 31 M.R.S. § 1637(3).

In this case, Tucker has offered evidence that Peggy as Manager made a \$375,000 interest-free loan to Cianchette Family LLC, the entity whose members are Eric and the Cianchette Family Trust (a trust whose beneficiaries exclude Tucker) – even though section 5.1.3 of the LLC Agreement expressly denied Peggy authority to make loans exceeding \$50,000. Moreover, section 5.4.3 of the LLC agreement specifies that dealings between the LLC and members or their affiliates shall be “at arm’s length and on commercially reasonable terms.” Tucker has also offered evidence that Peggy increased the monthly rent paid by the Casco Bay Ford dealership to Cianchette Family LLC from the \$23,000 set forth in the lease to \$65,000 and that she directed those payments to be made to an entity called Top of Exchange LLC, another entity owned by Eric and the Cianchette

Family Trust that excludes Tucker. It is undisputed that Top of Exchange has no ownership interest in the Ford dealership real estate and is not owed any money by PET LLC.

If proven, the actions challenged by Tucker would appear to constitute the oppression of a minority shareholder by the two majority shareholders and would constitute breaches of the LLC Agreement and cognizable claims against Peggy for breach of fiduciary duty. As a result, a direct action under 31 M.R.S. § 1637(3) is appropriate in this case.

One of the reasons to allow direct actions in cases of this kind is that any recovery in a derivative action would accrue to the corporation and thus be under the control of the same majority shareholders who have been named as defendants and whose oppressive conduct is being challenged by the minority shareholder. *See Dowling v. Narragansett Capital Corp.*, 735 F.Supp. 1105, 1113-14 (D. R.I. 1990) (allowing recovery to accrue to the control of those who committed wrongdoing would produce “absurd result”). Indeed, Eric and Peggy argue in this case that Tucker has not been injured because if PET had retained the money Peggy loaned interest-free to Cianchette Family LLC and if Peggy had not paid allegedly exorbitant rent to another Cianchette entity, Peggy would still have the right to determine whether any of that money would have been distributed to Tucker or credited to him. Defendant’s Motion for Partial Summary Judgment dated October 23, 2017 at 24 n.4. Contrary to defendants’ arguments, this *supports* Tucker’s argument that he should be entitled to bring a direct action.

31 M.R.S. § 1637(3)(B) expressly contemplates that recovery in a direct action may be paid directly to the plaintiff. In addition, if a jury finds Eric and/or Peggy liable on Tucker’s claims with respect to the management of PET LLC, section 9.3 of the LLC Agreement permits the court to fashion appropriate equitable relief if there is any reason why awarding a monetary recovery to Tucker would be inappropriate. Although Tucker has not sought any recovery from PET LLC, he

has named PET LLC as a defendant, and PET will be retained as a defendant to the extent that its presence may be necessary to award complete relief.

It bears emphasis that 31 M.R.S. § 1637(3) essentially tracks § 7.01(d) of the American Law Institute's 1994 Principles of Corporate Governance. ALI Comment (e) to § 7.01 suggests that direct actions by shareholders in closely held LLCs may be allowed if they will not (1) unfairly expose the corporation or the defendants to multiple actions, (2) prejudice the interests of creditors of the corporation, or (3) prejudice the rights of other shareholders. There are only three members of PET LLC, and all are parties to this action. There is no possibility of multiple lawsuits, and there are no creditors or other shareholders whose rights may be prejudiced.

Accordingly, the court concludes that the claims made by Tucker in counts IX and X of the complaint are claims that may be treated as direct actions under 31 M.R.S. § 1637(3)(A). Defendants argue, based on the wording of § 1637(3)(A), that an action first has to be commenced as a derivative action before it can be treated as a direct action. The problem with that argument is that § 1637(2) dispenses with all the prerequisites of derivative actions in the case of closely-held LLCs and §1637(3)(B) allows direct recovery by members of closely-held LLCs. Under the circumstances, no purpose would be served by requiring Tucker to have first asserted a derivative claim.

Fiduciary Duty Claim vs. Peggy

As noted above, count X of Tucker's complaint asserts a claim that Peggy violated her fiduciary duty as Manager of PET LLC. 31 M.R.S. § 1559 (1) provides that, except as may be set forth in the LLC agreement, members of an LLC shall discharge their duties in good faith with a view to the interests of the LLC and the members and with the care and skill or an ordinarily

prudent person. However, 31 M.R.S. §§ 1521(3)(A) and (B) expressly provide that the duties of a member – including any fiduciary duties – may be restricted or eliminated by the provisions of the limited liability agreement, “except that the implied contractual covenant of good faith and fair dealing [established in 31 M.R.S. § 1522(2)] may not be eliminated.” § 1521(3)(A).

The PET LLC Agreement provides that as Manager, Peggy

shall not be liable, responsible, or accountable in damages or otherwise to the Company or to any Member for any action taken or any failure to act on behalf of the Company within the scope of the authority conferred on the [Manager] by this Agreement or by law, unless the action was taken or omission was made fraudulently or in bad faith or unless the action or omission constituted gross negligence.

PET LLC Agreement § 5.4.1.

Accordingly, while section 5.4.1 limits Peggy’s liability to instances of fraud, bad faith, or gross negligence, she is not entirely immunized by the LLC Agreement.¹⁸ Moreover, while Peggy argues that the provisions of the LLC Agreement convert Tucker’s fiduciary duty claims into contract claims and that Tucker’s fiduciary duty claims are redundant in view of his contract claims, the court disagrees. *See RJ Associates Inc. v. Health Payors’ Organization Limited Partnership HPA, Inc.*, 1999 Del. Ch. LEXIS 161 at *34 (Del. Ct. of Chancery 1999); *Maillet v. FrontPoint Partners LLC*, 2003 U.S. Dist. LEXIS 9832 at *9-*10 (S.D.N.Y. 2003). Although there is overlap between Tucker’s contractual claims in count IX and his fiduciary duty claims in count X, he is entitled to proceed on both theories.

¹⁸ Moreover, to the extent that Tucker alleges that Peggy acted outside the scope of her authority by making a loan in excess of \$50,000, section 5.4.1 may not apply.

Tucker's Punitive Damage Claim

While Tucker has brought a separate count of his complaint for punitive damages, punitive damages are not a stand-alone cause of action but are a remedy that may be awarded as part of the damages for a tort claim if a defendant is found liable on such a claim and plaintiff additionally proves the prerequisites for punitive damages by clear and convincing evidence. Without expressing any opinion as to whether Tucker will be able to offer sufficient evidence at trial to allow his punitive damage claim to go to the jury, *see St. Francis de Sales Federal Credit Union v. Sun Insurance Co.*, 2002 ME 127 ¶ 2, 818 A.2d 995, there are a sufficient number of factual disputes with respect to Tucker's tort claims at this point that summary judgment cannot be granted on the claim for punitive damages.

Defendants' Counterclaims against Tucker for Breach of Fiduciary Duty

Count I of defendants' counterclaims, brought on behalf of Eric and Peggy, alleges that Tucker violated his fiduciary duty to the other members of PET LLC by manipulating the financial affairs of the LLC, taking unauthorized money from the LLC, taking various actions at the Casco Bay Ford dealership that amounted to self-dealing, providing confidential information to competitors, and usurping corporate opportunities.¹⁹ Defendants' claim that Tucker usurped a corporate opportunity is also the subject of count III of the defendants' counterclaims, and their claim that Tucker disclosed confidential information is the subject of count V of defendants' counterclaims.

¹⁹ Notably, these claims are brought as a direct, rather than a derivative, action against Tucker by Eric and Peggy, which appears to be inconsistent with defendants' arguments that counts IX and X of Tucker's complaint could only have been brought as a derivative action.

Tucker seeks summary judgment on count I based on 31 M.R.S. § 1559(3), which provides in relevant part that unless otherwise provided in the LLC agreement

a member not involved in the management of a limited liability company does not have a fiduciary duty to the limited liability company, or to any other member . . . solely by reason of being a member.

Nothing in the PET LLC Agreement imposes any fiduciary duty upon a member not involved in management.

Under the agreement, moreover, Peggy as Manager has “full, *exclusive*, and complete discretion, power and authority . . . to manage, control, administer, and operate the business of and affairs of the Company for the purposes herein stated, and to make all decisions affecting such business and affairs” PET LLC Agreement § 5.1.2 (emphasis added). Section 5.4.1.1 further provides, “No member is an agent of the Company solely by virtue of being a Member, and no Member has authority to act for the Company solely by virtue of being a member.” In both these provisions, the “Company” is defined as PET LLC, not Casco Bay Ford. PET LLC Agreement § 1 (definitions).

Accordingly, the LLC Agreement excluded Tucker from involvement in the management of PET LLC. Based on section 1559(3) and the provisions of the PET LLC Agreement, therefore, Tucker did not owe any fiduciary duty to either PET LLC or its members.

Eric and Peggy argue that although Tucker was not involved in the management of the LLC, he was the general manager of the Casco Bay Ford dealership and was very much involved in the management of the dealership. In that capacity, however, Tucker was acting as an employee of the dealership or of the LLC, not as a member of the LLC. Whatever wrongdoing may be committed by employees, they are not subject to a fiduciary duty to their employers, at least absent

evidence that a relationship of trust and confidence existed between employer and employee and that there was a great disparity of position and influence favoring the employee.²⁰

Tucker's alleged failings at the dealership may be relevant to the course of dealing between the parties – specifically to the events of March 2016, when Eric and Peggy declined to go forward with what Tucker alleges was a second agreement to sell their membership interests and when Tucker either was fired or resigned from his employment at Casco Bay Ford. However, Tucker is entitled to summary judgment on Eric and Peggy's counterclaim for breach of fiduciary duty.

PET LLC Counterclaim for Usurpation of Corporate Opportunity

Count III of Defendants' counterclaims, brought on behalf of PET LLC, alleges that Tucker usurped a corporate opportunity belonging to PET LLC by going into business as a majority owner of a Chevrolet dealership in Waldoboro ("Tucker Chevy").²¹ The first question on this issue is whether a duty to bring a corporate opportunity to the attention of PET LLC can be imposed upon Tucker if he did not have a fiduciary duty to PET LLC for the reasons stated earlier.

In the leading Maine case on usurpation of a corporate opportunity, the Law Court emphasized that the obligation to bring business opportunities to the attention of the corporation was derived from the fiduciary duty owed to a corporation by corporate officers and directors. *Northeast Harbor Golf Club v. Harris*, 661 A.2d 1146, 1148-49 (Me. 1995) (outlining the principle

²⁰ In this case there is no evidence of any disparity of position and influence favoring Tucker.

²¹ Defendants previously argued that certain other alleged misconduct by Tucker constituted the usurpation of corporate opportunity, *see* Plaintiff's October 20, 2017 SMF ¶46, but they do not reiterate those arguments in opposition to Tucker's motion for summary judgment. In addition, their other allegations do not fall within any recognizable definition of usurpation of a corporate opportunity. In opposing summary judgment, defendants also do not contend that Tucker's subsequent employment as General Manager at a Ford dealership in Brunswick (now known as "Tucker Ford" even though Tucker is apparently not an owner) constituted the usurpation of a corporate opportunity. *See* Defendants' Opposition to Tucker's Motion for Summary Judgment dated November 13, 2017 at 11 n.3.

that “corporate fiduciaries owe a duty of loyalty to their corporations”). *See id.* at 1150 (“a corporate fiduciary should not serve both corporate and personal interests at the same time”). In this case, for the reasons stated earlier, Tucker did not owe a fiduciary duty pursuant to the LLC statute and the PET LLC Agreement.

Moreover, the PET LLC Agreement also expressly provides in pertinent part:

[N]othing in this Agreement shall be deemed to restrict in any way the rights of any Member . . . to conduct any other business or activity whatsoever, *and no Member shall be accountable to the Company or to any other Member with respect to that business or activity even if the business or activity competes with the Company’s business.*

PET LLC Agreement § 5.4.2 (emphasis added).

Given that Tucker did not owe a fiduciary duty to PET LLC or to Eric and Peggy as a matter of law and that he was expressly immunized from being accountable to PET LLC based on the conduct of other businesses (even if those competed with PET LLC’s business), the court cannot find that he may be held liable for usurpation of a corporate opportunity.

Defendants’ Claim for Disassociation

Count IV of defendants’ counterclaim seeks disassociation of Tucker from PET LLC pursuant to 31 M.R.S. § 1582(5). That section authorizes the equitable remedy of judicial expulsion of a person from membership in an LLC if the person

A. Has engaged or is engaging in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the limited liability company’s activities;

B. Has willfully and persistently committed, or is willfully and persistently committing, a material breach of the limited liability company agreement or the person’s duty or obligation under this chapter or under applicable law; or

C. Has engaged, or is engaging in conduct relating to the limited liability company's activities that makes it not reasonably practicable to carry on the activities with that person as a member.

Although Eric and Peggy argue that disassociation is warranted under all three categories in 31 M.R.S. § 1582(5), they have not offered evidence that Tucker has committed any material breach of the LLC Agreement, and the court has ruled above that defendants cannot prevail as a matter of law on a claim that Tucker breached a duty to the LLC. Tucker is therefore entitled to summary judgment to the extent that Eric and Peggy rely on section 1582(5)(B).

Similarly, the evidence in the summary judgment record establishes that it cannot be found under §1582(5)(C) that it is "not reasonably practicable" to carry on the activities of the LLC so long as Tucker is a member. *See* Plaintiffs' October 20, 2017 SMF in support of motion for summary judgment at ¶¶ 80-83, 85-86 (admitted) and Peggy Dep. 344, cited in both ¶ 84 of Plaintiffs' October 20, 2017 SMF and ¶ 84 of Defendants' November 13, 2017 opposition SMF. Although they assert that Tucker's continued presence in the LLC prevents them from carrying on the business, defendants have not demonstrated that there is a factual dispute for trial on this issue.

However, even if Tucker cannot be found liable for breach of fiduciary or usurpation of corporate opportunity on this record, there are disputed issues of fact as to alleged misconduct by Tucker. The court cannot rule out the possibility this could be found after trial to be "wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the limited liability company's activities." 31 M.R.S. § 1582(5)(A).

Accordingly, Tucker's motion for summary judgment is denied with respect to Eric and Peggy's disassociation claim to the extent that claim is based on 31 M.R.S. § 1582(5)(A).

PET LLC's Trade Secrets Claim

The final counterclaim is brought by PET LLC against Tucker for alleged violations of the Uniform Trade Secrets Act, 10 M.R.S. §§ 1541-48. The trade secrets allegedly disclosed were Casco Bay Ford dealer financial statements provided to General Motors (apparently in connection with Tucker's involvement with the Chevrolet dealership in Waldoboro) and some other financial information (described as estimates of Casco Bay Ford advertising costs, charts created by Tucker to monitor his performance at Casco Bay Ford, and an approximation of Casco Bay Ford's profits for 2015 and 2016). The latter documents were allegedly provided to Robert Esposito and Steve Goodrich, principals in other Ford dealerships who were affiliated with Tucker in connection with Tucker's proposed purchase of Casco Bay Ford.

The Uniform Trade Secrets Act allows recovery of "actual losses" and unjust enrichment resulting from misappropriation of trade secrets. 10 M.R.S. § 1544(1). In the context of this case, misappropriation is defined as "[d]isclosure or use of a trade secret without express or implied consent by a person who . . . [a]t the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . [a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use" 10 M.R.S. § 1542(2)(B)(2)(ii).

"Trade Secret" is defined as follows:

"Trade Secret" means information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:

A. Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

B. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

10 M.R.S. § 1542(4).

Tucker's summary judgment motion focuses on the second part of the definition of a trade secret – whether the dealer financial statements have been the subject of reasonable efforts to maintain their secrecy.²² See *Spottiswoode v. Levine*, 1999 ME 79 ¶ 27 n.7, 730 A.2d 166. On this issue Tucker argues that PET LLC did nothing to mark dealer financial statements as confidential, that the PET LLC agreement says nothing about confidential information, that dealer financial information was provided to some persons who were not employees or managers of PET LLC or Casco Bay Ford, and that dealer financial statements were at some point kept in an unlocked file cabinet in the Casco Bay Ford showroom. Plaintiffs' October 20, 2017 SMF ¶¶ 91-95, 101, 103, 116-21.

Defendants respond that dealer financial statements were also kept in a locked attic and file cabinet. Defendants' November 13, 2017 Opposition SMF ¶¶ 107-08, 111-12. Intermittent or occasional locking is not enough to generate a factual dispute as to whether reasonable security efforts were made. Defendants also contend that employees at Casco Bay Ford including Tucker had signed a policy to maintain the confidentiality of "customer information." *Id.* ¶¶ 105-06. However, defendants have not made the policy in question part of the summary judgment record and "customer information" is not at issue in this lawsuit.

Defendants further refer to a statement in an email by Tucker that he would not want certain information he sent to Esposito and Goodrich in April 2016 to become public. *Id.* ¶ 102. However, defendants have acknowledged that they do not know what that information consists of, which

²² Although not placed in issue by the pending summary judgment motion, it could be difficult for PET LLC to prove that the dealer financial statements derive independent economic value within the meaning of the first part of the "trade secret" definition. The archetypal trade secrets are proprietary formulas, processes, or devices which have intrinsic value. Although proprietors of closely-held companies understandably consider their financial statements to be confidential information that they do not want released to competitors (as exemplified by protective orders entered in this case), it is far from clear that those statements have independent economic value or that any actual economic loss can be proven to result from their disclosure. See 10 M.R.S. §§ 1542(4)(A), 1544(1).

makes its status as a trade secret too speculative. *Id.* ¶ 90. Defendants finally rely on Peggy's characterization of a document which she says was authored by Tucker that prohibited disclosure of confidential material, trade secrets, or proprietary information outside the company. *Id.* ¶ 106. The document in question, however, has not been submitted as part of the summary judgment record, and Peggy's characterization of the document is hearsay that is not admissible for purposes of summary judgment. Rule 56(e) expressly requires that sworn or certified copies of documents referred to in an affidavit be attached to the affidavit.

The court concludes that on this issue defendants have not offered evidence that, if produced at trial, would be sufficient to resist a motion for judgment as a matter of law as to whether PET LLC took reasonable efforts to maintain the confidentiality of the alleged trade secrets. As a result, Tucker is entitled to summary judgment on PET's trade secrets claim for damages. This does not necessarily mean that defendants cannot raise arguments with respect to the appropriateness of Tucker's alleged disclosure of confidential or proprietary information as part of their allegations of misconduct on Tucker's part.

The entry shall be:

1. Defendants' motions to strike the affidavit of Sean Rankin and the November 13, 2017 affidavit of Tucker Cianchette are denied but, as stated above, the court has reviewed the arguments made in those motions in determining whether and to what extent it can consider assertions in those affidavits.

2. Plaintiff's motion to strike the affidavit of George Marcus is denied but, as stated above, the court will consider the exhibits to that affidavit and will disregard statements unrelated to the appended documents.

3. Plaintiffs' motion to strike the "Statement of Additional Undisputed Material Facts" appended to defendants' reply statement of material facts is granted.

4. Defendants' motion for partial summary judgment is denied as with respect to counts I, II, IV, V, VII, IX, and X of plaintiffs' complaint.

5. Defendants' motion for summary judgment dismissing counts III, VI, and VIII of the complaint is granted.

6. Plaintiffs' claim for punitive damages (count XI) is not a free-standing cause of action. However, plaintiffs' punitive damage claim remains in the case at this time as a potential remedy for plaintiffs' tort claims.

7. Defendant Tucker Cianchette's motion for partial summary judgment dismissing counts I-III and V of defendants' counterclaim is granted.

8. Defendant Tucker Cianchette's motion for partial summary judgment dismissing count IV of defendants' counterclaim is denied.

9. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: January 12, 2018



Thomas D. Warren
Justice, Superior Court

Cianchette, et al. v. Cianchette, et al. PORSC-CV-16-249

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