STATE OF MAINE
SAGADAHOC, SS.

BUSINESS AND CONSUMER COURT
LOCATION: WEST BATH
DOCKET NO.: CV-07-03

JAMES CLIFFORD, ET ALS,

Plaintiffs

v.

STEVEN CASE, ET ALS,

Defendants

ORDERS ON:
(1) PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT;
(2) DEFENDANTS' MOTION FOR SUMMARY SUMMARY JUDGMENT;
(3) COUNTERCLAIM DEFENDANT CLIFFORD'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND
(4) COUNTERCLAIM DEFENDANTS' MOTION TO DISMISS

This matter is before the court on (a) the motion of Plaintiffs James A. Clifford ("Clifford") and Christos Orestis, III ("Orestis" and collectively "Plaintiffs") for partial summary judgment on Count II of Plaintiffs' Complaint; (b) the motion of Defendants Steven L. Case ("Case"), Rowland Ricketts ("Ricketts"), Kimberly Low ("Low"), Case Professional Resources, LLC ("CPR"), S.L. Case and Associates, Inc. and The Rickets Group, LLC (collectively "Defendants") for summary judgment on all Counts of Plaintiffs' Complaint[1]; and (c) the motion of Counterclaim Defendant Clifford for summary judgment on Count I of the Amended Counterclaim of Counterclaim Plaintiffs Case, Ricketts, Low, CPR, S.L. Case and Associates, Inc. and The Rickets Group, LLC (collectively "Counterclaim Plaintiffs"); and (d) the motion of Counterclaim Defendants Clifford and Orestis to dismiss Count II of the Amended Counterclaim.

[1] Defendants have styled their motion as one for partial summary judgment as to Counts I through IV asking only for summary judgment on the issue of damages with respect to Plaintiffs' business claims. However, the scope of this relief encompasses the entirety of those Counts and, when coupled with Plaintiffs' request for summary judgment on the remaining Counts V through X, Defendants appear to be asking for summary judgment on all Counts of Plaintiffs' Complaint.

UNDISPUTED FACTS

In early 2005, Plaintiffs and Defendants engaged in discussions regarding the formation of a business enterprise. (Pls.' S.M.F. ¶ 1.) At that time, Plaintiffs were the principals of a "call center" business known as The Tangent Group. Case and Ricketts were the principals of CPR, a company that performed insurance underwriting services. (Defs.' A.S.M.F. ¶¶ 1 & 4.)

Pursuant to the unanimous agreement of all parties, on May 26, 2005 Articles of Organization were filed with the State of Maine to create Global Insurance Resources, LLC ("GIR"). (Pls.' S.M.F. ¶¶ 3-4.) Throughout the remainder of that year, GIR took a number of steps directed towards conducting and advertising its business. Those steps included opening a business checking account, publishing articles in insurance trade publications, entering into a lease agreement for office space and requesting business credit cards for each of the individual Plaintiffs and Defendants. (Pls.' S.M.F. ¶¶ 13-19.)

On or about December 31, 2005, Clifford, acting on behalf of his single-member-managed limited liability company *Pro Se* Holdings, LLC ("Pro Se"), Orestis, acting on behalf of his single-member-managed limited liability company CO3, LLC ("CO3"), and Case, acting on behalf of Case Professional Resources, LLC, whose members included Case, Ricketts and Low, all signed a document called "Letter of Intent/Joint Venture" ("Agreement"). (Pls.' S.M.F. ¶¶ 6, 8, 12, 20; Exh. C to Verified Compl.) The Agreement provided in part as follows:

> This Letter of Intent will confirm and summarize our ongoing discussions surrounding a proposed joint venture between the shareholders of [CPR] on the one hand and CO3 . . . and Pro Se . . . on the other. As discussed, we have adopted the name "Global Insurance Resources, LLC" ("GIR") to apply to the joint venture.

(Exh. C. to Verified Compl.) In further relevant part, the Agreement provides the following:

> 2. The parties have jointly formed GIR as a Maine limited liability company. The parties have agreed to formalize their business relationship by and through written agreement(s), including but not limited to this Letter of Intent and an operating

> agreement. The operating agreement will more clearly define the rights and duties of GIR's principles and will define, among other things, division of equity, basic corporate governance, bonus programs to GIR employees, and distribution of profits to members of GIR. A summary of the current agreement [on these topics] is . . . attached hereto. ***Note that it is anticipated that the terms of the operating agreement shall expire on or before December 31, 2006, at which time the parties will negotiate and execute a superseding agreement.***
>
> 3. . . . the parties will conduct business through December 31, 2005 by and through CPR. Until December 31, 2005, Case . . ., Low, Ricketts . . ., Orestis and Clifford shall remain salaried employees of CPR and all insurance-related business conducted by the parties in 2005 shall be booked for legal and tax purposes as CPR business. On January 1, 2006, Orestis and Clifford will cease doing business individually and their respective entities shall serve as the vehicle in which they conduct their business.

(*Id.*) A document entitled "Current Agreement Relating to Division of Equity, Corporate Structure, and Profit Distribution" was attached to the Agreement (*Id.*) In part, the document provided that

> . . . the parties agree that the division of equity, ownership and control in GIR shall be split among CPR and its principals on the one hand and the Orestis and Clifford entities on the other. It is anticipated that GIR shall be divided and controlled [with CPR at 58%, CO3 at 22% and Pro Se at 20%] . . .
>
> It is anticipated that the parties will discuss the terms and conditions herein, make appropriate changes, and execute as soon as possible. It is further understood that the [Agreement] will reflect the parties' general agreement with respect to GIR business and that the details of all terms and conditions will be fully discussed, negotiated and documented in a fully executed operating agreement.

(*Id.*)

No document other than the Agreement was ever executed for the purpose of describing the relationship of the parties as related to GRI. (Defs.' A.S.M.F. ¶ 11.)[2]

Upon their arrival at work on June 27, 2006, Clifford and Orestis were called to a meeting with Case, Ricketts, Low, an attorney claiming to represent those three parties and two off-duty police officers. They were read a prepared statement announcing their termination as

[2] Plaintiffs have denied Defendant's S.M.F. ¶ 11, but only on the basis that the Agreement itself constituted an operating agreement.

employees of CPR. (Pls.' S.M.F. ¶¶ 80-81.) On July 12, 2006, S.L. Case & Associates and CPR gave Plaintiffs formal notice that they had dissolved GIR as a "joint venture" and that they would be winding up the affairs of that entity. (Pls.' S.M.F. ¶ 78.) In spite of that, GIR remains a limited liability company in good standing with the State and its articles of organization have not been cancelled. (Pls.' S.M.F. ¶ 83.)

At all times relevant to the allegations in Count I of the Amended Counterclaim, GIR's Executive Board consisted of Clifford, Christos Orestis ("Orestis"), Case, Ricketts and Low. (Counterclaim Def.'s S.M.F. ¶ 14.) Clifford also served in the roles of Executive Vice President, Chief Operating Officer and General Counsel for GIR. (Counterclaim Def.'s S.M.F. ¶ 15.) In these roles, Clifford's duties included performing general legal services for GIR. (*Id.*)

Plaintiffs' Verified Complaint alleges Breach of Contract (Count I), Judicial Dissolution of LLC (Count II), Waste and Mismanagement (Count III), Breach of Fiduciary Duties (Count IV), Fraudulent Inducement (Count V), Intentional Interference with Contractual and Economic Relationships (Count VI), Slander & Trade Libel (Count VII), Conversion (Count VIII), Invasion of Privacy (Count IX) and Exemplary Damages (Count X). In their cross-motions for summary judgment, Plaintiffs seek summary judgment in their favor on Count II while Defendants seek summary judgment on all Counts of Plaintiffs' Verified Complaint.

Counterclaim Plaintiffs' Amended Counterclaim alleges claims of legal malpractice against Clifford (Count I) and "Rescission of Joint Venture" (Count II) against Clifford and Orestis. Clifford seeks summary judgment on Count I of the Amended Counterclaim, and Clifford and Orestis have filed a motion to dismiss Count II.

DISCUSSION

I. Plaintiffs' Motion for Partial Summary Judgment on Count II of Complaint

Count II of the Complaint seeks a judicial dissolution of GIR. In their opposition to Plaintiffs' motion for partial summary judgment on this count, Defendants argue that they have consistently "disclaimed" membership in GIR or, if they ever were members, that they have withdrawn from that membership.

A. Disclaiming Membership

Defendants offer no support for the argument that they were never members of GIR, other than Case's avowed understanding that they would not become members until an operating agreement separate from the Agreement had been memorialized. (Defs.' A.S.M.F. ¶ 42.) However, the Agreement states that "[t]he parties *have jointly formed* GIR as a Maine limited liability company" and "have agreed to formalize their business relationship by and through written agreement(s), including but not limited to this Letter of Intent and an operating agreement." (Exh. C. to Verified Compl.) (emphasis added). Thus, as of the signing of the Agreement at the end of December 2005, Defendants knew that they were members of GIR and that their rights as members were at least partially determined by the Agreement. Any contrary understanding by Case does not undermine the language of the Agreement and the court concludes that Defendants were members of GIR.

B. Withdrawal from GIR

In the alternative, Defendants argue that, even if they were once members of GIR, they subsequently withdrew their membership pursuant to 31 M.R.S.A. § 692(3). From this premise, they assert that GIR was automatically dissolved pursuant to 31 M.R.S.A. § 701(3) without the need for any judicial action or intervention.

Preliminarily, it is noted that 31 M.R.S.A. § 701 was repealed over a decade ago. *See* 31 M.R.S.A. § 701(3), *repealed by* P.L. 1997, ch. 633, § 18. That aside, Defendants have not taken proper steps to withdraw from GIR. "Unless the operating agreement or articles of organization provide that a member has no power to withdraw by voluntary act from a limited liability company, the member may do so at any time by giving a 30-day written notice to the other members . . . ." 31 M.R.S.A. §692(3). Despite Defendants' claim that "[a]rguably, there have been numerous written notices of withdrawal already given in this case," (Defs.' Opp'n to Pls.' Mot. Summ. J. at 3), the only admissible evidence offered by them in support of this contention is a letter styled "Notice of Dissolution of Joint Venture" sent by counsel for Defendants to counsel for Plaintiffs, dated July 12, 2006, (Exh. D to Verified Compl.). The thrust of this letter presents an argument that, despite GIR having conducted business as a "joint venture" between the parties, there was never a meeting of the minds on an operating agreement following the Agreement and, therefore, GIR was never formed as a limited liability company. (*Id.*) The letter then pronounces that the joint venture was thereby dissolved. (*Id.*) Of particular relevance to Defendants' argument, the letter also provided as follows:

> Given the current circumstances . . . it is clear that the venture cannot continue as a joint venture of these parties, that it will not grow into any other sort of relationship, and that it must be terminated. Therefore, the [Agreement], to any extent that it may be binding, and any other remaining business relationship between Case and your clients is hereby terminated, effective as of the date of this letter.

(*Id.*)

The Law Court has stated that "strict compliance with the statutory written notice requirement is necessary to effectuate a member's voluntary withdrawal from a limited liability company." *Bell v. Walton*, 2004 ME 146, ¶ 7, 861 A.2d 687, 689. The court explained that it is

important to have a "a bright line by which members of limited liability companies can easily determine the status of their responsibilities toward one another." *Id.* ¶ 11, 861 A.2d at 689. This protects both remaining members of a limited liability company, who "have the opportunity to notify creditors that the withdrawing member can no longer bind the company," and the member who has arguably withdrawn against "false or unfounded claim[s of withdrawal that] could improperly deprive that member of his or her rights to any distribution, threaten usurpation of the member's management powers, and deprive the member of the fiduciary duties owed by other members." *Id.* ¶ 9, 861 A.2d at 689.

This court finds that proper written notice of withdrawal was not given in this case and concludes that this finding comports with the rule of strict construction of Section 692(3). The essence of Defendants' letter was to argue that they were not members of GIR, but simply members of the "joint venture" incarnation of that company, which entitled them to end their involvement with Plaintiffs at will. After asserting in their letter that there was no limited liability company[3], Defendants remaining claim that, in addition to dissolving the joint venture, "any other business relationship between Case and your clients is hereby terminated" is not enough to constitute written notice of withdrawal from GIR. To permit otherwise would be to render hopelessly murky the "bright line" rule laid out by the Law Court. Accordingly, Defendants' alternate argument that they voluntarily withdraw from GIR is not persuasive.[4]

[3] Indeed, within the same paragraph as the alleged withdrawal from GIR, the letter states that "it is clear that the . . . joint venture . . . will not grow into any other sort of relationship." This clearly acknowledges that Defendants did not consider there to be any limited liability company from which to withdraw.

[4] Defendants make a one-sentence argument at this point in their brief that GIR was dissolved as of December 30, 2005 under the terms of the Agreement when no subsequent agreement between the parties was reached. This argument is raised again in greater detail in section II of this Order dealing with Defendants' motion for summary judgment.

Based on the foregoing, the court concludes that GIR was in fact formed as a limited liability company and that Defendants were and remain members of GIR. Nevertheless, on the motion record it is impossible for the court to grant summary judgment in Plaintiffs' favor on Count II of their Complaint. Pursuant to 31 M.R.S.A. § 702, certain facts must be established prior to judicial dissolution,[5] and the existence of such facts has not been a focus of the parties in their summary judgment briefs.

II. Defendants' Motion for Summary Judgment

[5] Specifically, the statute authorizes the court to enter a decree dissolving a limited liability company and to dissolve its assets if it is established that:

> A. The managers of the limited liability company are so divided respecting the management of the limited liability company's business and affairs that the votes required for action by the managers cannot be obtained and the members are unable to terminate the division, with the consequence that the limited liability company is suffering or will suffer irreparable injury, or the business and affairs of the limited liability company can no longer be conducted to the advantage of the members generally;
>
> B. The members are so divided respecting the management of the business and affairs of the limited liability company that the limited liability company is suffering or will suffer irreparable injury, or the business and affairs of the limited liability company can no longer be conducted to the advantage of the members;
>
> C. The acts of the managers or those in control of the limited liability company are illegal or fraudulent;
>
> D. The assets of the limited liability company are being misapplied or wasted;
>
> E. The petitioning member has a right, under a provision of the articles of organization, the operating agreement or section 701, to dissolution of the limited liability company at will or upon the occurrence of any specified event or contingency and has made a conforming demand upon the managers or members in control, who have failed to proceed with dissolution as required by section 701; or
>
> F. The limited liability company has abandoned its business and has failed, within a reasonable time, to take steps to dissolve and liquidate its affairs and distribute its assets.

31 M.R.S.A. § 702(1).

For the purpose of their motion for summary judgment, Defendants have assumed that "the nature of [the parties] business relationship was that of members of a jointly owned limited liability company, known as GIR." (Defs.' Mot. Summ. J. at 3.).

A. Automatic Dissolution

Defendants first argue that GIR was automatically dissolved under Maine law. There is no dispute that the Agreement is the only document setting forth the terms under which the company operated. Defendants note that the Agreement "anticipated that the terms of the operating agreement shall expire on or before December 31, 2006, at which time the parties will negotiate and execute a superseding agreement." (Exh. C. to Verified Compl.) A superseding agreement was never successfully negotiated. Therefore, Defendants argue that pursuant to 31 M.R.S.A. § 701(1), which permits nonjudicial dissolution "at the time . . . specified in a limited liability company operating agreement," GIR was dissolved on December 31, 2006.

Defendants' argument misconstrues the language of the Agreement in two ways. First, that document does not go so far as to state that GIR would discontinue business as of December 31, 2006 absent a superseding agreement. It simply anticipates that the "terms" of the operating agreement, in this case the Agreement, would expire on or before that date. While the Agreement does not say what terms would govern GIR should the old terms expire, it also does not say that this eventuality would necessarily result in its dissolution. Further, the Agreement does not state that its terms would expire on December 31, 2006, only that "it is anticipated" that they would expire. Given the Law Court's requirement of strict compliance with the terms of the statutes controlling limited liability companies, it would be inappropriate to construe the foregoing language as establishing a firm end date for GIR in the absence of a superceding document.

B. Plaintiffs' Damages

Defendants also claim that they are entitled to summary judgment on Counts I through IV of the Complaint because Plaintiffs cannot establish that they suffered any damages as a result of their ouster from GIR.

As an initial matter, there is no doubt that Plaintiffs have cited some facts in the record that could support a finding of at least some damages. Specifically, they allege that "[f]urniture and fixtures purchased by GIR are still being used by CPR." (Pl.'s A.S.M.F. ¶ 41.) Defendants admit this to be the case. Certainly those items have some value that could form the basis for a damages award.[6] At a minimum, therefore, summary judgment in Defendants' favor for lack of damages is not appropriate.

In spite of the foregoing determination, the court addresses Defendants' additional more significant argument that Plaintiffs cannot sustain their primary claim of damages based on alleged lost future profits because Plaintiffs' lay and expert witnesses cannot appropriately testify to the value of GIR as a business at any time nor to its lost future profits.

1. Lay Testimony

Defendants argue that the testimony of Orestis and Clifford regarding lost future profits is inadmissible lay opinion.

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions and inferences which are (a) rationally based on the perception of the witness and (b) helpful to . . . the determination of a fact in issue.

M.R. Evid. 701. The Law Court has consistently held that "'[p]rospective profits are allowable only if they can be estimated with reasonable certainty.'" *Rutlend v. Mullen*, 2002 ME 98, ¶ 22, 798 A.2d 1104, 1112 (quoting *Ginn v. Penobscot Co.*, 334 A.2d 874, 887 (Me. 1975)). Thus, to

[6] This simply serves as one example and is not meant to imply that Plaintiffs have failed to allege other forms of damages that could result in a larger award following trial.

be admissible, an opinion regarding lost profits "must be an informed opinion based on facts that the fact-finder can evaluate." *Id.*

Although Defendants' argument is directed to the testimony of Clifford and Orestis, the only lay witnesses Plaintiffs actually reference in support of their claim for lost future profits are Lesa Watson ("Watson"), the finance director of GIR and CPR, and Ricketts. Plaintiffs cite letters Watson wrote, dated April 12, 2006 and May 2, 2006, in which she states that "[i]n the first quarter of 2006 GIR had sales of $736,000 and a net income of $118,000." (Exh. 10-11 to Pls.' A.S.M.F.) Both letters go on to assert that "[t]his is considered rapid growth for the company as last year total sales were $1.2 million dollars . . . ." (*Id.*) In the April 12 letter, Watson notes that GIR has "the potential of growing to over $10 million within a year." (Exh. 10 to Pls.' A.S.M.F.) In Watson's May 2 letter, however, she revises that projection to say that "[w]e have the potential of growing to over $6 million within a year." (Exh. 11 to Pls.' A.S.M.F.)[7]

Neither letter reveals the basis for Watson's projection. When asked at her deposition how those figures were derived, Watson said that "Clifford and I worked on cash flows quite often together and he would tend to be more of the person that would, you know, put in the projections as to where the growth of the company might come from . . . so that's where these numbers came from was some projections that they were thinking that this is where things would be going." (Watson Dep. at 41.)

Thus, it seems clear that Watson made no independent determination of potential future profits based on studying facts that a fact-finder could evaluate. Rather, she simply relied on Clifford's projections for GIR and parroted those projections in her letters. In the context of

[7] There is no explanation given or evident on the motion record as to why Watson's description of the profit making potential of GIR varied so wildly within the span of a few weeks.

Defendants' motion for summary judgment, Watson's opinion regarding future profits must be excluded, not only because they do not comport with M.R. Evid. 701, but because they are hearsay under M.R. Evid. 801(c).

The only other lay evidence regarding lost future profits purportedly comes from Ricketts who expressed in his deposition an understanding that the sales forecast at the beginning of 2006 for GIR was "relatively high and probably 5 – in the 5 to 7 million range." (Pls.' A.S.M.F. ¶ 21.) Again, there is no indication of the basis of Ricketts's projection.

Lay testimony aside, Plaintiffs' Additional Statement of Material Facts references a one-page document titled "2006-2007 Business, Resource, and Capacity Analysis." (Pls.' A.S.M.F. ¶ 19; Exh. 12 to A.S.M.F.) This document is full of projected income figures for GIR. However, there is no indication as to what forms the basis for the projections. Therefore, it provides no means by which a fact-finder could evaluate the facts underlying the document to make a determination regarding the weight to afford its projections. *See Rutlend*, 2002 ME 98, ¶ 22, 798 A.2d at 1112.

Although some lay testimony may be admissible regarding Plaintiffs' damages stemming from their alleged wrongful ouster from GIR, the motion record does not disclose any admissible lay testimony regarding the lost opportunity for future profits.

2. Plaintiffs' Expert's Testimony

Plaintiffs have designated Mark G. Filler ("Filler") as an accounting expert regarding lost future earnings. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise." M.R. Evid. 702. The Law Court has instructed that the proponent of such evidence "must establish that (1) the testimony is relevant pursuant to M.R. Evid. 401, and (2) it will assist the trier of fact in understanding the

evidence or determining a fact in issue." *Searles v. Fleetwood Homes of Pa., Inc.*, 2005 ME 94, ¶ 21, 878 A.2d 509, 515-16 (citing *State v. Williams*, 388 A.2d 500, 504 (Me. 1978)). Although the *Williams* standard is not identical to the federal *Daubert* standard, which requires a court to make a threshold determination regarding the reliability of an expert's methodology before admitting her testimony, *United States v. Mooney*, 315 F.3d 54, 63 (1st Cir. 2002), it still requires an initial determination by the court that the expert's testimony is relevant. Relevance requires some valid foundation for the expert's opinion.

Mindful of the foregoing, the court concludes that Filler's testimony regarding GIR's future profits is not admissible. He testified at his deposition that he used what is known as a "discounted cash-flow model" to determine what GIR's future earnings would be over a period of six years. (Filler Dep. at 39-40.) He chose that period of time solely because Orestis represented to him that "the business plan was to try to sell the company when sales approached $10,000,000. (*Id.*) Filler consulted no written documents, but relied on a single phone conversation with Orestis that lasted approximately thirty minutes (Filler Dep. at 40 & 62.)

Applying his model, Filler forecast $2,800,000 in cash flow for 2007, $3,600,000 for 2008, $4,600,000 for 2009, $8,900,000 for 2010, $7,800,000 for 2011 and $9,500,000 for 2012. (Filler Dep. at 62-71.) The ultimate source for the figures that Filler plugged into his projection model, however, was Orestis. (Filler Dep. at 66.)[8] Filler did not seek to independently analyze whether the numbers supplied by Orestis were grounded in anything other than mere speculation, acknowledging that he relied on Orestis telling him that this kind of increase was "what he could do and what he represented to me that this is what they all thought they could do." (*Id.*) Given

[8] At this point in his deposition, Filler was asked for the source of the percentage increases in cash flow over what GRI had previously experienced. He acknowledges that they are "based on just representations from [] Orestis as to what he could do in the future." (Filler Dep. at 66.)

that there is no actual data to support Filler's projections beyond Orestis's unsupported assertions about the future cash flow of GIR, Filler's testimony regarding GIR's future profits does not satisfy the relevance prong of the test for admissibility of evidence of M.R. Civ. P. 702.[9]

With Filler's testimony excluded, along with the earlier determination that there is no admissible lay evidence on the issue of lost future damages, Plaintiffs are left with no support on this record for their claim for such damages. As a result, partial summary judgment on the issue of lost future damages must be entered in favor of Defendants.

C. Slander

Defendants also move for summary judgment on Count VII of Plaintiffs' Verified Complaint alleging Slander & Trade Libel. The only relevant evidence cited by Plaintiffs in opposition to summary judgment on this count is a statement by Orestis in his deposition that Ricketts sent an e-mail to a third party

> which unfortunately I could not find, even though I went to lengths to find it, in it, it made . . . pretty clear that I was pushed out of the company and we had parted ways because we didn't share the same values . . . That was the one instance where I saw something in writing. Other than that, the people I was hearing from, industry colleagues, contacts, they were relating to me phone conversations that they had had when they were being contacted directly from [Case].

(Orestis Dep. at 34.) This is simply an account of what various and unnamed third parties told Orestis that Case had told them. At best, it is double hearsay. It is Plaintiffs' responsibility to put forward evidence of a quality that would be admissible at trial in order to avoid summary judgment on Count VII. They have failed to do so. *See* M.R. Civ. P. 56(e).

[9] The court is not convinced by Plaintiffs' argument that Filler's forecast is based on more than simply Orestis's assertions given that he also reviewed numerous business records prior to reaching his conclusion, (Filler Dep. at 13-14). In context, Filler's discussion of his review of these materials makes clear that, although he reviewed them, the sole basis for his figures regarding GIR's future profits is his conversation with Orestis.

D. Conversion

In order to establish a prima facie case of conversion, a plaintiff must present evidence establishing the following elements:

> (1) a showing that the person claiming that his property was converted has a property interest in the property; (2) that he had the right to possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for its return that was denied by the holder.

Withers v. Hackett, 1998 ME 164, ¶ 7, 714 A.2d 798, 800.

Plaintiffs argue that future profits constitute a part of the "property" allegedly converted by Defendants. Leaving aside the issue of whether future profits could ever be the subject of a conversion claim, there is no admissible evidence, as noted earlier, supporting Plaintiffs' claim for damages related to those profits.

Other than lost future profits, Plaintiffs also claim that they were forced to leave behind a number of personal effects, including "files, cell phones, etc." when they were physically escorted out of GIR's offices. (Pls.' A.S.M.F. ¶ 34.) They also claim to have demanded the return of their "July compensation, [] their computers and hard drives, [] access to [] pda phones, and [] their personal information and contact lists." (Pls.' A.S.M.F. ¶ 42.) Although nowhere in Plaintiffs' Statement of Additional Material Facts does not recite that the demand was denied, Count VII of the Verified Complaint includes Plaintiffs' averment that "Defendants have refused to surrender the personal property demanded by Plaintiffs, and Defendants have refused to pay Plaintiffs in accord with the agreed guaranteed payments from GIR's profits." (Verified Compl. ¶ 124.) Accordingly, Plaintiffs have met their burden of establishing an issue of material fact regarding their conversion claim.

E. Invasion of Privacy

Count IX of Plaintiffs' Verified Complaint alleges the tort of invasion of privacy. In order to withstand a motion for summary judgment related to a claim of invasion of privacy, a plaintiff must present facts establishing that a defendant "(1) intruded upon her physical and mental solitude or seclusion, (2) publicly disclosed private facts, (3) placed her in a false light in the public eye, or (4) appropriated her name or likeness for the [the defendant's] benefit." *Loe v. Thomaston*, 600 A.2d 1090, 1093 (Me. 1991).

In the Verified Complaint, Plaintiffs allege that "*on information and belief*, sometime on June 28, 2006, or soon thereafter, Case, Ricketts and/or Lowe, either personally or through agents" accessed Clifford's and Orestis's personal and business files without permission. (Verified Compl. ¶¶ 50-52.) (emphasis added) Although the allegations in a verified complaint can generally be likened to those of an affidavit for purposes of summary judgment, the jurat "on information and belief" makes clear that Plaintiffs' specific averment here is not sworn to as based on personal knowledge.

Without the Verified Complaint, the only relevant evidence offered by Plaintiffs is two e-mail messages apparently sent by Ricketts to Case on June 22, 2006. Plaintiffs claim that these messages prove that Defendants "began to rummage through the Plaintiffs [sic] personal material and computers even before they forcibly removed the Plaintiffs from the business." (Pls.' Opp'n to Def's Mot. Summ. J. at 16.) The first e-mail has the subject header "Archieval [sic] searches" and reads in full as follows:

> Searched back through all previous files from one source and found absolutely nothing. Will now start the process through primary source who prepared the documents. I know there is pertinent data there from a quick review earlier this week. Will let you know.

(Exh. 16 to Pls.' A.S.M.F.) The second e-mail has no subject header and reads as follows:

> Steve – I cannot find anything different than what you developed. Have been looking for about an hour and really see nothing that I can add. Sorry – opps there is one thing if I can find it – it is current – I found the tone upsetting for a professional operation. It was a series of e-mails which you may have already and I will forward that.
>
> One Problem is that anything I had available on Outlook was lost as was most of the data transferred Internet Explorer so I could access gir mail[.]

(*Id.*) Neither message provides evidence in support of Plaintiffs' claim. To the extent it is possible to draw any conclusions at all from these emails, it is certainly not possible to conclude that they establish that Defendants "rummaged" through Plaintiffs' personal material and computers. In fact, Plaintiffs are not even mentioned in either e-mail. Based upon the lack of any admissible evidence in support of Plaintiffs' invasion of privacy claim, summary judgment in favor of Defendants on Count IX of Plaintiffs' Verified Complaint is warranted.

F. Fraudulent Inducement

Count V of Plaintiffs' Verified Complaint alleges that Defendants are liable under a theory of fraudulent inducement. The basis of this claim is that Defendants represented that GIR would operate as a limited liability company when they really intended to operate it as a "joint venture." Summary judgment on this cause of action in favor of Defendants is appropriate because this claim has been rendered moot by virtue of this Court's earlier determination that GIR was at all relevant times a limited liability company with Defendants as members.

G. Tortious Interference with Contractual and Economic Advantage

In order to sustain a claim of tortious interference with a prospective economic advantage, a plaintiff must prove: "(1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages." *Rutland v. Mullen*,

2002 ME 98, ¶ 13, 798 A.2d 1104, 1110. The only facts alleged by Plaintiffs that relate to this cause of action are those arising out of Defendants' ouster of Plaintiffs from GIR.[10]

Plaintiffs cannot withstand summary judgment on this claim because they fail to allege that Defendants interfered with any existing or prospective contract Plaintiffs had with a third party. Although this element is not mentioned in *Rutland*, above, the Restatement makes it an explicit requirement. RESTATEMENT (SECOND) OF TORTS §§ 766-766B. Plaintiffs cite no authority to support their proposition that an alleged interference with the contractual relationship between Plaintiffs and Defendants can support a tortious interference claim. Indeed, it would be superfluous because that alleged behavior already forms the basis for Plaintiffs' cause of action for breach of contract. Therefore, summary judgment in Defendants' favor on Count VI of Plaintiffs' Verified Complaint is appropriate.

H. Exemplary Damages

Finally, Defendants move for summary judgment on Count X of Plaintiffs' Verified Complaint, which asks for exemplary, or punitive, damages. Defendants' only grounds for summary judgment on this Count is that Plaintiffs are not entitled to an award of punitive damages because Defendants are entitled to judgment on all the other underlying tort claims. Because Plaintiffs' cause of action for conversion survives summary judgment, their claim for exemplary damages related to that count does, as well.

III. Motion for Partial Summary Judgment on Count I of Amended Counterclaim

Count I of the Amended Counterclaim asserts a claim against Clifford for Legal Malpractice with respect to CPR. In Maine, "an attorney-client relationship arises when '(1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to

[10] For example, Plaintiffs allege that Defendants' action in hiring two off-duty police officers to remove Plaintiffs from GIR's offices constituted intimidation that interfered with their valid business interest in GIR. (Pls.' Opp'n to Def's Mot. Summ. J. at 17-18.)

matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.'" *Estate of Keating v. Biddle*, 2002 ME 21, ¶ 14, 789 A.2d 1271, 1275 (quoting *Board of Overseers of the Bar v. Mangan*, 2001 ME 7, ¶ 9, 763 A.2d 1189, 1192-93).

In this case, there is no dispute that Clifford had an attorney-client relationship with GIR or that Clifford provided faulty advice. Rather, the arguments are focused entirely on whether Clifford had an attorney-client relationship with CPR.

In their opposition statement of material facts, Counterclaim Plaintiffs allege that "Clifford provided legal services to [CPR]." (Counterclaim Pls.' A.S.M.F. ¶ 3.) However, this is a legal conclusion, not a fact. They also allege that Clifford wrote letters on behalf of CPR on stationary bearing his attorney letterhead. (Counterclaim Pls.' A.S.M.F. ¶ 4.) At best, the evidence only demonstrates that Clifford drafted a letter to Bonnie Master at John Hancock Life Insurance Co. regarding the formation of GIR. There is no indication that the letter was ever sent to Ms. Master, nor is there any indication that the letter was, as argued by Counterclaim Plaintiffs, drafted for CPR as opposed to GIR.

The principals of CPR were also principles of GIR and the parties intended that CPR's business would be folded into GIR. For that reason, the first two factors in the *Biddle* test do little to advance the argument of either side. The key element, then, is the third factor – whether a reasonable person would believe that Clifford expressly or impliedly agreed to provide legal advice for CPR's benefit.

Arguing that there is a genuine issue of material fact on this issue, Counterclaim Plaintiffs assert that "Clifford performed legal work on negotiated contracts on behalf of [CPR]." (Case Aff. ¶ 6.) However, there is no indication as to which specific contracts are referred to here. Further, this particular claim is not even mentioned in Counterclaim Plaintiffs' Additional

Statement of Material Facts. It is merely referenced in their brief. Thus, even if this statement could be read as more than a mere legal conclusion, it is not be properly before the court on this motion. *See* M.R. Civ. P. 56(h)(2).

Finally, Counterclaim Plaintiffs note that Clifford was an employee of CPR in 2005 and received a salary. (Counterclaim Pls.' A.S.M.F. ¶ 2.) Clifford's response to this assertion is that he was an employee of CPR in 2005 for tax purposes only and that any work he did in 2005 was exclusively for GIR. In support, Clifford offers only the Verified Complaint and his own deposition testimony. However, in view of other contrary evidence, including Case's contradictory affidavit testimony, Clifford's "verified" assertion is not enough to warrant summary judgment. In particular, the terms of the Agreement, which this court earlier found to constitute the operating agreement for GIR, provide that "the parties will conduct business through December 31, 2005 by and through CPR. Until December 31, 2005, Case . . ., Low, Ricketts . . ., Orestis and *Clifford shall remain salaried employees of CPR and all insurance-related business conducted by the parties in 2005 shall be booked for legal and tax purposes as CPR business.*" (Exh. C. to Verified Compl.) (emphasis added). This language implies that Clifford was considered an employee of CPR, that any business that was conducted for the benefit of GIR was also considered "CPR business", and that any actions taken by Clifford for the benefit of GIR would be considered "for legal . . . purposes as CPR business." (*Id.*) There can be little doubt that an attorney employed by a company and performing legal services[11] for it has established an attorney-client relationship with that business. Therefore, the Agreement, together with Case's affidavit, create a genuine issue of material fact as to whether Clifford had an attorney-client relationship with CPR.

[11] Clifford at least admits to performing legal services on behalf of GIR. As noted above, all business conducted for GIR was apparently done through CPR.

IV. Motion to Dismiss Count II of Amended Counterclaim

Orestis and Clifford have moved to dismiss Count II of the Amended Counterclaim pursuant to M.R. Civ. P. 12(b)(6). Count II alleges that GIR was a joint venture and seeks an equitable rescission of the Agreement which led to their membership in that entity.

When reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, the court considers the allegations of the amended counterclaim as if they were admitted and in the light most favorable to the Counterclaim Plaintiffs. *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 7, 843 A.2d 43, 47. "A dismissal should only occur when it appears 'beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim.'" *McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994) (quoting *Hall v. Bd. of Envtl. Prot.*, 498 A.2d 260, 266 (Me. 1985)).

Among other things, Count II alleges that, subsequent to June 2006, Counterclaim Plaintiffs became aware of certain evidence that "at or after the time they [formed GIR in 2005]" Orestis and Clifford used company computers to "publish offensive, pornographic and salacious correspondence" regarding GIR employees and clients. (Amended Counterclaim ¶¶ 23 & 25.) Counterclaim Plaintiffs further allege that had they known about this "after-acquired evidence [when] they entered into the joint venture, or had [Orestis and Clifford "timely notified [them] of their proclivities[, they] never would [formed GIR] in the first instance."[12] (Amended Counterclaim ¶ 28.) Based on this evidence, Counterclaim Plaintiffs seek an equitable rescission

[12] When read in full, the Amended Complaint also alleges that, had Counterclaim Plaintiffs been aware of the alleged after-acquired evidence, they might also have terminated the "joint venture" between themselves and Orestis and Clifford. As discussed earlier, the court has determined that GIR was a limited liability company, not simply a joint venture. That determination aside, the focus of Counterclaim Plaintiffs' argument in their brief is that the court should exercise its equitable powers to rescind the Agreement under which they joined GIR.

of the Agreement pursuant to which they became members of GIR. (Amended Counterclaim ¶ 29.)

The court agrees with Orestis and Clifford that the allegation in Count II that GIR was a joint venture is of critical relevance to the viability of Counterclaim Plaintiffs' rescission claim.[13] A joint venture, like a partnership, is terminable at the will of its members. Whereas, under Maine law an LLC may only be dissolved pursuant to the company's operating agreement or articles of incorporation, the written consent of all of its members, or a judicial dissolution. 31 M.R.S. § 701(A)(1), (2) & (4).

This court has already determined that GIR was a limited liability company and there is no allegation in the Amended Complaint, and no summary judgment evidence, that any of the events of dissolution contemplated by section 701 has occurred. In light of the comprehensive statutory scheme governing limited liability companies in Maine, this court concludes that it does not have the authority to take action that, despite its equitable rescission characterization by Counterclaim Plaintiffs, would allow the dissolution of an LLC in a manner not contemplated by Maine law or would amount to judicially crafting an "event of withdrawal" that is not included in 31 M.R.S.A. § 692.[14]

---

[13] The court also agrees that, notwithstanding the fact that this is 12(b)(6) motion, the allegation that GIR was a joint venture is a legal theory, not the assertion of a fact that the court should view in the light most favorable to Counterclaim Plaintiffs and treat as admitted.

[14] The only case cited by Counterclaim Plaintiffs in which a court employed the remedy of equitable rescission to invalidate the operating agreement of a limited liability company is an unpublished opinion of the Tenth Circuit Court of Appeals, interpreting Kansas law, which by its own terms is not binding precedent. *Lloyd v. Horn Inc.*, 1998 U.S. App. LEXIS 20519 (10th Cir. 1998). Unlike the instant case, *Lloyd* involved a managing partner of a newly formed limited liability company who failed to disclose to the other principals of the company his intention to immediately resign his managerial position even though the other principals had entered into an agreement enlarging the managing partner's ownership interest in reliance on his continued service to the company. *Id.* at *7. The issue of specific intent, and its concealment by the managing partner, was considered "constructive fraud" under Kansas law and was the key to the decision in *Lloyd* decision. *Id.* Nothing of this nature is alleged in the present case.

Even were equitable rescission otherwise an available remedy here, however, Counterclaim Plaintiffs' argument is not supported by the facts as pled in the Amended Counterclaim. Specifically, Count II alleges that, following execution of the Agreement, Orestis and Clifford violated a fiduciary duty to Counterclaim Plaintiffs by virtue of their "reprehensible conduct" and their failure to disclose that conduct. (Counterclaim Pls.' Opp. to Mot. to Dismiss. at 6-7.) However, in the context of the 12(b)(6) motion, for such behavior to even arguably warrant equitable rescission, it would have to rest on the additional allegations that Orestis and Clifford intended to engage in the offending conduct at the time the parties entered into the Agreement and that they concealed that intention from Counterclaim Plaintiffs. Such an averment does not appear in the Amended Counterclaim. Accordingly, Count II of the Amended Counterclaim must be dismissed.

DECISION

Based on the foregoing and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

> Plaintiffs' Motion for Partial Summary Judgment on Count II of their Verified Complaint is DENIED, except that there are no triable issues of fact regarding GIR's status as a limited liability company and Defendants' membership in GIR, and the court finds, as uncontroverted fact, that GIR was formed as a limited liability company and Defendants were and remain members of GIR.
>
> Defendants' Motion for Summary Judgment on Counts I, III through IV, VIII and X of Plaintiffs' Verified Complaint is DENIED, except that Plaintiffs have not produced any admissible or relevant evidence that they sustained lost future damages and, therefore, there is no triable issue of fact with respect to Plaintiffs' claim of lost future damages.
>
> Defendants' Motion for Summary Judgment on Counts V through VII and IX of Plaintiffs' Verified Complaint is GRANTED. Judgment for Defendants on Counts V through VII and IX of Plaintiffs' Verified Complaint.
>
> Counterclaim Defendant James A. Clifford's Motion for Partial Summary Judgment on Count I of the Amended Counterclaim of Counterclaim Plaintiffs is DENIED.

Counterclaim Defendants Orestis and Clifford's Motion to Dismiss Count II of the Amended Counterclaim of Counterclaim Plaintiffs is GRANTED. Judgment for Orestis and Clifford on Count II of the Amended Counterclaim.

Dated: July 18, 2008

Justice, Superior Court