STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 24, 2017

ISABEL BARBEITOS MARTIN, Individually and in her capacity as Executrix of The ESTATE OF MICHAEL J. MARTIN	:	
Plaintiff,	:	
v.	:	**C.A. No. PC-2014-6336**
PASCARELLA & GILL P.C.; STEPHEN E. PASCARELLA, SR., CPA; STEPHEN E. PASCARELLA, II, CPA; and LISA GILL, CPA,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court is the Defendants'—Pascarella & Gill P.C., Stephen E. Pascarella, Sr., CPA, Stephen E. Pascarella, II, CPA, and Lisa Gill, CPA (collectively, Defendants)—Rule 12(b)(6)[1] Motion to Dismiss Plaintiff Isabel Barbeitos Martin's (Plaintiff) Complaint. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

In May of 2012, Michael Martin (Michael)[2] passed away; he was survived by his wife, Isabel Barbeitos Martin—the Plaintiff in this matter—and two sons. Compl. at ¶ 15. Prior to his

[1] In the interest of brevity, the Court will generally refer to our Rules of Civil Procedure by number only. Any references to other rules will be noted accordingly.

[2] Throughout this Decision, the Court will use first names in referring to many of the people involved in this lawsuit. In so doing, the Court seeks to improve readability and intends no disrespect.

death, Michael was a shareholder in two closely-held corporations: Lanmar Corporation (Lanmar) and Landry & Martin Oil Co., Inc. (Landry & Martin) (collectively, the Martin Corporations). Id. at ¶¶ 7, 13. Michael was a shareholder in the Martin Corporations along with two members of his immediate family: his father, Bernard Martin (Ben), and his brother, Christopher Martin (Chris). Id. at ¶ 7. Lanmar, a commercial real estate company, issued ninety-eight shares owned in the following manner: Ben, 50 shares; Michael, 24.5 shares; and Chris, 23.5 shares. Id. at ¶¶ 8, 11. Landry & Martin, a full service oil company, issued 100 shares divvied up in the following manner: Ben, 43.5 shares; Michael, 28.5 shares; and Chris, 28 shares. Id. at ¶¶ 10, 12. Together, as of December 31, 2011, the Martin Corporations were valued in excess of twenty-six million dollars. Id. at ¶¶ 9-10.[3]

In August of 2011, Michael was diagnosed with terminal cancer. Id. at ¶ 14. Around that time, in order to arrange his financial affairs, Michael reached out to Pascarella & Gill, P.C. (Pascarella & Gill)—an accounting firm with which the Martin Corporations had a forty-year-long relationship. Id. at ¶¶ 16, 34. Pascarella & Gill is a professional corporation operated by three certified public accountants: Stephen E. Pascarella, Sr. (Stephen Sr.); Stephen E. Pascarella, II (Stephen II); and Lisa Gill (Lisa). Id. at ¶¶ 2-5. Michael turned to Pascarella & Gill for the purpose of determining the value of his respective shares in the Martin Corporations based on two Buy-Sell Agreements that Michael, Ben, and Chris, as shareholders, entered into with the Martin Corporations in early 2000. Id. at ¶¶ 19-20, 35.

In the early months of 2000, Ben and Michael discussed with Stephen Sr. their interest in entering into a buy-sell agreement that would require the Martin Corporations, in the event that

[3] Respectively, as of year-end 2011, Lanmar had a fair market value in excess of twenty million dollars and Landry & Martin had gross annual sales in excess of six million dollars. Compl. at ¶¶ 9-10.

one of the shareholders passed away, to purchase the deceased shareholder's shares. Id. at ¶ 17. Stephen Sr. prepared two Buy-Sell Agreements, one for Lanmar and one for Landry & Martin. Id. at ¶ 18. Ben, Michael, and Chris signed the Buy-Sell Agreements on or about March 14, 2000 and April 20, 2000, respectively. Id. at ¶¶ 19-20. The Buy-Sell Agreements required the Martin Corporations to purchase a deceased shareholder's shares in the event he died. Id. at ¶¶ 17, 19-21. In both Buy-Sell Agreements there are identical purchase price provisions which detail how the purchase price of the deceased shareholder's shares would be determined. Id. at ¶¶ 19-20. Those purchase price provisions provide that:

> "The purchase price for each share of stock sold hereunder shall be determined by the independent public accountants regularly engaged to examine the books of the Corporation. The determinations required hereby shall conform to generally accepted accounting principles applied on a basis consistent with that applicable to the financial statements of the Corporation for the fiscal year then ended." Id.

From the time the Buy-Sell Agreements were signed in 2000, through the time when Michael passed away in 2012, Pascarella & Gill's accountants were the "independent public accountants regularly engaged to examine the books of the [Martin] Corporation[s]." Id. at ¶¶ 19-20, 22.

By 2003, to fund a potential buy-out of Michael's shares in accordance with the Buy-Sell Agreements, the Martin Corporations had purchased $1.5 million of life insurance policies. Id. at ¶¶ 25-26. Sometime around October of 2003, Stephen Sr. advised Michael about how the buy-out would work under the Buy-Sell Agreements and that such a buy-out would be funded, in part, by proceeds of the life insurance policies. Id. at ¶ 27. In August of 2004, Stephen Sr. provided Michael with an outline of the purchase price determination for his shares in addition to providing Michael with estate planning advice. Id. at ¶ 28.

Fast forward to 2011: Michael, having received the terminal disease diagnosis, sought a determination of the purchase price of his shares pursuant to the Buy-Sell Agreements' purchase price provisions. Id. at ¶¶ 34-35. Pascarella & Gill determined that the purchase price for Michael's shares in Lanmar was $4,087,790. Id. at ¶¶ 35, 38. Similarly, Pascarella & Gill determined that the purchase price for Michael's shares in Landry & Martin was $355,595. Id. at ¶ 44. However, at some point after Michael received those calculations, Ben, Stephen Sr., Stephen II, and Lisa discussed the notion that the value of Michael's shares in Lanmar ought to be discounted by 35% to represent what was called "Built-in Capital Gain."[4] Id. at ¶ 39. Though the Buy-Sell Agreements' purchase price provisions made no mention of such a "Built-in Capital Gain," Ben and Defendants still sought to discount the value of Michael's shares. Id. at ¶¶ 40-41. This allegedly occurred even after Lisa admitted to Michael's family attorney that the purchase price provisions would have to be amended to include any "Built-in Capital Gain." Id. at ¶ 42.

Shortly after Michael passed away in August of 2012, Stephen Sr., Lisa, and Ben met with Plaintiff, her two sons, and her family attorney to discuss the purchase price of Michael's shares in the Martin Corporations. Id. at ¶ 45. At this meeting, in addition to having discounted the value of Michael's shares via the "Built-in Capital Gain," see id. at ¶¶ 39-43, 46, Stephen Sr. and Lisa, acting in part at Ben's direction, explained to Plaintiff that the Martin Corporations would deduct additional amounts from the value of Michael's shares. Id. at ¶ 46. Stephen Sr. and Lisa characterized those amounts as loans on which Michael supposedly owed repayment to the Martin Corporations. Id. at ¶¶ 46-47. According to Stephen Sr. and Lisa's determinations,

[4] According to the allegations in the Complaint, there was apparently no such discount discussion with respect to the $355,595 valuation of Michael's Landry & Martin shares. Id. at ¶ 44. The only dispute was with respect to the $4,087,790 valuation of Michael's shares in Lanmar.

the loans totaled $502,073—a debt to be off-set against the purchase price for Michael's shares. Id. at ¶ 47. Through those off-sets and the 35% "Built-in Capital Gain," Michael's shares in the Martin Corporations were significantly devalued. Id. at ¶¶ 47, 49.

Thereafter, Plaintiff sued the Martin Corporations in this Court contesting the valuation of Michael's shares. See id. at ¶ 36. The Court found in her favor and held that the shares ought to have been valued at the amount Defendants originally provided to Michael in 2011 using the Buy-Sell Agreements' purchase price provision: $4,087,790 for shares in Lanmar and $355,595 for shares in Landry & Martin.[5] On December 29, 2014, Plaintiff brought the present lawsuit, seeking damages incurred as a result of Defendants' allegedly wrongful determination of the purchase price of Michael's shares in the Martin Corporations. Plaintiff asserted five claims against Defendants: (a) breach of contract; (b) negligence; (c) breach of fiduciary duty; (d) aiding and abetting a breach of fiduciary duty; and (e) tortious interference with contract. Id. at ¶¶ 63-96. Defendants subsequently moved to dismiss Plaintiff's Complaint. Each party has submitted memoranda in support of their respective positions, including supplemental and second supplemental memoranda.

II

Standard of Review

"'[T]he sole function of a motion to dismiss is to test the sufficiency of the complaint[.]'" Audette v. Poulin, 127 A.3d 908, 911 (R.I. 2015) (quoting Ho-Rath v. R.I. Hosp., 115 A.3d 938, 942 (R.I. 2015)). In testing the complaint's sufficiency, the Court's "review is confined to the four corners of that pleading," id. (citation omitted), and the Court "'assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the

[5] The Court's Decision in that matter was specifically limited to a determination of the purchase price of Michael's shares; the case has since been voluntarily dismissed with prejudice.

plaintiff[].'" R.I. Emp't Sec. All., Local 401 v. State, Dep't of Emp't & Training, 788 A.2d 465, 467 (R.I. 2002) (hereinafter R.I. Emp't) (per curiam) (quoting St. James Condo. Ass'n v. Lokey, 676 A.2d 1343, 1346 (R.I. 1996)). Put another way, "'[w]hen ruling on a Rule 12(b)(6) motion, the [Court] must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor.'" Pellegrino v. R.I. Ethics Comm'n, 788 A.2d 1119, 1123 (R.I. 2002) (quoting R.I. Affiliate, ACLU v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). Accordingly, a motion to dismiss "should not be granted 'unless it appears to a certainty that the plaintiff[] will not be entitled to relief under any set of facts which might be proved in support of [her] claim.'" R.I. Emp't, 788 A.2d at 467 (internal alterations omitted) (quoting St. James Condo Ass'n, 676 A.2d at 1346).

III

Discussion

In their several memoranda supporting their Motion to Dismiss, Defendants set forth numerous arguments, many of which directly relate to the five counts contained in Plaintiff's Complaint. However, Defendants also assert a host of arguments on a more general level, including a defense based on principles of agency law, dismissal for failure to join indispensable parties, and the affirmative defense of claim preclusion. Before turning to Defendants' arguments with respect to the five counts in Plaintiff's Complaint, the Court will first address Defendants general contentions regarding agency, failure to join indispensable parties, and claim preclusion.

With respect to agency, Defendants reason that, as accountants in the employ of the Martin Corporations, they were acting as agents of a disclosed principal and therefore cannot be held liable for their actions. In support of this position, Defendants cite a case from our Supreme

Court for the proposition that "'an agent acting on behalf of a disclosed principal is not personally liable to a third party for acts performed within the scope of his authority.'" Kennett v. Marquis, 798 A.2d 416, 418 (R.I. 2002) (quoting Cardente v. Maggiacomo Ins. Agency, Inc., 108 R.I. 71, 73, 272 A.2d 155, 156 (1971)). According to Defendants, various allegations in the Complaint state that they were acting "under direction from Ben" or were directed by Ben and the Martin Corporations when they discounted the value of Michael's shares using both the so-called "Built-in Capital Gain" deduction and the loan offsets. See, e.g., Compl. at ¶¶ 41, 48. Essentially, Defendants argue that Ben and the Martin Corporations, as disclosed principals to Michael, the third party, are liable for the actions of their agents, Defendants. However, even assuming an agency relationship was formed here, there are several exceptions to the agency defense, such as when the agent performs: (1) "unauthorized acts outside the scope of the agency"; (2) "acts to which the agent has bound himself or herself—either expressly or impliedly—under a contract"; or (3) "acts within the scope of a duty that is otherwise independent of the agency relationship." Kennett, 798 A.2d at 419 (citations omitted).

If, as alleged, Defendants determined the value of Michael's shares in a manner contrary to their duties—contractual or otherwise—as certified public accountants hired by the Martin Corporations, then Defendants acted beyond the scope of their authority and a defense based in agency law fails. See id. Based on the allegations in Plaintiff's Complaint to that effect, and considering the deference with which this Court must review Plaintiff's allegations, see R.I. Emp't, 788 A.2d at 467, Defendants' agency argument is unavailing. To find otherwise could contort agency law to provide an absolute bar to accountants who raise the defense that they were simply following orders even when their actions were beyond the scope of their authority.

Next, Defendants argue that Plaintiff's Complaint should be dismissed wholesale for Plaintiff's failure to join indispensable parties. This argument is rooted in the same line of reasoning as Defendants' agency defense. Under Rule 19(a) of our Rules of Civil Procedure,

> "A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest; or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest."

Our "[Supreme] Court has defined an indispensable party as one 'whose interests could not be excluded from the terms or consequences of the judgment . . . as where the interests of the absent party are inextricably tied in to the cause . . . or where the relief really is sought against the absent party alone.'" Rosano v. Mortg. Elec. Registration Sys., Inc., 91 A.3d 336, 340 (R.I. 2014) (quoting Root v. Providence Water Supply Bd., 850 A.2d 94, 100 (R.I. 2004)).

Here, Defendants argue that Ben, Chris, and the Martin Corporations are indispensable parties to Plaintiff's lawsuit because their "interests could not be excluded from the terms or consequences of [a] judgment" in this proceeding. See id. However, Plaintiff can obtain the complete relief she seeks from Defendants in this lawsuit without joining Ben, Chris, and the Martin Corporations. If Defendants seek indemnity from Ben, Chris, or the Martin Corporations, that is for them to decide and does not serve as a proper basis for dismissal for failure to join indispensable parties.[6] Accordingly, the Court declines to dismiss Plaintiff's Complaint for failure to join Ben, Chris, and the Martin Corporations.

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[6] The Court's conclusion on this issue is buttressed by the fact that Defendants have filed a third-party complaint against now-third-party defendants Ben, Chris, and the Martin Corporations.

In addition, Defendants further argue that res judicata, or claim preclusion,[7] bars Plaintiff from bringing the present lawsuit. "Claim preclusion prohibits the 'relitigation of all the issues that were tried or might have been tried in the original suit.'" Lennon v. Dacomed Corp., 901 A.2d 582, 590 (R.I. 2006) (quoting E.W. Audet & Sons, Inc. v. Fireman's Fund Ins. Co. of Newark, N.J., 635 A.2d 1181, 1186 (R.I. 1994)). Here, as in Lennon, 901 A.2d at 590, Defendants seek to preclude Plaintiff's current lawsuit based on Plaintiff's prior lawsuit against Ben, Chris, and the Martin Corporations—a lawsuit that was voluntarily dismissed with prejudice.[8] A voluntary dismissal that has been "designated 'with prejudice' [] will be accorded preclusive effect in a subsequent proceeding if the following three requirements are fulfilled: (1) the parties are the same or in privity with the parties of the previous proceeding; (2) an identity of issues in both proceedings; and (3) a valid final judgment on the merits has been entered in the previous proceeding." Id. at 591 (citations omitted). Defendants argue that all three of those elements are met, and claim preclusion should bar Plaintiff's Complaint; Plaintiff disagrees.

Generally, claim preclusion is a defense that "shall [be] set forth affirmatively" "[i]n [a] pleading to a preceding pleading." Super. R. Civ. P. 8(c) (including res judicata among a list of affirmative defenses). However, although claim preclusion is an affirmative defense often raised in an answer, many courts have found that, where circumstances permit, affirmative defenses may be addressed on a Rule 12(b)(6) motion to dismiss. See, e.g., Diaz-Buxo v. Trias Monge, 593 F.2d 153, 155 (1st Cir. 1979) (collecting cases); see also 5 Wright & Miller, Federal Practice and Procedure, Civil 3d § 1277 at 634 n.12 (2004) (collecting cases). While our Supreme Court

[7] In accordance with the modern trend of our case law, see Plunkett v. State, 869 A.2d 1185, 1188 (R.I. 2005), the Court will refer, when circumstances permit, to res judicata as "claim preclusion."

[8] After this Court issued a bench decision finding in Plaintiff's favor, the parties settled their dispute, which resulted in a voluntary dismissal with prejudice.

has yet to directly address the interplay between claim preclusion as a Rule 8(c) affirmative defense and a motion to dismiss brought pursuant to Rule 12(b)(6), it has discussed a Rule 12(b)(6) motion to dismiss based on a Rule 8(c) statute-of-limitations affirmative defense. See Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009). In Barrette, the Court explained that "'[i]f the complaint discloses on its face that the claim is barred by the statute of limitations, the defense may be raised on a motion to dismiss under Rule 12(b)(6).'" Id. (quoting Kent, R.I. Civil Practice § 9:5 (2006)). In so explaining, our Supreme Court also cited the venerable Wright & Miller, noting that:

> "Under the normal rules of pleading, the statute of limitations is an affirmative defense and must be raised in the answer. Since Rule 9(f) makes allegations of time material, however, the defense of the statute may be raised on a motion to dismiss under Rule 12(b)(6) when it is apparent from the face of the complaint that the time limit for bringing the claim for relief has passed." Id. (quoting 5A Wright & Miller, Federal Practice and Procedure, Civil 3d § 1308 at 340 (2004)).

Thus, our Supreme Court found that a complaint "will [not] withstand a motion to dismiss based on a statute-of-limitations defense merely because it contains satisfactory notice of the substance of the claim" when the complaint clearly shows that the claim contained therein is time-barred. Id.

Based on our Supreme Court's reasoning in Barrette, this Court finds that while the affirmative defense of claim preclusion may be raised on a Rule 12(b)(6) motion to dismiss, such a motion will not be granted unless "the complaint discloses on its face" that the elements of claim preclusion are satisfied. See id. Such a finding is consistent with the Rhode Island Supreme Court's well-settled instruction that "'the sole function of a motion to dismiss is to test the sufficiency of the complaint[.]'" Audette, 127 A.3d at 911 (quoting Ho-Rath, 115 A.3d at 942). Moreover, several federal courts that have discussed the interaction between claim preclusion under Rule 8(c) and motions to dismiss under Rule 12(b)(6) have found that claim

preclusion—unlike the statute-of-limitations defense—is best addressed after the motion to dismiss stage.[9] See, e.g., Houbigant, Inc. v. Dev. Specialists, Inc., 229 F. Supp. 2d 208, 220 (S.D.N.Y. 2002) (denying the defendant's motion to dismiss "on res judicata grounds . . . as premature" in light of "the general rule that a res judicata defense is to be considered only after it is pleaded in a defendant's answer"); Putzier v. Ace Hardware Corp., No. 13 C 2849, 2016 WL 1337295, at *19 (N.D. Ill. Mar. 30, 2016) (declining to apply claim preclusion on a motion to dismiss even though the defendant "put forth a persuasive argument that the prior judgments [it] obtained . . . may eventually preclude some of the [p]laintiffs' claims" because the "complaint simply does not admit the facts necessary to conclusively establish a res judicata defense"). Wright & Miller's treatise is similarly supportive of such an approach: "[because] the facts necessary to establish an affirmative defense generally must be shown by matter outside the complaint, the defense technically cannot be adjudicated on a motion under Rule 12." 5 Wright & Miller, Federal Practice and Procedure, Civil 3d § 1277 at 629 (2004).

Applying that rule to the case at hand, based solely on a review of the allegations contained in Plaintiff's Complaint, the Court finds that it is not appropriate to grant Defendants' Motion to Dismiss based on the affirmative defense of claim preclusion. Simply put, other than some passing references to Plaintiff's prior lawsuit against Ben, Chris, and the Martin Corporations, e.g., Compl. at ¶ 36, and allegations evidencing that Defendants served as accountants for the Martin Corporations, Plaintiff's Complaint does not disclose on its face each of the elements of claim preclusion. See Putzier, 2016 WL 1337295, at *19; see also Barrette, 966 A.2d at 1234. This is distinct from the complaint at issue in Barrette. There, the Court

[9] It is well established that "'where the Federal rule and our state rule are substantially similar, we will look to the Federal courts for guidance or interpretation of our own rule.'" Hall v. Kuzenka, 843 A.2d 474, 476 (R.I. 2004) (quoting Heal v. Heal, 762 A.2d 463, 466-67 (R.I. 2000)).

could clearly determine the date from when the statute of limitations ran for purposes of applying the statute-of-limitations affirmative defense; here, however, claim preclusion is not self-evident from the face of the Complaint. Compare Barrette, 966 A.2d at 1234, with 5 Wright & Miller, Federal Practice and Procedure, Civil 3d § 1277 at 643 (2004) ("The statute of limitations defense is unusual in that . . . its effectiveness may well appear on the face of the complaint. Most of the affirmative defenses referred to in Rule 8(c) are less self-evident, however, and usually do not give rise to a motion addressed to the viability or sufficiency of the complaint.").

For example, the issues raised in this Complaint appear different from those in Plaintiff's previous lawsuit. In her previous lawsuit, Plaintiff sought from this Court a determination of the purchase price for Michael's shares. In this lawsuit, however, Plaintiff raises a different issue: but for Defendants' alleged misconduct—which resulted in the improper determination of the purchase price for Michael's shares—she would not have had to bring the first lawsuit against Ben, Chris, and the Martin Corporations. From the face of the Complaint, it is unclear whether the factual allegations set forth conclusively establish that there was an identity of issues between Ben, Chris, and the Martin Corporations in the previous lawsuit and Defendants in the present matter. Such a lack of clarity is precisely why this Court cannot, on this Rule 12(b)(6) Motion to Dismiss, determine whether Defendants have affirmatively shown that claim preclusion applies. Therefore, based on this jurisdiction's liberal pleading rules, see Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1118 (R.I. 2004), the standard of review with respect to Defendants' Rule 12(b)(6) Motion to Dismiss, see Audette 127 A.3d at 911, and the cases cited above, see, e.g., Putzier, 2016 WL 1337295, at *19, this Court declines to grant Defendants' Rule 12(b)(6) Motion to Dismiss on the basis that Plaintiff's Complaint is barred by claim preclusion. At this juncture in the proceedings, the record is not yet ripe for such a determination.

To reorient the reader, thus far the Court has found that Plaintiff's Complaint will not be dismissed based on an agency defense, for failure to join indispensable parties, or due to claim preclusion. Those arguments were aimed at the entirety of Plaintiff's Complaint and, as such, were discussed first. The Court will next address the rest of Defendants' arguments within the context of Plaintiff's specific claims: (a) breach of contract; (b) negligence; (c) breach of fiduciary duty; (d) aiding and abetting a breach of fiduciary duty; and (e) tortious interference with contract.

A

Breach of Contract

Defendants aver that Plaintiff's breach of contract claim (Count I) fails to state a claim for which relief can be granted for the following reasons: (1) Defendants are not a party to the Buy-Sell Agreements between the Martin Corporations and their shareholders; and therefore cannot be liable for their alleged breach; (2) Plaintiff is neither a party nor a third-party beneficiary of the alleged agreement between the Martin Corporations and Defendants to determine the purchase price of Michael's shares pursuant to the Buy-Sell Agreements and therefore there is no privity between Michael and Defendants that would allow Plaintiff to maintain an action for breach of contract; and (3) Plaintiff has not suffered damages. Plaintiff does not contest Defendants' first point as to whether there was a breach of the Buy-Sell Agreements. Rather, Plaintiff argues that Defendants are in breach of a separate agreement (the Accounting Agreement)—one made by Defendants to determine the value of Michael's shares pursuant to the purchase price provisions of the Buy-Sell Agreements. Thus, according to the allegations in Plaintiff's Complaint, it appears that there are two contracts at issue here—(1) the

Buy-Sell Agreements and (2) the alleged Accounting Agreement—but Plaintiff only alleges a breach of the latter as to Defendants in this case.

Plaintiff argues that Defendants have breached the Accounting Agreement, which was an agreement to determine the purchase price of Michael's shares under the purchase price provisions of the Buy-Sell Agreements. Defendants argue that the Accounting Agreement, if there was one, was made between the Martin Corporations and Defendants. According to Defendants, the only way Plaintiff could assert Michael's rights under the Accounting Agreement would be if Michael were a third-party beneficiary of that agreement. However, Plaintiff contends that the Accounting Agreement took one of two forms: it was either made (1) between Defendants and Michael, as an individual shareholder of the Martin Corporations; or (2) between the Defendants and the Martin Corporations. If, as Plaintiff argues, the Accounting Agreement was made between Michael and Defendants, then Plaintiff reasons that Michael can clearly sue for its breach as a party in privity. Alternatively, Plaintiff argues that even if the Accounting Agreement was made between the Martin Corporations and Defendants, then Michael was a third-party beneficiary of that agreement, meaning Plaintiff has standing to sue for its breach.

As to Defendants' argument that Plaintiff has failed to establish damages, Plaintiff counters that Defendants' breach of the Accounting Agreement harmed her in two ways. First, Plaintiff argues that Defendants' breach caused her to have to wait at least two years to receive the proper purchase price of Michael's shares under the Buy-Sell Agreements, entitling her to the interest that has accrued on the money owed to her. Second, Plaintiff also maintains that Defendants' breach of contract caused her to have to bring a lawsuit against Ben, Chris, and the Martin Corporations to determine the proper purchase price of Michael's shares. Essentially,

with respect to Plaintiff's second allegation of damages, this lawsuit against Defendants is an effort to recoup litigation costs, including attorneys' fees, for Plaintiff having had to assert her contractual rights in the previous lawsuit against Ben, Chris, and the Martin Corporations.

In a nutshell, the arguments Plaintiff and Defendants levy back and forth center on two questions: (1) Has Plaintiff properly alleged that Michael was either a party to or a third-party beneficiary of the Accounting Agreement to establish standing to sue for its breach? and (2) If yes, has Plaintiff suffered compensable damages—in the form of interest or litigation costs—as a result of Defendants' alleged breach of that contract?

1

Has Plaintiff Sufficiently Pled Breach of Contract?

As explained above, Plaintiff relies on two theories of contract law to allege her breach of contract claim. First, Plaintiff alleges that she has properly pled breach of contract on the theory that Michael, as a shareholder of the Martin Corporations, entered into an agreement with Defendants whereby Defendants would determine the purchase price of his shares in accordance with the terms of the Buy-Sell Agreements. In order to prevail on her claim for breach of contract, Plaintiff "must not only prove both the existence and breach of a contract, [s]he also must prove that [Defendants'] breach thereof caused [her] damages." Petrarca v. Fid. & Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005). Here, Plaintiff has alleged that there was a "valid and enforceable contract" between Michael and Defendants and that Defendants' breach of the Accounting Agreement caused her damages. Compl. at ¶¶ 63-66; see also id. at ¶¶ 23-24, 27-28. By the express language of the Complaint, Plaintiff has sufficiently alleged a claim for breach of contract necessary to survive Defendants' Motion to Dismiss on the theory that the Accounting Agreement was made between Michael, as a shareholder, and Defendants. See Petrarca, 884

A.2d at 410; Compl. at ¶ 64 (alleging that "Michael Martin, on the one hand and [Defendants], in partnership, joint venture and vicariously for one and the other, on the other hand, entered into a valid and enforceable contract . . ."); see also R.I. Emp't, 788 A.2d at 467 (stating the standard of review of a Rule 12(b)(6) motion to dismiss).

Plaintiff's second theory in support of her breach of contract claim is not so clear. At first glance, Count I of Plaintiff's Complaint lacks any reference to Michael as a third-party beneficiary; in fact, nowhere in the Complaint does the term "third-party beneficiary" appear. Defendants conclude that this fact is dispositive of Plaintiff's third-party beneficiary breach of contract claim. According to Defendants, for a third party to assert rights under a contract as an intended beneficiary, the intent to benefit that third party must be unequivocal. See Forcier v. Cardello, 173 B.R. 973, 985 (D.R.I. 1994). Defendants contend that Plaintiff's failure to expressly identify Michael as a third-party intended beneficiary of the Accounting Agreement is fatal to her claim.

Under Rhode Island law, "[w]hen one party for valuable consideration, engages another by contract to do some act for the benefit of a third party, the latter who would enjoy the benefits, may maintain an action for breach of contract." Davis v. New England Pest Control Co., 576 A.2d 1240, 1242 (R.I. 1990) (citing Rae v. Air Speed, Inc., 435 N.E.2d 628, 632-33 (Ma. 1982)); see also Cathay Cathay, Inc. v. Vindalu, LLC, 962 A.2d 740, 745-46 (R.I. 2009); Restatement (Second) Contracts § 302. "If the third party is an intended beneficiary, the law implies privity of contract." Davis, 576 A.2d at 1242 (citation omitted); see also Restatement (Second) Contracts § 304 ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.").

Significantly, "'[u]nless the parties to a contract explicitly state otherwise, or absent circumstances which clearly indicate that performance under the contract is for the benefit of a third party, the law presumes that parties enter into a contract for their own benefit and not for the benefit of a third party.'" Forcier, 173 B.R. at 985 (quoting R.I. Depositors Econ. Prot. Corp. v. Ernst & Young, C.A. No. 92–1120, slip op. at 3-4 (R.I. Super. Mar. 11, 1994) (Krause, J.)). "Mere knowledge or awareness of a[] potential benefit cannot, without more, prove an explicit intent to confer a benefit, and [a] plaintiff[] must show a clear intent to benefit in order to state a claim as an intended beneficiary." Forcier, 173 B.R. at 986. Thus, a third-party beneficiary may maintain an action for breach of contract if the contract either expressly states or circumstances clearly indicate that the contract was entered into for the benefit of the third party. See Davis, 576 A.2d at 1242; Forcier, 173 B.R. at 985; Restatement (Second) Contracts § 302.

Here, Defendants argue that the Accounting Agreement, if there was one, was made between the Martin Corporations and Defendants. According to Defendants, the only route of recovery for Plaintiff under the Accounting Agreement is for Plaintiff to show that Michael was a third-party intended beneficiary of that contract; otherwise, Plaintiff's claim fails. Defendants aver that Plaintiff has not pled allegations naming Michael as a third-party beneficiary of the Accounting Agreement and, on this basis, move to dismiss the claim for breach of contract.

In considering Defendants' arguments, the Court is mindful that its duty when reviewing a motion to dismiss is solely "'to test the sufficiency of the complaint.'" Audette, 127 A.3d 911 (quoting Ho-Rath, 115 A.3d at 942). The Court is bound to "'look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor.'" Pellegrino, 788 A.2d at 1123 (R.I. 2002) (quoting Bernasconi, 557 A.2d at 1232). Rule 8(a) of our Rules of Civil Procedure requires a plaintiff's complaint to set forth nothing more

than "[a] short and plain statement of the claim showing that [she] is entitled to relief" and "[a] demand for judgment for the relief the pleader seeks."

As the Rhode Island Supreme Court has explained, "[t]he plaintiff is not required to plead the ultimate facts that must be proven in order to succeed on the complaint. The plaintiff is also not obligated to set out the precise legal theory upon which his or her claim is based." Haley v. Town of Lincoln, 611 A.2d 845, 848 (R.I. 1992). Rather, "[a]ll that is required is that the complaint give the opposing party fair and adequate notice of the type of claim being asserted." Id. "The policy behind these liberal pleading rules is a simple one: cases in our system are not to be disposed of summarily on arcane or technical grounds." Id. Thus, the Court will only grant a motion to dismiss where "'it appears to a certainty that the plaintiff[] will not be entitled to relief under any set of facts which might be proved in support of [her] claim.'" R.I. Emp't, 788 A.2d at 467 (internal alterations omitted) (quoting St. James Condo Ass'n, 676 A.2d at 1346).

Here, although Plaintiff does not identify in precise terms that Michael was a third-party intended beneficiary of the Accounting Agreement, the Court cannot find, at this stage in the litigation, that "'it appears to a certainty that the plaintiff[] will not be entitled to relief under any set of facts which might be proved in support of [her] claim.'" Id. (emphasis added). In other words, there is a conceivable set of facts that support Plaintiff's claim that Michael was a third-party intended beneficiary of the Accounting Agreement. See id. For example, the Complaint contains allegations that establish Defendants had more than mere knowledge or awareness that Michael would benefit from their determination of the purchase price of his shares. See, e.g., Compl. at ¶ 22 ("At the time the Buy-Sell Agreements were adopted and at all times relevant hereto, Pascarella & Gill were the independent public accountants engaged to examine the books of the Martin [] Corporations."); id. at ¶ 23 (stating that "it was agreed that Pascarella & Gill, in

the event of shareholder death, would calculate the purchase price of decedent's shares in the Martin [] Corporations"); id. at ¶ 27 ("Pascarella Sr. provided his advice as a certified public accountant and financial adviser to Michael [] as to how the buy-out would proceed under the Buy-Sell Agreements"); id. at ¶ 28 ("Pascarella Sr., in his capacity as a trusted family and corporate adviser to Michael . . . provided estate planning advice to Michael [] and outlined how the purchase price would be calculated for the purchase of his stock under the relevant Buy-Sell Agreements"); id. at ¶ 60 ("Pascarella Sr., Pascarella II and Gill were well aware that the shareholders in the Martin [] Corporations requested and agreed to have Pascarella & Gill act in a neutral capacity to determine the purchase price for the decedent's shares in conformity" with the terms of the purchase price provisions of the Buy-Sell Agreements).

Such allegations "cloak th[e] third party [Michael] with the mantle of intended beneficiary," see Forcier, 173 B.R. at 986 (citation omitted), and show that Defendants had more than "[m]ere knowledge or awareness of a[] potential benefit" flowing to Michael. See id. These allegations evidence "circumstances which clearly indicate that performance under the [Accounting Agreement was] for [Michael's] benefit." See id. at 985 (citation omitted); Restatement (Second) Contracts § 302; Compl. at ¶¶ 22-23, 27-28, 60. Plaintiff's Complaint need only give Defendants "fair and adequate notice of the type of claim being asserted," not a precise legal theory—here, it does just that.[10] Haley, 611 A.2d at 848. Therefore, after reading Plaintiff's Complaint as a whole, the Court determines that Plaintiff has set forth sufficient allegations to establish Michael as a third-party intended beneficiary of the Accounting

[10] The Court's determination as to the sufficiency of Plaintiff's Complaint in this regard is bolstered by the fact that Defendants raised the argument that Michael was not a third-party intended beneficiary of the alleged Accounting Agreement made between the Martin Corporations and Defendants. See Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss at 1, 11-12. Though not dispositive of the Court's decision on the matter, the fact that Defendants raised the argument indicates they received fair and adequate notice of the claim.

Agreement—even though the Complaint does not specifically designate him as one. See Davis, 576 A.2d at 1242; Haley, 611 A.2d at 848; Forcier, 173 B.R. at 985; Super. R. Civ. P. 8(a); see also Restatement (Second) Contracts § 302.

To answer the first question posed above, Plaintiff has properly alleged that Michael was either a party to or a third-party beneficiary of the Accounting Agreement to establish standing to sue for its breach. Plaintiff's two theories of breach of contract—one for a contract between Michael and Defendants and the other for a contract between the Martin Corporations and Defendants—may proceed.

2

Has Plaintiff Alleged Compensable Damages?

Moving to the issue of damages, Defendants argue that, even assuming Plaintiff has alleged a breach of contract, Plaintiff has not alleged that she was damaged. Defendants' argument on damages is fourfold. First, Defendants assert that Plaintiff has not suffered damages because she was not forced to accept Defendants' valuation of Michael's shares. Second, Defendants contend that, ultimately, Plaintiff did not receive less than fair market value for Michael's shares. Third, Defendants argue that Plaintiff's request for interest is too speculative and unrecoverable as an independent element of damages. Fourth, Defendants maintain that Rhode Island law generally does not allow for attorneys' fees as an independent element of damages.

In response, Plaintiff focuses on Defendants' third and fourth arguments: interest and attorneys' fees. Plaintiff argues that she is entitled to interest because the purchase price of Michael's shares—had Defendants properly calculated it in accordance with the relevant provisions of the Buy-Sell Agreements—would have been paid in 2012, not after a trial on the

matter. She contends that she is entitled to the loss of the use of the full purchase price as damages. In addition, Plaintiff distinguishes her request for attorneys' fees from the garden variety case where a prevailing party bases her request for fees either on statute or contract. Rather, Plaintiff seeks litigation costs, including over $300,000 in attorneys' fees, incurred in connection with her lawsuit against Ben, Chris, and the Martin Corporations to determine the proper purchase price of Michael's shares. According to Plaintiff, but for Defendants' breach of contract, she would not have had to bring the previous lawsuit.

As noted above, one of the elements necessary to prevail on a claim for breach of contract is damages. Petrarca, 884 A.2d at 410. "'[I]t is well settled that a court may award damages for breach of contract to place the injured party in as good a position as if the parties fully performed the contract.'" Guzman v. Jan-Pro Cleaning Sys., Inc., 839 A.2d 504, 508 (R.I. 2003) (alteration in original) (quoting Riley v. St. Germain, 723 A.2d 1120, 1122 (R.I. 1999) (per curiam)). Plaintiff points to two forms of damages in this case: attorneys' fees and interest. Before addressing whether interest is recoverable, the Court will first discuss whether attorneys' fees incurred from a prior lawsuit suffice as an independent element of damages.

Plaintiff's request for litigation costs, including attorneys' fees, poses an interesting issue. Ordinarily, a "claim for counsel fees as an element of damages must [] fail since it is well settled that attorney's fees may not be awarded as a separate item of damages in the absence of contractual or statutory authorization." Scully v. Matarese, 422 A.2d 740, 741 (R.I. 1980). However, that rule applies in a more typical lawsuit where a party requests attorneys' fees as an add-on to compensatory damages. Such a scenario is also distinct from a lawsuit where a plaintiff's sole allegation of damages is the fees incurred from bringing that lawsuit. For example, if Plaintiff had alleged a claim for breach of contract and offered factual allegations

establishing all elements other than breach, but alleged that the only harm incurred was the attorneys' fees expended to bring that particular claim, then Plaintiff would have failed to aver damages and would be without recourse. In that hypothetical example, there is no harm other than the fees needed to bring the lawsuit. The facts at hand, however, present a distinct scenario. Here, rather than sue for attorneys' fees and other litigation costs expended in bringing the present lawsuit, Plaintiff asks for attorneys' fees incurred as a result of a previous lawsuit. As discussed below, attorneys' fees are recoverable damages under the unique facts alleged.

As one federal court has explained, "where a breach of contract has caused a party to maintain or defend a suit against a third person, the courts have permitted the recovery against the contract breacher of counsel fees and other litigation expenses incurred in the prior suit involving the third party." Artvale, Inc. v. Rugby Fabrics Corp., 232 F. Supp. 814, 826 (S.D.N.Y. 1964), aff'd, 363 F.2d 1002 (2d Cir. 1966). However, that rule was provided within the context of a suit for breach of a covenant not to sue. In Quill Co. v. A.T. Cross Co., our Supreme Court considered "whether a nonbreaching party to a covenant not to sue may recover as damages for breach of that covenant litigation expenses that it has incurred in defending against a claim brought in breach of said covenant[.]" 477 A.2d 939, 940 (R.I. 1984). There, the Court found that "[their] review of the relevant authorities convinces [them] that such damages should be recoverable in certain circumstances, although [they] consider[ed] this case an inappropriate one in which to apply such a rule." Id. (emphasis added). As our Supreme Court found, there were "no facts or circumstances that would support [a] finding of the existence of an obvious breach of [the] covenant not to sue." Id. at 944. Yet, while our Supreme Court left for another day whether such a rule could be applied, it expressed agreement with the Second Circuit's formulation in Artvale, Inc. that the inquiry should focus on "seeking to determine what

the parties fairly contemplated, or would have had they addressed their minds to the problem." Artvale, Inc. v. Rugby Fabrics Corp., 363 F.2d 1002, 1008 (2d Cir. 1966).[11] A review of the case law reveals that our Supreme Court appears to have left the issue unresolved.

Moving outside the narrow context of a breach of a covenant not to sue, and towards the universe of cases dealing with standard breach of contract claims—as is alleged here—courts have allowed recovery of attorneys' fees for breach of contract claims under limited circumstances. For example, in citing numerous cases adopting such a rule, one court has stated that "[w]hen the defendant's breach of contract caused the plaintiff to engage in litigation with a third party to protect its interests and such action would not have been necessary but for defendant's breach, attorney fees and litigation expenses incurred in litigation with a third party may be recovered as an element of plaintiff's damages from defendant's breach of contract." Masonic Temple Ass'n of Crawfordsville v. Indiana Farmers Mut. Ins. Co., 837 N.E.2d 1032, 1039 (Ind. Ct. App. 2005); see also id. at 1038 (collecting cases). Similarly, as the First Circuit has recognized, "when the natural consequence of a defendant's tortious conduct or a defendant's breach of contract is to cause the plaintiff to become involved in litigation with a third party, the attorney's fees associated with that litigation are recoverable from the defendant." Mut. Fire, Marine & Inland Ins. Co. v. Costa, 789 F.2d 83, 88-89 (1st Cir. 1986) (citing Restatement (Second) Torts § 914(2); 22 Am. Jur. 2d Damages § 166 at 235-36; 25 C.J.S. Damages § 50 at 787-88) (deciding the case under Massachusetts law).

This Court finds the reasoning of those courts persuasive, and holds that, on the facts alleged in the Complaint, Plaintiff's litigation costs and reasonable attorneys' fees incurred from

[11] Of note, in Artvale, Inc., the Second Circuit affirmed the federal district court's denial of attorneys' fees based on the lack of facts showing a lawsuit "brought in obvious breach or otherwise [] bad faith" to constitute a breach of a contract not to sue. 363 F.2d at 1008.

its previous lawsuit against Ben, Chris, and the Martin Corporations are recoverable as an independent element of damages. See Mut. Fire, Marine & Inland Ins. Co., 789 F.2d at 88-89; Masonic Temple Ass'n of Crawfordsville, 837 N.E.2d at 1038-39. Unlike the facts our Supreme Court considered in Quill Co., where the legal validity of the contract not to sue was unclear, here, the circumstances alleged in Plaintiff's Complaint warrant the recovery of reasonable attorneys' fees for breach of contract. See 477 A.2d at 940, 944. Resolving all doubts in Plaintiff's favor, see Pellegrino, 788 A.2d at 1123, the Court finds that a reading of the Complaint raises the inference that but for Defendants' breach of contract, Plaintiff would not have had to pursue litigation against Ben, Chris, and the Martin Corporations. See Guzman, 839 A.2d at 508.

Next, the Court considers whether Plaintiff has pled a conceivable claim for damages in the form of interest. Plaintiff argues that Defendants' breach of contract has deprived her of the use of the money she would have received in 2012 when she expected to receive the proper purchase price for Michael's shares. Conversely, Defendants contend that any interest Plaintiff may be entitled to as a result of the delay in her receiving payment under the Buy-Sell Agreements is too speculative to be compensable.

As noted above, "'it is well settled that a court may award damages for breach of contract to place the injured party in as good a position as if the parties fully performed the contract." Guzman, 839 A.2d at 508 (quoting Riley, 723 A.2d at 1122). The underlying principle for awarding damages in a breach of contract action is to put the nonbreaching party in the position she would have been but for the breach. See id. Our Supreme Court has not had occasion to consider the awarding of interest for breach of contract in the context of the unique facts presented in Plaintiff's Complaint. However, our Supreme Court has opined that:

> "Broadly speaking, it is generally held that interest on unliquidated demands will not be allowed as damages. Undoubtedly there is a clear distinction between a claim for damages entirely unliquidated, as, for example, claims for damages arising from assault and battery, from seduction, or from slander and libel, which are wholly at large, and a liquidated claim, where there is an express contract to pay a sum certain at a fixed time. In the former cases, the amount of damages is unknown until determined after the presentation of evidence by a decision, award, or verdict. In the contract case, both parties know what the claim is, and when it is due and payable. It is in dealing with cases lying between these extremes, where the distinction is less clear and obvious, that courts have so differed in their interpretation and application of the rule as to interest that their decisions are far from harmonious as to when interest may be allowed." Pearson v. Ryan, 42 R.I. 83, 83, 105 A. 513, 513 (1919) (emphasis added).

Based on that continuum bookended by two extreme or clear-cut scenarios, the Rhode Island Supreme Court, in quoting the Connecticut Supreme Court with approval, noted that "[t]he determination of whether or not interest is to be recognized as a proper element of damage is one to be made in view of the demands of justice rather than through the application of any arbitrary rule." Id. at 83, 105 A. at 513 (citation omitted). The First Circuit has also noted that "[t]he Rhode Island court takes an equitable view of the obligation to pay interest." Chernack v. Radlo, 331 F.2d 170, 173 (1st Cir. 1964).

Here, it is clear that Plaintiff's claim for interest lies between the extremes described in Pearson. Plaintiff does not seek a request for interest on a straightforward breach of contract claim, nor does she seek interest based purely on unliquidated damages arising from a tort claim. Faced with such ambiguity, the Court takes "an equitable view of the obligation to pay interest." Id. Indeed, another court considering the problem of whether to award interest has stated that the question basically boils down to "whether the interests of justice require the allowance of interest as damages for the loss of use of money." S. New England Contracting Co. v. State of Conn., 345 A.2d 550, 560 (Conn. 1974).

In light of Plaintiff's allegations, the Court determines that the interests of justice are furthered by allowing Plaintiff to claim interest as a form of compensable damages. See Pearson, 42 R.I. at 83, 105 A. at 515; S. New England Contracting Co., 345 A.2d at 560. Essentially, but for Defendants' breach of the Accounting Agreement, Plaintiff would not have lost the use of the money due to her under the Buy-Sell Agreements. Though she does not set forth a claim that Defendants breached the Buy-Sell Agreements, the allegations in the Complaint—and all reasonable inferences made therefrom—show that Defendants were at least aware that breaching the Accounting Agreement would cause a delay in Plaintiff receiving money that was lawfully hers. Allegedly, Defendants' breach aided the Martin Corporations in withholding the full purchase price for Michael's shares, causing Plaintiff to lose the use of money for at least two years. The Court's finding on this issue comports with the fundamental notion that Plaintiff should be restored to the position she would have been had Defendants not breached the Accounting Agreement. See Guzman, 839 A.2d at 508. Thus, the Court holds that Plaintiff may recover interest as a compensable damage for the loss of the use of the purchase price for Michael's shares.[12] See Pearson, 42 R.I. at 83, 105 A. at 515; S. New England Contracting Co., 345 A.2d at 560. Whether Plaintiff can prove damages in this way is a matter for another day.[13]

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[12] The Court's holding that Plaintiff may recover interest also extends to the rest of her claims—negligence, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and tortious interference with contract. It is unclear whether Defendants or Plaintiff contested this issue, but for purposes of this Motion to Dismiss, Plaintiff's claim for interest survives.

[13] In support of their argument that Plaintiff is not entitled to interest as a measure of damages, Defendants point to language in the Lanmar Buy-Sell Agreement which they claim disposes of the issue. The Court takes note that the Lanmar Buy-Sell Agreement contains language addressing interest—specifically, that "[t]o the extent that the purchase price shall be paid in notes, each such note shall be payable not later than five years from its date of issue and shall bear interest from such date to its date of payment at an annual rate of six percent payable semiannually." Lanmar Buy-Sell Agreement ¶ 3(e). Pursuant to that agreement, the price for

The Court's determinations with respect to attorneys' fees and interest are similar in reasoning—but for Defendants' breach of the Accounting Agreement: (1) Plaintiff would not have had to bring suit against Ben, Chris, and the Martin Corporations; and (2) Plaintiff would not have lost the use of money that should have been paid to her pursuant to the Buy-Sell Agreements. Therefore, the Court answers the second question posed above in the affirmative: Plaintiff has alleged compensable damages to sufficiently establish a cause of action for breach of contract.

In sum, with respect to Plaintiff's breach of contract claim, the Court finds that under either theory Plaintiff has offered—breach of the Accounting Agreement made between Michael, as a shareholder, and Defendants or, alternatively, breach of the Accounting Agreement made between the Martin Corporations and Defendants—she has sufficiently alleged a breach of contract and damages resulting therefrom. Whether Plaintiff can prove each of the requisite elements of that alleged breach of contract is beyond the scope of this Decision; that is a matter of proof, not pleading. For the reasons stated above, Defendants' Motion to Dismiss Count I of Plaintiff's Complaint is denied.

B

Negligence

Next, Defendants seek to dismiss Plaintiff's second count—a claim for negligence. In Count II of the Complaint, Plaintiff alleges that Defendants negligently determined the purchase price of Michael's shares, which resulted in harm to Plaintiff. Defendants move to dismiss that

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Michael's shares could have been wholly in cash or wholly in promissory notes, or partially in cash or partially in promissory notes. However, the amount of interest to which Plaintiff is entitled as a result of Defendants' breach of contract is a matter of proof, not pleading, and is thus beyond the scope of this Decision. In other words, the Lanmar Buy-Sell Agreement's language does not defeat the Court's conclusion that Plaintiff has stated a viable claim for interest as a compensable damage.

claim on two grounds. First, Defendants argue that they did not owe Plaintiff a duty of care, a necessary element of negligence. Defendants reason that, as accountants for the Martin Corporations, they owed a duty of care only to those corporations and owed no such duty to Michael. Defendants further argue that Plaintiff has failed to show another element of negligence: harm. Defendants reiterate the same arguments regarding harm in the context of Plaintiff's negligence claim as they averred regarding Plaintiff's breach of contract claim. However, as the Court found supra, section A.2, Plaintiff has sufficiently set forth allegations establishing damages. Again, but for Defendants' negligence, Plaintiff contends, Plaintiff's previous lawsuit against Ben, Chris, and the Martin Corporations would not have been necessary. See Masonic Temple Ass'n of Crawfordsville, 837 N.E.2d at 1038 (citing W. Sunview Props. LLC v. Federman, 338 F. Supp. 2d 1106 at 1127-28 (D. Haw. 2004)). Moreover, even if those specific damages failed to state a claim for relief, this Court is obligated not only to "assume that all allegations in the complaint are true," but also to "resolve any doubts in a plaintiff's favor." Pellegrino, 788 A.2d at 1123 (citation omitted) (internal quotation marks omitted). Again, whether Plaintiff can prove she is entitled to damages is a matter beyond the scope of the Motion before the Court. Thus, for purposes of this Motion to Dismiss, the singular issue of concern discussed in this section is whether Defendants owed Michael a legal duty necessary for Plaintiff to maintain a claim for negligence.

In Rhode Island, the elements of negligence are familiar: (1) a duty owed by defendants to plaintiff; (2) breach of that duty; (3) conduct establishing that the breach proximately caused an injury; and (4) harm. Medeiros v. Sitrin, 984 A.2d 620, 625 (R.I. 2009). The primary issue raised by Defendants' Motion to Dismiss with respect to Plaintiff's negligence claim is whether the factual averments in Plaintiff's Complaint show a legal duty running from Defendants to

Michael (and in turn Plaintiff) either as his accountants or as accountants to the Martin Corporations. Our Supreme Court has rejected a rule that would have required strict privity "for aggrieved third parties to bring suits against accountants alleging professional malpractice or negligence . . . ." Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 727 n.2 (R.I. 2003). While our Supreme Court opened the door for a third party to establish accountant liability for negligence, it did not adopt a test for this Court to apply in "assessing the viability of third-party negligence claims against accountants." Id. Rather, Bowen left for another day precisely which approach this Court should take in "determining whether non-clients can maintain a cause of action for negligence against accountants." Id. Since Bowen, our Supreme Court has not reconsidered the issue. See Caparco, Sr. v. Lefkowitz, Garfinkel, Champi & Derienzo, Inc., No. PC-2013-1484, 2015 WL 5074489, *7 (R.I. Super. Aug. 21, 2015) (Silverstein, J.).

As our Supreme Court has indicated, there are three approaches a court can take to assess potential third-party negligence claims against accountants: (1) the near-privity approach; (2) the Restatement approach; and (3) the reasonable foreseeability approach. Bowen Court Assocs., 818 A.2d at 727 n.2. This Court has previously discussed, in significant detail, the distinctions between and policies underlying those three approaches. See Anjoorian v. Arnold Kilberg & Co., No. PC-1997-1013, 2006 WL 3436051, *5-6 (R.I. Super. Nov. 27, 2006) (Silverstein, J.). In Anjoorian, after carefully considering the merits of each approach, this Court settled on the Restatement approach as most appropriate. Id. at *7. "[T]he Restatement approach strikes the appropriate balance" between the near-privity approach—which provides the most restrictive standard for liability—and the foreseeability approach—which provides the most expansive standard for liability. Id.; see also Caparco, Sr., 2015 WL 5074489, at *7.

Consistent with its prior decisions, this Court will apply the Restatement approach to the matter at bar. Restatement (Second) Torts § 552, the source from which the Restatement approach gleans its name, provides that:

> "(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

An accountant's liability for negligence under subsection (1) is limited to loss incurred:

> "(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> "(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." Restatement (Second) Torts § 552 (2)(a)-(b).

In the seminal case establishing accountant liability for negligence in this jurisdiction, the U.S. District Court for the District of Rhode Island followed Restatement (Second) Torts § 522 and held "that an accountant should be liable in negligence for careless financial misrepresentations relied upon by actually foreseen and limited classes of persons." Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 93 (D.R.I. 1968) (emphasis added).

Turning to the factual averments in the Complaint, Plaintiff alleges that Defendants served as accountants for both Michael and the Martin Corporations. Compl. at ¶ 70. If, as Plaintiff alleges, Defendants served as Michael's accountants, then a duty of care running from Defendants to Plaintiff is clearly established under the Restatement approach. According to Plaintiff, Defendants "held themselves out to be a professional accounting firm," id. at ¶ 68, and "in serving as both certified public accountants and as financial and business advisers to

[Plaintiff] and the Martin [] Corporations," id. at ¶ 70, Defendants "owed Michael [] a duty of care in determining the purchase price for [his] shares in [the Martin Corporations.]" Id. at ¶ 71. Plaintiff also alleges that Michael relied on Defendants to determine the purchase price for the shares in accordance with the terms of the Buy-Sell Agreements. See id. at ¶¶ 24, 27-28, 35, 55. Defendants, as Plaintiff claims, negligently performed that duty by applying the so-called "Built-in Capital Gain" deduction and improperly offsetting loans against the purchase price of Michael's shares. Id. at ¶¶ 39-49. On those allegations, Defendants owed Plaintiff a duty of care, and Plaintiff has stated a legally sufficient claim for negligence.

On the other hand, if, as Plaintiff alleges (and Defendants insist), Defendants acted as the accountants for the Martin Corporations—and not Michael individually—then Plaintiff's Complaint must contain allegations establishing that Michael (and in turn Plaintiff) was in the "actually foreseen and limited classes of persons" needed to establish a third-party negligence claim. See Rusch Factors, Inc., 284 F. Supp. at 93. The Court is satisfied that Plaintiff has done just that. According to Plaintiff, Defendants have served as accountants for the Martin Corporations for forty years. Compl. at ¶ 16. Then, Plaintiff contends, Stephen Sr. helped Ben and Michael draft and execute the Buy-Sell Agreements, showing that Defendants knew its purchase price determination was for the benefit of the Martin Corporations' shareholders. Id. at ¶¶ 17-23. Once Michael was diagnosed with terminal cancer, he reached out to Defendants for financial advice, which resulted in Defendants providing to Michael a statement of personal financial condition containing the $4,087,790 valuation of Michael's shares in Lanmar. Id. at ¶¶ 34-35. Thereafter, the Complaint states that Defendants negligently determined the purchase price of Michael's shares on behalf of the Martin Corporations. Id. at ¶¶ 39-49.

These factual averments bear out that Michael (and in turn Plaintiff) was in a limited class of individuals who would benefit from Defendants' duty to prepare a valuation of shares pursuant to the Buy-Sell Agreements' purchase price provisions. Defendants' longstanding relationship with the Martin Corporations, coupled with their involvement in the drafting and execution of the Buy-Sell Agreements, leads this Court to conclude that Michael (and in turn Plaintiff) are well within the limited classes of persons to whom Defendants owed a legal duty. See Rusch Factors, Inc., 284 F. Supp. at 93; see also Anjoorian, 2006 WL 3436051, at *8. Although Plaintiff does not allege that Defendants prepared audit reports or certified financial statements like the accountants prepared in Anjoorian and Rusch Factors Inc., the facts Plaintiff alleges are sufficiently similar in nature as to establish a duty of care. Like the accountants in Anjoorian, 2006 WL 3436051, at *1, and Rusch Factors, Inc., 284 F. Supp. at 86, Defendants are certified public accountants. Compl. at ¶¶ 3-5. In their capacity as certified public accountants, Defendants were tasked with determining the purchase price of Michael's shares in the Martin Corporations. Id. at ¶¶ 19-20, 23-24. They knew Michael would receive and rely on the accounting determination they prepared. Id. Whether they needed to do so in the form of a certified financial statement or audit report is not dispositive of whether Defendants owed Plaintiff a duty of care for purposes of this Motion.[14] Rather, what is dispositive are the factual allegations establishing that Defendants had an obligation to provide Michael with information based on their professional skill—specifically, a determination of the purchase price for his shares in conformity with general accounting principles. Id. at ¶¶ 3-5, 19-20, 23-24.

Applying the Restatement test, Plaintiff has sufficiently alleged that Defendants "in the course of [their] business, profession or employment, or in any other transaction in which he has

[14] Furthermore, Defendants prepared and delivered to Michael a statement of personal financial condition, which specifically included a calculation of his shares in Lanmar. Compl. at ¶ 35.

a pecuniary interest, [allegedly] supplie[d] false information for the guidance of others in their business transactions" and "is subject to liability for pecuniary loss caused to [Michael and Plaintiff] by their justifiable reliance upon the information" because "[they allegedly] fail[ed] to exercise reasonable care or competence in obtaining or communicating the information." See Restatement (Second) Torts § 552(1); see also Compl. at ¶¶ 16-23, 34-35, 39-49, 67-74. According to Plaintiff's Complaint, Defendants knew that Michael would rely on and did, in fact, rely on their professional skill to determine the value of his shares under the Buy-Sell Agreements. E.g., Compl. at ¶¶ 34-35. Based on the factual allegations in the Complaint, the Court finds that Plaintiff has sufficiently alleged a duty of care running from Defendants to Plaintiff and a harm resulting therefrom. See Rusch Factors, Inc., 284 F. Supp. at 93; Anjoorian, 2006 WL 3436051, at *8; Restatement (Second) Torts § 552 (1)-(2). Therefore, Defendants' Motion to Dismiss with respect to Count II of Plaintiff's Complaint is denied.

C

Breach of Fiduciary Duty

Next, Defendants argue that Count III of Plaintiff's Complaint, which alleges a claim for breach of fiduciary duty, should be dismissed because Defendants did not owe Plaintiff a fiduciary duty. As this Court has previously explained, "[t]o prevail on a claim for breach of fiduciary duty, a party must establish (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." R.I. Res. Recovery Corp. v. Van Liew Trust Co., No. PC-2010-4503, 2011 WL 1936011, *7 (R.I. Super. May 13, 2011) (Silverstein, J.) (citations omitted) (internal quotation marks omitted). According to comment a to Restatement (Second) Torts § 874, a fiduciary relationship exists between two parties "when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope

of the relation." See also R.I. Res. Recovery Corp., 2011 WL 1936011, at *7. "Indeed, a fiduciary relationship 'arises whenever confidence is reposed on one side, and domination and influence result on the other' or 'when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.'" Id. (quoting Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1076 (N.D. Iowa 2003)).

In her Complaint, Plaintiff alleges that Defendants not only owed the Martin Corporations a fiduciary duty, but also that they owed Michael a fiduciary duty. To support this contention, Plaintiff points to Defendants' status as the certified public accountants who had been in the Martin Corporations' employ for forty years. Compl. at ¶ 78. Furthermore, according to Plaintiff, the close relationship that the Martin Corporations developed with Defendants continued to the point where Michael, following news of his terminal diagnosis, sought estate planning advice from Defendants and relied on them to prepare the valuation of his shares under the terms of the Buy-Sell Agreements. Id. at ¶¶ 34-35, 78. Plaintiff avers that when Defendants improperly valued Michael's shares, damages resulted. Id. at ¶¶ 34-35, 39-49, 75-80. In the Complaint, Plaintiff recounts that Defendants provided advice both as financial advisers, e.g., id. at ¶ 35, and as personal and family advisers, e.g., id. at ¶¶ 28, 42. Plaintiff alleges that Michael relied on Defendants' advice based on the trust he placed in them. See id. at ¶¶ 24, 45, 55, 62. Those allegations are sufficient to allege that Defendants assumed "a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation," R.I. Res. Recovery Corp., 2011 WL 1936011, at *7, as is necessary to state a claim for breach of fiduciary duty. Id. As a result, Defendants' Motion to Dismiss Count III of Plaintiff's Complaint is denied.

D

Aiding and Abetting a Breach of Fiduciary Duty

Defendants next contend that Count IV of Plaintiff's Complaint should be dismissed because the Rhode Island Supreme Court has not yet addressed or adopted aiding and abetting a breach of fiduciary duty as a cognizable tort claim. However, this Court has previously stated that, under Massachusetts' consumer protection law, "'[a]iding and abetting a breach of fiduciary duty requires proof that: (1) there was a breach of fiduciary duty; (2) the defendant knew of the breach; and (3) the defendant actively participated or substantially assisted in or encouraged the breach to the degree that he or she could not reasonably be held to have acted in good faith.'" R.I. Res. Recovery Corp., 2011 WL 1936011, at *8 (quoting Prof'l Servs. Grp., Inc. v. Town of Rockland, 515 F. Supp. 2d 179, 192 (D. Mass. 2007)). Massachusetts is not alone in this view: the First Circuit has explained that New Hampshire would also recognize the tort of aiding and abetting a breach of fiduciary duty. See Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 82-83 (1st Cir. 2001) (citing Restatement (Second) Torts § 876(b)).

The fact that our Supreme Court has not yet had occasion to address this tort, without more, is insufficient to defeat Plaintiff's claim at this juncture. Rather, Plaintiff has alleged that Defendants aided and abetted Ben's breach of his fiduciary duty to Michael when they knowingly, willfully, intentionally, and actively assisted Ben in wrongfully discounting or devaluing the value of Michael's shares. Compl. at ¶¶ 39-49, 81-91. In light of the growing recognition of aiding and abetting a breach of fiduciary duty as a tort in nearby jurisdictions, as well as this Court's own acknowledgement of it in R.I. Res. Recovery Corp., 2011 WL 1936011 at *8, the Court denies Defendants' Motion to Dismiss Count IV. See also Restatement (Second) Torts § 876(b).

E

Tortious Interference with Contract

Finally, Defendants maintain that Count V of Plaintiff's Complaint fails to state a claim upon which relief can be granted for two reasons. First, Defendants contend that Plaintiff has not properly pled her claim for tortious interference with contract. Second, Defendants argue that, assuming Plaintiff has sufficiently alleged tortious interference with contract, Plaintiff has not suffered damages.

With respect to Defendants' first argument regarding Plaintiff's pleading, Defendants assert that Plaintiff has altogether failed to plead that Defendants acted with "legal malice"—one of the elements of tortious interference with contract. Under Rhode Island law, "[t]o establish a prima facie case of tortious interference with contractual relations . . . the aggrieved party must show '(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his [or her] intentional interference; and (4) damages resulting therefrom.'" Belliveau Bldg. Corp. v. O'Coin, 763 A.2d 622, 627 (R.I. 2000) (quoting Smith Dev. Corp. v. Bilow Enters., Inc., 112 R.I. 203, 211, 308 A.2d 477, 482 (1973)). As our Supreme Court has provided, "[t]o establish intentional interference with contract, no showing of actual malice is necessary; rather, a showing of 'legal malice' will suffice: 'Malice, in the sense of spite or ill will, is not required; rather legal malice—an intent to do harm without justification—will suffice.'" Id. (quoting Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 753 (R.I. 1995)).

Defendants argue that Plaintiff's failure to use the term "legal malice" in alleging tortious interference with contract means this Court must find that Plaintiff has failed to state a claim for relief. However, as belabored above, this Court views pleadings liberally, and, in order to survive a motion to dismiss under Rule 12(b)(6), a complaint need only give "fair and adequate

notice" to an opposing party. See Haley, 611 A.2d at 848. In paragraph 95 of the Complaint, Plaintiff alleges that Defendants "jointly, severally, vicariously with one and the other, in joint venture, and in partnership did tortuously [sic] interfere with [Plaintiff's] contractual rights." (Emphasis added). The Court finds that subsumed within that language is the inference that Defendants acted with the requisite legal malice needed for Plaintiff to assert a claim for tortious interference with contract. The wording in paragraph 95, coupled with the allegations strewn throughout the Complaint, as well as the titling of Count V as a claim for "Tortious Interference with Contract," sufficiently put Defendants on notice of Plaintiff's claim. See Haley, 611 A.2d at 848. Defendants ask this Court to surgically deconstruct the Complaint and dismiss it based on a hypertechnical reading, but our well-settled case law instructs a different standard of review—one that requires a liberal construction of the pleading, making all favorable inferences in Plaintiff's favor and avoiding dismissal based "on arcane or technical grounds." See Haley, 611 A.2d at 848; Pellegrino, 788 A.2d at 1123.

Defendants further argue that Plaintiff's claim for tortious interference with contract fails because it lacks compensable damages. However, the Court finds otherwise. Briefly, "when [a] plaintiff is forced to sue a third party to hold it to the bargain with which a defendant intentionally and wrongfully interfered, attorney's fees in that action may properly be awarded against the tortfeasor." O'Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843, 850 (Mass. 1996); see also Hanlin Grp., Inc. v. Int'l Minerals & Chem. Corp., 759 F. Supp. 925, 937 n.17 (D. Me. 1990) (noting that Maine and Restatement (Second) Torts § 914 "have recognized as a valid claim for damages the expenses incurred in litigation with a third party if they are 'the natural and probable consequences of [the defendant's tortious] act.'") (quoting Gagnon v.

Turgeon, 271 A.2d 634, 635 (Me. 1970)). Pursuant to that reasoning, Plaintiff's claim for tortious interference with contract properly alleges damages. See id.

Moreover, Plaintiff's count for tortious interference with contract alleges damages separate and apart from any argument that Plaintiff only seeks litigation costs or interest. In Count V, Plaintiff asserts an additional harm—specifically, punitive damages—suffered beyond the damages which were arguably compensated in Plaintiff's prior lawsuit against Ben, Chris, and the Martin Corporations. See Compl. at ¶ 96. Accordingly, the Court finds that Plaintiff has sufficiently averred a form of compensable damages stemming from Defendants' allegedly tortious interference with the Buy-Sell Agreements and Defendants' Motion to Dismiss Count V of Plaintiff's Complaint is denied. See Audette, 127 A.3d at 911; R.I. Emp't, 788 A.2d at 467.

IV

Conclusion

For the foregoing reasons, after "assum[ing] that all allegations in the [C]omplaint are true, and resolv[ing] any doubts in [] [P]laintiff's favor," see Pellegrino, 788 A.2d at 1123 (quoting R.I. Affiliate, ACLU, 557 A.2d at 1232), it does not "'appear[] to a certainty that [Plaintiff] will not be entitled to relief under any set of facts which might be proved in support of [her] claim[s].'" See R.I. Emp't, 788 A.2d at 467 (quoting St. James Condo Ass'n, 676 A.2d at 1346); Super. R. Civ. P. 12(b)(6). Accordingly, Defendants' Motion to Dismiss is denied. Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Isabel Barbeitos Martin v. Pascarella & Gill P.C., et al.**
CASE NO:	**PC-2014-6336**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 24, 2017**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**William M. Russo, Esq.**
For Defendant:	**Kevin J. Holley, Esq.** **Richard A. Van Tienhoven, Esq.**