STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
CIVIL ACTION
DOCKET NO. BCD-CV-18-02

CHARLES R. MAPLES, and
KATHY S. BROWN,

Plaintiffs,

v.

EVAN CONTORAKES, CHERI CONTORAKES, COMPASS HARBOR VILLAGE, LLC, and COMPASS HARBOR VILLAGE CONDOMINIUM ASSOCIATION,

Defendants.

ORDER FOLLOWING BENCH TRIAL

This case is about the longstanding and pervasive mismanagement and misconduct of the Defendants in connection with the Compass Harbor Village Condominiums in Bar Harbor, Maine. Since 2007, and for a period of over ten years to the present, the Association and the Declarant have repeatedly and comprehensively violated important requirements of the Declaration and Bylaws, as well as applicable provisions of the Maine Condominium Act, 33 M.R.S. §§ 1601-101 through 1604-118 (2018), and the Maine Nonprofit Corporation Act, 13-B M.R.S. §§ 101-1406 (2018). As a result, Plaintiff unit owners have experienced financial loss, extreme frustration and mental anguish, and have been deprived of the enjoyment of their condominiums.

This case was tried to the Bench on April 8-9, 2019. The trial followed this Court's Order on Cross-Motions for Partial Summary Judgment which granted summary judgment for Defendants on Counts VI (Implied Warranty), VII (Fraud), and VIII (Personal Liability) and denied Plaintiffs' Motion. The remaining counts in Plaintiffs' Complaint, as well as Defendants' Counterclaim, remained for trial. The parties filed concurrent post-trial briefs on May 31, 2019.

At the trial, Plaintiffs called Charles Maples ("Maples"), Joseph Carlton, Esq., Casey Hardwick ("Hardwick"), and Kathy Brown ("Brown") to testify. Barbara Giffords' testimony was presented by way of her deposition transcript. Cheri Contorakes' testimony was also presented by way of her deposition transcript. Defendants called Evan Contorakes ("Contorakes") to testify. Exhibits 1-73 were admitted into evidence by agreement, with the exception of exhibits 11, 15, 17, 30, 38, 39, 58, and 59 which were withdrawn. The Court has considered all the evidence admitted at trial, and assessed the credibility of witnesses. For the reasons discussed below, Plaintiffs have substantially prevailed on their claims.

FINDINGS OF FACT

Based on the stipulations of the parties and the evidence adduced at trial, and drawing all reasonable inferences therefrom, the Court makes the following findings of fact. Defendant Compass Harbor Village, LLC ("Compass Harbor" or "Declarant") was established on or about September 15, 2006. Defendant Evan Contorakes[1] was and is its sole member. Mr. Contorakes is a longtime entrepreneur and real estate developer of residential and commercial properties, including at least one prior condominium development. In 2007, Compass Harbor created the Compass Harbor Village Condominiums in Bar Harbor, Maine, pursuant to the Maine Condominium Act, 33 M.R.S. §§ 1601-101 through 1604-118. Compass Harbor is the Declarant. The Declaration is dated January 25, 2007 and is recorded in the Hancock County Registry of Deeds on March 2, 2007 (hereafter "Decl.").

The Compass Harbor Village Condominiums consists of twenty-four residential units, comprised of several stand-alone units with the rest of the units connected in three rows. Defendant Compass Harbor Village Association (the "Association") was incorporated on or about July 18,

[1] Evan Contorakes and his wife, Defendant Cheri Contorakes, are individual Defendants in this action, but in its Order on Cross-Motions for Summary Judgment, the Court concluded the Contorakeses are not subject to personal liability.

2007. The Association adopted Bylaws prior to the sale of the first unit. The first unit was sold on or about May 14, 2007. In total, Compass Harbor has sold nine of the twenty-four units in the Compass Harbor Village Condominiums. The remaining fifteen units are still owned by Compass Harbor. Because Compass Harbor still owns more than fifty percent of the condominium units, the declarant control period has not yet ended. *See* 33 M.R.S. § 1603-103(d)(1).

The Plaintiffs in this matter are Charles R. Maples ("Mr. Maples") and Kathy S. Brown ("Ms. Brown") (collectively referred to as "Plaintiffs"). Mr. Maples signed his purchase and sale agreement on July 13, 2007 and bought Unit 4 on July 31, 2007. He paid $168,625 for the unit. Ms. Brown signed her purchase and sale agreement with Compass Harbor on June 26, 2007 and bought Unit 9 on July 27, 2007. She paid $133,502 for the unit. Mr. Maples owns a stand-alone unit and Ms. Brown owns a row unit.

Mr. Maples was drawn to Bar Harbor because it was important to his late wife. After she passed in 2006, he spent most days in or around Acadia National Park. The Compass Harbor Village condominiums caught his eye because they are located very close to the entrance to Acadia National Park. Mr. Maples wanted to purchase a condominium rather than a house because he lived in Texas six months of the year and wanted a condominium association to take care of maintenance, paying bills, "accounting for the operation of the 24 units" and other such issues.

Similarly, Ms. Brown bought a condominium unit because she wanted to avoid having to do exterior maintenance such as painting, mowing, raking and weeding. Ms. Brown had never owned any real estate previously. She preferred owning in a condominium association rather than continuing to rent because owners would be more likely than renters to ensure the property was well maintained. A functioning association was important to her because it provided the opportunity to be involved in decision-making and budgets that she never enjoyed as a tenant.

By 2008, Defendants had sold nine units (with Declarant retaining ownership of the remaining 15 units). In 2008, the economy went into a downturn. The Declarant did not sell any further units.

After Plaintiffs purchased their units, maintenance "was not a problem" initially, but soon went "downhill." The pool was no longer heated "after the first unit was sold," junk accumulated in the pool, algae grew in it, and the gate and fence were broken. The wood exterior of units began to rot, paint began peeling, gardens and grounds became overgrown with weeds, driveways became full of potholes, and trash often littered the grounds. A dangling light fixture on the exterior of Mr. Maples' unit remained unfixed for years until after the lawsuit was filed. A window on Mr. Maples' unit has remained broken for four and a half years. A hole remained in Ms. Brown's front deck for years, allowing mice to enter her home. Another hole remained in another unit's wall for months after a fire, unfixed even after someone covered the hole with a plywood sign saying "fix me." The common laundry room was rarely, if ever, cleaned, is "gross and disgusting" and its washers and dryers frequently do not operate. Plaintiffs communicated concerns about the poor maintenance to Mr. Contorakes and to the property manager, Mr. McConomy, but most of the problems went unfixed. As a result, the condominium common areas and building exteriors appear shabby and unkempt.

Unlike common area maintenance, which was acceptable at least initially, condominium governance was defective from the start of Plaintiffs' ownership. From the dates they purchased their units in 2007 until after the lawsuit was filed in 2017, Plaintiffs never received notice of any annual, special or regular meeting of the Association or its Board, nor any minutes of any meeting. Plaintiffs never waived receiving notice of meetings and always provided a current address to the Association. Defendants failed to convene any annual, special or regular meeting between 2007

and 2017. With the exception of 2017 and 2018, there are no other agendas, notices, or minutes from 2007 to the present. Defendants admit there were no "formally-noticed association meetings" prior to 2017. The annual meetings finally held in 2017 and 2018 were minimalistic affairs, prompted by this litigation, and held solely to go through the motions of electing a Board and officers. Over the course of more than ten years, the Association has never formally met to take or approve any other authorized action.

Upon creation of the Association, the Declarant appointed Mr. and Mrs. Contorakes to the Association's Board of Directors. (*See* Decl., art. 8 at 21.) The Declarant has never appointed a third director. Except for one day in 2017 when Ms. Brown briefly served as a Board member, Mr. and Ms. Contorakes have been the only members of the Board as well as the only officers the Association has ever had. Year after year, until 2017, Defendants never convened an annual meeting at which unit owners could vote to elect directors. Defendants admit this. The Board never elected officers until 2017. In 2017, Defendants finally held an annual meeting, and Mr. Contorakes, Mrs. Contorakes, and Ms. Brown were "elected" to the Board. Mr. Contorakes and Mrs. Contorakes were the only individuals who voted. Ms. Brown stepped down the next day. Defendants failed to fill the vacancy, and Mr. Contorakes and Mrs. Contorakes remain the only directors and officers on the Board. Mr. Contorakes is the President, and Mrs. Contorakes is the Secretary-Treasurer.

For over ten years, the Contorakes have ignored the basic formal requirements of both the Declaration and the Association. The Association was administratively dissolved by the Maine Bureau of Corporations on or about September 10, 2008, then reinstated on or about July 1, 2010, then administratively dissolved again on or about August 18, 2014. It was reinstated again on or about September 21, 2015, then dissolved again on or about August 22, 2016, and was not

reinstated until after this litigation was filed. Similarly, Compass Harbor was administratively dissolved on or about August 18, 2014 and was not reinstated until after this litigation was filed. The Association was required to file annual reports each year, but did not. It was Defendants' responsibility to file the "basic documents" keeping the two entities in good standing with the State of Maine and they admit that they did not until after this litigation was commenced.

For over ten years, despite numerous requests from owners, the Association's Board—consisting only of the Contorakeses—has not followed any regular process for establishing budgets or setting assessments. The Board never prepared an estimate of expenses for the Association, never prepared or voted on an estimated annual budget, never called an association meeting to review and vote on a budget, never sent a budget to the unit owners, never sent financial statements to the unit owners, never called a meeting to review or ratify a revised annual budget, and never sent a revised budget to unit owners. Prior to this lawsuit, Mr. Maples never received the only two documents Defendants referred to as "budgets," and neither the Board nor the Association voted to approve those documents as budgets. The documents do not in fact constitute budgets for purposes of the Bylaws. Mr. Contorakes and Mrs. Contorakes simply decided how much money to spend and what expenses to incur.

For over ten years, despite numerous requests from owners, the Board—consisting only of the Contorakeses—has not followed any regular, transparent process for establishing condominium assessments. The Board has never met to designate assessments owed by each unit owner and the Association never voted on said assessments. Mr. Maples and Ms. Brown never received any explanation for why their purported monthly assessments increased from $63 to $140 and from $48 to $121, respectively, and there was never a vote by the Board or the Association on those increases. Neither the Board nor the Association approved any special assessments, although

Defendants imposed special assessments. One of the unauthorized special assessments levied in 2015 was supposedly to paint the siding, but the painting never occurred. The Declarant and the Board, acting through the Contorakeses, have capriciously conducted Association business behind the scenes, dispensed with any formalities, and ignored owner requests for explanations and information.

For over ten years the Defendants have regularly taken other actions affecting the Association without ever convening a meeting to hold a vote for the purpose of authorizing the activity. The Board supposedly engaged Mr. McConomy to provide services as the Association's property manager. Mr. McConomy worked at a restaurant in Bar Harbor owned and operated by Mr. Contorakes through an LLC. On May 17, 2007, Mr. McConomy signed a promissory note to Mr. Contorakes personally in the amount of $100,000 relating to his purchase of Unit 14. At some point approximately three to four years ago, Mr. Contorakes entered into a verbal contract with Mr. McConomy pursuant to which Mr. McConomy agreed to serve as property manager for the Association. Mr. McConomy gets paid by reducing his note to Mr. Contorakes by $10,000 per year regardless of how much or little he works.

Without approval or authorization from the Association, Mr. Contorakes agreed with Mr. McConomy that he does not have to pay Association fees until he has paid off his note to Mr. Contorakes. At $10,000 per year, it will take Mr. McConomy ten years to pay off the $100,000 note. Since Mr. Contorakes entered into the agreement three or four years ago, six or seven years remain until Mr. McConomy begins paying Association fees.

Neither the Association nor the Board ever voted to approve hiring Mr. McConomy, nor did they ever vote to approve any agreement whereby Mr. McConomy did not have to pay assessments. Defendants admit this and further admit that Mr. Contorakes entered into these

agreements on his own. Making Mr. Contorakes's pattern of conducing Association business based solely on his whim even more egregious, the Declarant assessed the $10,000 in "loan forgiveness" to the Association and also deducted the $10,000 from the assessments the Declarant owes to the Association. Neither the Board nor the Association approved this arrangement, which is obviously in the self-interest of the Contorakes and the Declarant, but disadvantageous to the other owners.

For over ten years the Association's and Declarant's banking practices and records of disbursements have been in complete disarray. Unit owners were routinely directed to remit payment of all regular and special fees to Mr. Contorakes personally at his Florida address, not to the Association. The Association did not even have a bank account until June 2014. There is no evidence where any assessments paid by unit owners were deposited prior to June 2014. Mr. Maples paid monthly assessments of $63 beginning after purchasing his unit in 2007 and continuing through December 2013. Ms. Brown made monthly assessments of $48 from August 2007 until 2009 then monthly payments of $58 from 2009 until September 2014. Association records indicate that unit owners paid assessments in varying amounts at least as far back as 2008 and continuing through 2018. Seven years' worth of purported assessments—from the Association's creation in 2007 through the opening of its account in June 2014—were not deposited into an account belonging to the Association because none existed. From June 2014 through March 1, 2018 (the most recent Association account statement introduced), only six assessment payments were deposited into the Association account.

The same lack of banking control and accounting practices apply to assessments paid by other owners. For example, the Association's records show that Lucinda Dudley paid at least half of the 2008 assessments and all of 2009-2017 plus one special assessment, but there is no record

of where these payments were deposited. Luere Glover paid 2009-2017 condo fees and the special assessment for litigation. Only two payments were deposited into the Association account. There is no record of where the other payments were deposited, including a check from Ms. Glover dated 11/17/17 to Evan Contorakes. Harriett Burnham paid half of 2008, all of 2009 and 2011, half of 2015-2017 and the special assessment for plumbing and painting. Only Ms. Burnham's payment of $726 on 2/16/16 was deposited into the Association's account. There is no record of where the other payments were deposited.

From August 2014 to June 2017, six assessment payments were deposited into the Declarant's account. A smattering of checks provided by Defendants indicate that the Declarant used the Declarant's bank account to pay Gotts Disposal a total of $100 in 2015, $700 in 2016, and $200 in 2017, and $1,000 to the Bar Harbor Water Authority on November 25, 2016 and again on October 20, 2018. There is otherwise no list of Association expenses paid out of Declarant's account. There is no record of assessment payments ever being transferred into the Association account.

It is clear that the Association and Declarant failed to pay Association expenses out of an Association bank account. Defendants do not dispute this, and contend that Association expenses were paid out of a variety of accounts belonging to Mr. Contorakes or his family, or other businesses in which Mr. Contorakes has an interest but which are unrelated to the Association. This practice appears to have occurred, at least to a limited extent. Accounts belonging to the Contorakes family personally paid the Bar Harbor Water Authority $2,500 in 2016. The Evans Group paid $262.72 on March 4, 2013 to Bar Harbor Water Division, and $100 to Acadia Carpet Care on September 16, 2016. However, Defendants failed to maintain any accounting, management, or other system for tracking payments made for Association expenses. Because

Association expenses were not paid out of an Association account, Defendants failed to maintain any system by which unit owners could understand the basis for their assessments.[2]

It is perhaps not surprising that Defendants failed to use an Association bank account to pay Association expenses. Despite owning 15 of the 24 units, the Declarant never paid its assessments for condominium fees, whether into a bank account for the Association or otherwise. For over ten years, indeed from the inception of the condominium development, despite owning well over half of the units, the Declarant has failed to pay its condominium fees on its fifteen units.

The Plaintiffs made multiple requests for information and documents from Defendants. On August 10, 2015, Mr. Maples restated in writing a prior request for documentation of "special assessment fees," an accounting statement and "all of the information that has been requested prior to [August] 14th." On August 10, 2015, Ms. Brown also followed up on prior requests for records and information by emailing Mr. Contorakes to request a "PROPER ACCOUNTING of how [Association] money is spent." On August 22, 2015, Ms. Brown emailed Mr. Contorakes again to request the following:

> (1) We request a yearly budget from the year 2007 to the present, and not in short form as you have previously given, but as an official document.
>
> (2) We would like to know the name of the company for the Insurance and copies of the policy.
>
> (3) The email addresses of all Compass Harbor cond [sic] owners would be appreciated.
>
> (4) We request the names of the companies with which Compass Harbor is doing business for the last 5 years and their telephone numbers and addresses.
>
> (5) We would like to know what businesses Compass Harbor had used in the last 8 years, but which no longer are using.

[2] Because some payments were made, from whatever sources, minimal, basic services such as electricity, propane, and occasional trash pick-up have been provided to the condo's common areas.

> (6) How many employees work for Compass Harbor and what are their responsibilities?
>
> (7) Are all the condos' taxes paid and up to date?

She received no response.

Ms. Brown emailed Mr. Contorakes again on August 26, 2015, asking for "documentation for the costs of maintenance of the condos which my fees have helped pay for during the past five years, and all invoices for services which the special assessment fees will cover." Mr. Contorakes replied to Ms. Brown's August 10 email, providing the name of the insurance agent but never provided a copy of the policy. He identified a current and former property manager and the names of four companies or individuals with whom the Association did business but otherwise did not provide the requested documents and information. He specifically refused to provide budgets. In response to Ms. Brown's question about whether the condominiums' taxes were paid, Mr. Contorakes responded: "Mine are."

On December 3, 2015, an attorney representing Mr. Maples at the time, Joseph Carleton, Jr., Esq., sent a letter to the registered agent and attorney for the Association, demanding pursuant to 33 M.R.S. § 1603-118(a) the production of:

> (1) Records of receipts and expenditures affecting the operation and administration of the association and other appropriate accounting records since its creation.
>
> (2) Minutes of all meetings of its unit owners and executive board other than executive sessions, a record of all actions taken by the unit owners or executive board without a meeting and a record of all actions taken by a committee in place of the executive board on behalf of the association, since the Association was formed
>
> (3) Copies of all rules of the Association current in effect.
>
> (4) All financial statements and tax returns of the association for the past 3 years;
>
> (5) Financial and other records sufficiently detailed to enable the association to comply with the following subsections of section 1604-108 of the Maine Condominium Act:

(a) relating to reserves for capital expenditures
(b) relating to the most recently prepared balance sheet and income and expense statement
(c) the most recently prepared budget

(6) Copies of current contracts to which the Association is a party;

(7) Ballots, proxies and other records related to voting by unit owners after the election, action or vote to which they relate.

Plaintiffs also verbally requested records on many occasions, particularly requesting documentation for their condominium fees, but prior to this litigation never received any response. Plaintiffs sought records in order to understand and fulfill their duties and obligations as unit owners. Prior to this litigation, Plaintiffs never received any response to the many written requests for records and information made by them or by Attorney Carleton. Defendants admit this. Defendants never provided Plaintiffs with any explanation for not providing the requested documents and information.

In addition to requesting records, Attorney Carleton's December 3, 2015, letter put Defendants on notice that Mr. Maples and others were contemplating bringing claims for willful misconduct and gross negligence by the directors, violation of fiduciary duty on the part of the Declarant, and other causes of actions, including for attorney fees.

For over ten years, Defendants have conducted business behind the scenes; failed to institute or utilize any regular banking, accounting, or management systems; failed to recognize the need for or observe any formalities; failed to hold any meetings for the purposes of conducting Association business; and generally ignored the legitimate requests and needs of the owners, including Plaintiffs, because the Contorakeses control everything. Since they control everything, the Contorakeses have taken the position that they don't need any meetings, and can conduct business however they wish, because they can dictate the outcome of any vote.

Barbara Baron Giffords owned Unit 10, a row unit of 500 square feet, that she purchased in 2007. In March 2018, she sold her unit to her niece for the balance of her mortgage, which was $80,000, a loss of approximately $50,000. Ms. Giffords could no longer stand owning the unit because Defendants never responded to her repeated requests over many years for records and information like bank statements, what it cost to operate the Association, and documentation of her purported assessments. Since 2013, four of the originally purchased units have sold to third parties, for an average loss of approximately $53,000.

In 2018, Mr. Maples listed his unit for sale with a local realtor, for $199,800. By that point in time, Mr. Maples had become thoroughly exasperated with the Contorakeses' shockingly poor management, lack of responsiveness, and dictatorial control of the Declarant, Board, and Association. Mr. Maples had suffered mental anguish, lost enjoyment of his condo, and was no longer able to tolerate staying at the condo. At the time of trial, Mr. Maples's unit had not sold and had been on the market for 297 days.

As with Mr. Maples, Ms. Brown has experienced mental anguish and substantially lost the enjoyment of her condo due to the conduct of Defendants. Ms. Brown purchased her unit expecting a functional condominium association, and instead now feels like a renter. She has been frustrated in the extreme by Defendants' failure to respond to her information requests. She has never received an explanation for why her condo fees increased over the years. For good reason, Ms. Brown doesn't trust Mr. Contorakes. Ms. Brown would consider selling her unit, but the other individually-owned units that have sold have lost an average of approximately $53,000.

Renting is not a viable option for either Plaintiff. Mr. Maples bought his unit to use, not to rent. He has not rented his unit because he would be an "absentee landlord" six months each year, would have to hire someone to manage the unit, and is concerned about the expense and

"aggravation" of being a landlord. Mr. Maples notes that tenants "don't take care of things the way I would if I owned it." Ms. Brown cannot rent her unit because she lives in it.

In December 2013, in response to what he considered Defendants' comprehensive failure to perform as required under the Declaration and the Bylaws, Mr. Maples stopped paying his monthly assessment fees to Mr. Contorakes. Instead, Mr. Maples began paying his fees into an escrow account. The escrow account now contains approximately $5,000. Similarly, in September 2014, Ms. Brown stopped paying her $58/month condo fees, and instead began paying the fees into an escrow account. Checks sent from the Bank to pay her fees were being returned with no forwarding address. Further, Ms. Brown objected to the purported assessment increase to $121/month in December 2015, especially since Defendants provided no explanation, meetings, budgets, or basis for the increase. Prior to the purported increase, Ms. Brown considered the $58/month assessment a fair amount for the modest services provided.

Since approximately 2010, the Declarant has rented its fifteen units to temporary tenants on an annual basis, and keeps its units rented 98% of the time. Currently, 100% of the Declarant's units are rented. Tenants frequently have pets, and the Declarant and Association do not enforce the pet regulations contained in the Bylaws.

CONCLUSIONS OF LAW

The Court makes the following conclusions of law, organized under each of the respective, remaining counts of the Complaint and the Counterclaim.

Breach of Contract (Complaint, Count I)

The Declaration and Bylaws are contracts between the Declarant and the Association, on the one hand, and the unit owners, including Plaintiffs, on the other. Defendants concede this point: "Plaintiffs have met their burden of showing that there was a contract between Plaintiffs

and Defendants. There was no dispute at trial, or throughout the course of this case, that there was in fact a contract between and amongst them." (Def.'s Proposed Findings of Fact and Conclusions of Law p. 5.) *See also See Morison v. Wilson Lake Country Club*, 2005 ME 71, ¶ 20, 874 A.2d 885. Based on the evidence adduced at trial, along with the agreement of the Defendants, the Court concludes Plaintiffs have proven the existence of enforceable contracts with the Declarant and the Association.

Section 2.4 of the Declaration requires the Association to maintain limited common areas, common areas, and the exterior of buildings. Section 6.2(h) requires the Association to enforce multiple restrictions on pets. Article 8 of the Declaration requires the Board of Directors to be comprised of three people. Article 10 requires that assessments be levied and collected in conformity with the Bylaws. Section 10.1 provides as follows:

> The Board of Directors shall levy and enforce the collection of general and special assessments for common expenses as required by this Declaration and the By-Laws. Assessments shall commence when assessed by the Board of Directors. All common expense annual assessments shall be due and payable in equal monthly installments, in advance, when billed. Special assessments shall be due and payable when assessed, during such period of time as established by the Board of Directors. The Board of Directors may in its discretion change the assessment payment from monthly to quarterly, semi-annual, or annual.

Defendants failed to levy assessments in conformity with the Bylaws, and failed to make any effort at all to collect assessments from the Declarant.

Article II of the Bylaws requires the Association to convene annual and special meetings, properly noticed to owners, at which votes will be taken, for the purposes of conducting Association business. *See also* 13-B M.R.S. § 602; 33 M.R.S. § 1603-108. Pursuant to Article II, Section 4 of the Bylaws, written notices of "every meeting of the Association, stating whether it is an annual meeting or special meeting, the authority for the call, the place, day, and hour of the

meeting, and the items on the agenda, including . . . any budget changes . . . shall be given by the Secretary/Treasurer or Clerk at least ten (10) days before the date set for the meeting." Said notice must be given to each member either by hand delivery or mailing. *See also* 33 M.R.S. § 1603-108. "The executive board shall give timely notice reasonably calculated to inform unit owners of the date, time and place and topics proposed to be discussed at meetings of the executive board." *Id.*

In addition to proper notice, according to Article II, Section 6 of the Bylaws, there must be a quorum of more than 50% of the "total interest in the common elements" to conduct a meeting. For the Association to take any action, there must be an affirmative vote of a majority of those present. Only owners of units may vote. Finally, there must be minutes prepared of the meetings. Any action taken on behalf of the Association must be approved either by the Board or the members of the Association at a lawful meeting. Based on the evidence adduced at trial, no lawful action was taken on behalf of the Association from the time Plaintiffs purchased their condos in 2007 to the present.

Article III of the Bylaws requires that the Board of Directors be comprised of three people; that Directors and Officers be elected annually; that the Board convene annual, regular and special meetings, properly noticed, at which votes will be taken, for the purposes of conducting Board business. Article III also requires the annual election of Officers. Article IV requires the Officers to make all necessary filings, to maintain accounts, to maintain a record of receipts and disbursements, to prepare budges, and to keep minutes.

Article V of the Bylaws requires the Association to maintain fiscal controls and to keep books and accounts in accordance with customary accounting principles and practices; to prepare, publish, and adopt budgets; and to make assessments based on the budgets. According to Article

V, Section 2, the Board must estimate the amount required by the Association to meet its expenses for each fiscal year, including, but not limited to, management and administration expenses; the estimated costs of repairs, maintenance and replacement of common elements; the cost of such insurance and utilities as may be furnished by the Association; the amount of such reserves as may be reasonably established by the board, including general operating reserves, reserves for contingencies, and reserves for maintenance and replacements; common utility expenses, if any; and other expenses of the Association as may be approved by the Board of Directors including operating deficiencies, if any, for prior periods. (Decl. § 5.2.)

"Within 30 days of the commencement of each fiscal year, the Board shall cause an estimated annual budget to be prepared based on its estimations of annual expenses, and copies of such budget shall be furnished to each member." *Id.* "The Board shall call a meeting of the members not less than 14 nor more than 30 days after such budget is furnished to the members for the purpose of considering ratification of such budget." *Id. See also* 33 M.R.S. § 1603-103(c) & 1603-115(a). "Until the annual budget for a fiscal year is sent to each member by the Board, the member shall continue to pay that amount which had been established on the basis of the previous estimated annual budget." *Id.*

According to Article V, Section 3, the Board can revise assessments and make emergency assessments. If the Board deems the amount of membership assessments to be inadequate by reason of a revision in the estimated expenses or other income, then the Board shall prepare and cause to be delivered to members a revised estimated annual budget for the balance of that fiscal year. The Board shall call a meeting of the members to ratify the revised budget in the same manner as the annual budget. If the Board finds an emergency exists that requires immediate assessment of the members, then the Board may make an emergency assessment not to exceed an

amount equal to the then-current monthly assessment for each unit and shall be due and payable when communicated to the members. *Id.*

According to Article V, Section 2 of the Bylaws, each member's assessment is supposed to be based upon the budget approved at the annual meeting. *See also* 33 M.R.S § 1603-115(a) ("assessments must thereafter be made at least annually, based on a budget adopted at least annually by the association"). It is undisputed that Defendants never followed the budget and assessment process specified in the Bylaws. Indeed, but for one day in 2017, Defendants failed to provide a lawfully constituted board of directors with three members to approve a budget or assessments.

Defendants do not seriously contest that they breached the contracts, arguing only that their breaches were technical and not material. (Def.'s Proposed Findings of Fact and Conclusions of Law pp. 5-6.) The Association and the Declarant admit most, if not all, of the following violations, which the Court finds established by the evidence:[3]

A. failing to make the necessary filings with the Maine Bureau of Corporations (Bylaws, Article IV, Section 5; 33 M.R.S. § 1603-101; 13-B M.R.S. §§ 403-405 & 1301);
B. failing to maintain a bank account for the Association and failing to deposit Association funds into and pay Association expenses out of an Association bank account (Bylaws, Article IV, Section 4);
C. failing to maintain banking records, books and accounts in accordance with customary accounting principles and practices (Bylaws Article V, Section 1);
D. failing to provide a three-person Board (Declaration, Article 8; Bylaws, Article III, Section 5; Article IV, Section 2; 13-B M.R.S. § 702 & 703);
E. failing to hold annual meetings or other meetings (Bylaws, Article II, Sections 2 and 3; 13-B M.R.S. § 602; 33 M.R.S. § 1603-108);
F. failing to properly notice meetings (Bylaws, Article II, Section 4; 13-B M.R.S. § 603(1); 33 M.R.S. § 1603-108);
G. failing to maintain minutes of meetings, (Bylaws, Article II, Section 4; 33 M.R.S. § 1603-118(2));

[3] The Court includes corresponding statutory citations, for ease of reference when the Court discusses the Declaratory Judgment count.

H. failing to provide notices and minutes to unit owners, (Bylaws, Article IV, Section 5; 33 M.R.S. §§ 1603-108 & 1603-118);

I. failing to maintain association records (Bylaws, Article IV, Section 5; 33 M.R.S. § 1603-118; 13-B M.R.S. § 715);

J. failing to provide association records to unit owners (Bylaws, Article IV, Section 5; 33 M.R.S. § 1603-118; 13-B M.R.S. § 715);

K. failing to adopt budgets (Declaration, Article 10; Bylaws, Article V, Section 2; 33 M.R.S. § 1603-103(c) & 1603-115(a));

L. failing to properly make assessments (Declaration, Article 10; Bylaws, Article V, Section 2; 33 M.R.S. § 1603-103(c) & 1603-115(a));

M. failing to properly maintain the limited common and common elements and the exterior of the buildings (Declaration, Article 2, Section 2.4; Bylaws, Article V, Section 4(e); 33 M.R.S. § 1603-107); and

N. failing to enforce the pet regulations (Declaration, Article 6, Section 6.2(h).)

The Court further concludes that the breaches were indeed material, cutting to the heart of what it means to be a condo owner, and going to the core of why Mr. Maples and Ms. Brown purchased their condo units. They both expected and wanted a functioning condominium association. What they got, instead, was an utterly dysfunctional Association, run in a callous, dictatorial manner by the Declarant and the Contorakeses, who exhibited an absolute disregard for any of the formalities required by the Declaration and the Bylaws.

To the extent Defendants contest any of the breaches, their arguments are unpersuasive. For instance, Defendants argue the failure to file annual reports is immaterial, because after the litigation was commenced the annual reports were brought up to date. Defendants' failure to comply with the requirement of the Bylaws to timely file reports, however, reflects and underscores the extent to which Defendants disregarded the requirements of the Bylaws.

Defendants argue that Plaintiffs took no action to cure the defective Board. But Defendants never convened a meeting at which a vote could be taken (with the exception of 2017 and 2018), and at all times controlled the Declarant, the Association, and the Board. Further, Defendants took

all their actions behind the scenes, without bothering to obtain Board approval. The Plaintiffs were powerless to fix the breaches caused by Defendants.

Moreover, the Declarant and the Association have at all times had the power, control, and authority to provide for a properly constituted Board. The Declarant could have appointed an owner or spouse as a third Director, and the Association (controlled by Mr. and Ms. Contorakes as the only two Directors on the Board) could have appointed an owner or spouse to fill the vacancy. And the pool of potential directors was not limited to owners or their spouses. If an owner of a unit is a business entity, a designated agent of the owner is eligible to serve on the Board. (Decl. § 8.2.) Declarant is a business entity and owns fifteen of the twenty-four units. At any time, the Declarant could have appointed a designated agent to the Board in order to satisfy the three-director requirement, and the Association could have elected a designated agent of Declarant to fill the vacancy. With the exception of one day in 2017, the Declarant and Association have failed to provide the lawfully required three-person Board.

Defendants argue that although they failed to convene formal meetings as required by the Bylaws, their misconduct is excused because the Contorakeses sometimes held informal meetings to which Plaintiffs were invited. The Contorakeses' attempt to rationalize and excuse their behavior only underscores the extent to which they believed they could ignore with impunity the requirements of the Bylaws.

Defendants concede formal budgets were never prepared and presented to Plaintiffs for approval, but argue that failure is immaterial because the cost of basic Association expenses got paid and basic services were provided. Defendants utterly disregard and show nothing but contempt for the right of owners under the Bylaws to participate in and understand the management of their condominiums.

The main thrust of Defendants' defense to the breach of contract claim is that Plaintiffs have failed to prove damages. In this Defendants are only partially correct. Plaintiffs were not able to prove that Defendants' breaches have made it impossible for Plaintiffs to sell their units. Other units have sold, albeit at a loss, and it is not possible on the evidence presented to conclude Defendants' breaches make it impossible for Plaintiffs to sell their condos. It is fair, however, to infer that the overall shabbiness of the condominium exteriors and common areas caused by Defendants' deficient maintenance in breach of their contractual responsibilities have caused the value of Plaintiffs units to be decreased. But loss of economic value due to poor upkeep is not the only way in which Plaintiffs have been harmed by Defendants' pervasive and comprehensive breaches of contract.

The Declaration constitutes a covenant running with the land. (Decl. § 6.6.) Further, the Declaration is incorporated into Plaintiffs' deeds, and as such, breaches of the Declaration (and the Maine Condominium Act which it incorporates) are violations of Plaintiffs' real property rights. (Joint Exs. 4, 6.) "Some damage is presumed to flow from a legal injury to a real property right." *Gaffny v. Reid*, 628 A.2d 155, 158 (Me. 1993). In *Gaffny*, several condominium unit owners sued another unit owner for violating the association's bylaws because part of her cottage extended into the limited common element adjacent to her unit. 628 A.2d at 156-157. The trial court found that the plaintiffs had not proven any damages and refused to order the removal of the cottage because there was an inconsistent history of enforcing control over limited common elements and because "the value of the property in its entirety had been improved and that the benefits to plaintiffs from removing the cottage would be minimal or nonexistent." *Id*. at 158. However, the Law Court rejected the trial court's finding that there was no injury and held that Maine law

presumes damage from a "legal injury to a real property right." *Id.* Because the overall value of plaintiffs' condominiums had been increased, the Law Court awarded nominal damages.

In this case, Plaintiffs have demonstrated actual damages to their real property rights. For over ten years, the Defendants have systematically and comprehensively denied Plaintiffs of their rights to participate in, know about, and understand the administration and management of their condominium Association; their rights to have the common areas well maintained; their rights to have restrictions on use enforced; their rights to have the Declarant appoint a compliant Board; their right to have properly noticed, formal meetings, at which votes are taken and minutes kept; and their right to expect the Declarant to comply with the Declarant's responsibilities, including but not limited to the Declarant's responsibility to pay the assessment on the fifteen units it owns. The Declarant and Association have seriously damaged and undermined the real property rights Plaintiffs have been guaranteed by the Declaration.

"Any right or obligation declared by this Act is enforceable by judicial proceeding." 33 M.R.S. § 1601-114(b). "If a declarant or any other person subject to this Act fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by that failure has a claim for appropriate relief." *Id.* § 1604-116. Finally, the "remedies provided by this Act shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." *Id.* § 1601-114(a). In *Gaffney*, the Law Court awarded nominal damages. However, *Gaffney* does not limit damages for legal injury to nominal damages. Under appropriate circumstances, a court can award more than nominal damages for legal injury to a real property right. *See Knauer Family v. Delisle*, No. RE-08-01, 2008 Me. Super. LEXIS 225, at *11-12 (Sep. 29, 2008) (awarding $20,000 for a comparatively negligible encroachment).

Here, Plaintiffs have suffered substantial legal injury, in addition to their loss of economic value. The purpose of an award of compensatory damages for breach of contract is to place Plaintiffs in the same position they would have enjoyed under the Declaration and Bylaws were it not for Defendants' breaches. *Anuszewski v. Jurevic*, 566 A.2d 742, 743 (Me. 1989); *see also Lee v. Scotia Prince Cruises, Ltd.*, 2003 ME 78, ¶ 22, 828 A.2d 210; Horton & McGehee, *Maine Civil Remedies* § 4-3(c) at 61 (4th ed. 2004). Damages may not be awarded on the basis of guesswork or speculation. *Carter v. Williams*, 2002 ME 50, ¶ 9, 792 A.2d 1093. A damage award must be supported by the evidence, but damages do not have to be proven to a mathematical certainty, they may be determined to a probability. *Morissette v. Somes*, 2001 ME 152, ¶ 11, 782 A.2d 764. The fact finder is permitted to consider probable and inferential as well as direct and positive proof in determining damages. *Merrill Trust Co. v. State,* 417 A.2d 435, 440-441 (Me. 1980). *See also* Horton & McGehee, *Maine Civil Remedies* § 4-3(b)(2) at 58-60 (4th ed. 2004).

Under the circumstances of this case, one reasonable way to measure the amount of compensatory damages Plaintiffs should be awarded for the Defendants' multiple, serious breaches of the Declaration and Bylaws is to look at what each Plaintiff paid for their unit. Mr. Maples paid $168,625 for his unit; Ms. Brown paid $133,502 for her unit. Due to the pervasiveness and scope of Defendants' breaches, Plaintiffs' legal rights under the Declaration have been substantially impaired and their condos reduced in value. Accordingly, Mr. Maples is awarded damages in the amount of $134,900, which is equivalent to 80% of the price he paid for his unit. That amount reasonably puts Mr. Maples in as good a position as if Defendants had fully performed. Ms. Brown is awarded damages in the amount of $106,801, which is equivalent to 80% of the price she paid for her unit. That amount reasonably puts Ms. Brown in as good a

position as if Defendants had fully performed. The Declarant and the Association are joint and severally liable to each Plaintiff for their respective amount of damages.

Breach of Fiduciary Duty (Complaint, Count II)

Because Compass Harbor is the Declarant and owns more than fifty percent of the units (fifteen of the twenty-four units), it "is a fiduciary for the unit owners with respect to actions taken or omitted at [its] direction by officers and members of the executive board appointed by the declarant[.]" 33 M.R.S. § 1603-103(a). Defendants do not dispute that Declarant is a fiduciary with regard to Plaintiffs in their capacity as unit owners. (*See* Def.'s Proposed Findings of Fact and Conclusions of Law p. 9.) Indeed, the fiduciary relationship would be hard to dispute. Since Mr. Contorakes is the sole member of the Declarant; the Declarant appointed Mr. Contorakes and Mrs. Contorakes to the Board; with the exception on one day in 2017, for over ten years Mr. Contorakes and Ms. Contorakes have been the only members of the Board; and the Contorakes control the Declarant, the Association, and the Board—the Court concludes Declarant Compass Harbor is a fiduciary with respect to Mr. Maples and Ms. Brown for all actions taken or omitted by the Contorakes as members of the Board. *See id.*

As previously discussed, the Declarant control period has not yet ended. 33 M.R.S. § 1603-103(a), (d)(1). If a wrong accrues during the period of declarant control, and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to any unit owner for tort losses not covered by unit owner's insurance. 33 M.R.S. § 1603-111. In this case, the Declarant has had notice of this action and has defended, and there is no evidence Plaintiffs have any applicable insurance. Accordingly, the Declarant is liable to Mr. Maples and Ms. Brown for any tort loss caused by a breach of fiduciary duty.

The Law Court has long recognized the common law tort of breach of fiduciary duty. *See, e.g., Morris v. Resolution Trust Corp.,* 622 A.2d 708, 712 (Me. 1993). Litigation frequently involves arguments over whether the relationship gives rise to a fiduciary duty, and if so, what the duty entails. *See, e.g.*, *Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶¶ 17-21, 133 A.3d 1021; *Stewart v. Machias Sav. Bank*, 2000 ME 207, ¶¶ 10-11, 762 A.2d 44; *Bryan R. v. Watchtower Bible & Tract Soc'y, Inc.,* 1999 ME 144, ¶¶ 11-16, 738 A.2d 839. In this case, however, the Maine Condominium Act obviates the need to engage in the relationship analysis, because the Act makes the Declarant a fiduciary with respect to actions taken or omitted at its direction by the Contorakes. The Act further imposes an obligation of good faith in the performance of every duty it imposes upon the Declarant, including those cited herein. 33 M.R.S. § 1601-113. "[T]he declarant and its appointees are held 'to a higher standard of care than unit-owner elected directors.'" *Blanchard v. PHP Props, Inc*., Nos. CV-04-281, CV-04-319, 2005 Me. Super. LEXIS 17, at *6-7 (Jan. 14, 2005) (quoting 8 Richard Powell, *Powell on Real Property* § 54A.04 (2000)); *see also Fitch v. Diamond Cove Homeowners Ass'n*, No. BCD-WB-08-47, 2009 Me. Bus. & Consumer LEXIS 26, at *12 n.3 (Nov. 16, 2009). Since we have the necessary relationship and the duty, we can turn to breach, causation, and damages.

Defendants contend that in order to establish breach, Plaintiffs must prove both gross negligence and bad faith. (Def.'s Proposed Findings of Fact and Conclusions of Law p. 9-10.) In arguing for gross negligence, Defendants rely on *WahlcoMetroflex, Inc. v. Baldwin*, 2010 ME 26, ¶ 15-19, 991 A.2d 44. In *WahlcoMetroflex*, the Court held that plaintiff in a breach of fiduciary duty case needed to establish gross negligence. *Id.* ¶ 18. According to *WahlcoMetroflex,* gross negligence is defined as "reckless indifference to or a deliberate disregard" of a body of requirements. *Id.* ¶ 16.

WahlcoMetroflex, however, can be distinguished on several grounds. First, *WahlcoMetroflex* is a Maine case applying Delaware law. The doctrine of gross negligence is not recognized as a part of Maine law. *Beaulieu v. Beaulieu*, 265 A.2d 610, 612 (Me. 1970). Second, *WahlcoMetroflex* involved a shareholder who held a management position with a for-profit corporation. *Id.* ¶ 2. The case did not involve a declarant of a condominium, and did not entail the analysis of Maine condominium law. The Maine Condominium Act imposes on declarants both a fiduciary duty and a high standard of care, and it logically follows that the burden on Plaintiffs to establish breach is less than gross negligence. But in this case, whether the burden is gross negligence or mere negligence, Plaintiffs have met their burden of proof.

In the case at hand, the Declarant, the Board, and the Contorakeses blatantly disregarded important requirements contained in the Declaration and the Bylaws, and the corresponding duties under the Maine Condominium Act and the Maine Nonprofit Corporation Act—for over ten years. The Declarant displayed continuous reckless indifference and deliberate disregard for its duties under the operative documents, and for the rights of Plaintiffs. Plaintiffs have satisfied their burden to show the Declarant breached its fiduciary duty.

In arguing for the need to show bad faith, Defendants rely on *Seacoast Hanger Condo. II Ass'n v. Martel*, 2001 ME 112, ¶¶ 17-22, 775 A.2d 1166. In *Seacoast Hanger*, however, the defendants were unit owners, not a declarant, and thus not subject to the higher standard of care imposed on declarants. Further, the analysis occurred primarily under The Maine Nonprofit Corporation Act rather than the Maine Condominium Act.[4] Nevertheless, if Plaintiffs' burden requires establishing bad faith, they have easily satisfied that burden.

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[4] Moreover, given the higher standard of care imposed on a declarant, the Maine Condominium Act logically shifts to the declarant in a breach of fiduciary case the burden to show good faith as an affirmative defense. *See* 33 M.R.S. §§ 1601-113, 1603-103, 1603-111. It does not make sense to construe a declarant's statutory obligation to act in good faith as imposing on a plaintiff the need to show the declarant acted in bad faith. *See id.*

According to *Seacoast Hanger*, bad faith "imports a dishonest purpose and implies wrongdoing or some motive of self-interest." *Id.* ¶ 21 (citation omitted). In this case, the Declarant blatantly and wrongfully ignored important requirements of the Declaration, Bylaws, and Condominium Act in order to do whatever it pleased, avoid paying condo assessments for the fifteen units it owns, and to cut self-interested backroom deals like the one with Mr. McConomy. To the extent Plaintiffs have the burden to establish the Declarant's bad faith, they have amply satisfied that burden.

The Declarant's breach of its fiduciary duty to Mr. Maples and Ms. Brown caused both Plaintiffs to suffer loss of real property rights (as discussed above), frustration, mental anguish, devaluing of their condo units, and loss of the enjoyment of their condo units. Mr. Maples became so emotionally unable to use his unit, that he put it on the market. Ms. Brown would have done the same, but she needs to live in her condo.

The tort of breach of fiduciary duty supports an award of compensatory damages.[5] *See Morris,* 622 A.2d at 711. In determining the amount of compensatory damages, the Court is again guided by reference to the original purchase price of Plaintiffs' respective units. Accordingly, Mr. Maples is awarded damages against the Declarant Compass Harbor in the amount of $134,900. Ms. Brown is awarded damages against the Declarant Compass Harbor in the amount of $106,801.

Plaintiffs have also requested an award of attorney fees for prevailing in their claim against the Declarant for its breach of fiduciary duty. "Although a prevailing litigant generally has no right to recover attorney fees, a court may award attorney fees for some kinds of tortious conduct, including a breach of a fiduciary duty." *Murphy v. Murphy*, 1997 ME 103, ¶ 15, 694 A.2d

[5] As an equitable remedy, Plaintiffs requested rescission. (Pl.'s Findings of Fact and Conclusions of Law p. 27.) However, too much time has passed since Plaintiffs purchased their units, and so rescission is not an available remedy in this case. *See Mott v. Lombard*, 655 A.2d 362, 365 (Me. 1995) (purchaser must seek rescission within a reasonable time after the conveyance).

932 (citations omitted). "The amount of attorney fees awarded is within the court's discretion and the court is accorded substantial deference in its calculations." *Id.* ¶ 17. Plaintiffs have prevailed in their action against the Declarant for its breach of fiduciary duties owed to them as unit owners and are thus entitled to recover their attorney fees incurred in litigating this claim. Counsel for Plaintiffs can submit an attorney fees affidavit no later than seven business days after the date this decision is docketed. As the statutorily-defined fiduciary, the Declarant is liable for paying the award of attorney fees.

Unjust Enrichment (Complaint, Count III)

Plaintiffs have not satisfied their burden of proving unjust enrichment. Defendants did supply Plaintiffs with minimal services, and several years ago both Plaintiffs stopped paying condo assessment fees to Defendants. *See, e.g., Howard & Bowie, P.A. v. Collins,* 2000 ME 148, ¶ 13, 759 A.2d 707 (citing *June Roberts Agency v. Venture Properties,* 676 A.2d 46, 49 (Me. 1996)). Accordingly, judgment is granted to Defendants on Plaintiff's claim for unjust enrichment.

Specific Performance (Complaint, Count IV)

Specific performance is a remedy, not a separate cause of action. *See Sullivan v. Porter*, 2004 ME 134, ¶ 25, 861 A.2d 625. In this litigation, however, Plaintiffs have prevailed on their claims for breach of contract, breach of fiduciary duty, declaratory judgment, and unfair trade practices. Accordingly, Plaintiffs have proven causes of action that could support specific performance. Defendants object on the basis that specific performance is not available because there is an adequate remedy at law—damages. *See id.* (Def.'s Proposed Findings of Fact and Conclusions of Law p.11.) However, "[i]t is within the trial court's equitable powers to apply the remedy of specific performance when a legal remedy is either inadequate or impractical." *Id.* (citation omitted). Here, the Court has awarded damages. Plaintiffs, however, will continue to

own their condominium units, and Ms. Brown will continue to live in hers. Accordingly, the damages remedy by itself provides inadequate relief. The Court grants Plaintiffs' request for specific performance as follows.

Defendants must promptly come into substantial compliance with all of the provisions of the Declaration, Bylaws, and corresponding provisions of the Maine Condominium Act and the Maine Nonprofit Corporation Act. Without in any way limiting the comprehensiveness of the Court's order, Defendants must at a minimum specifically perform as follows:

1. The Declarant must promptly populate the Board with three eligible persons. Alternatively, the two existing Directors must promptly vote to fill the current Board vacancy.

2. The Board and the Association must hold formal annual, regular, and special meetings to transact Association business.

3. All Board and Association meetings must be properly noticed to the owners.

4. The Defendants must ensure minutes of all meetings are kept, in sufficient detail to inform owners of what transpired at the meetings.

5. The Defendants must establish banking, accounting, and fiscal controls in accordance with usual and customary practices.

6. The Defendants must only use Association bank accounts for Association deposits and payments.

7. The Declarant must timely deposit into the Association bank accounts the full amount of monthly assessments and special assessments for its fifteen units. That means, without limitation, that monthly assessments on its fifteen units must be actually paid and deposited monthly.

8. The Defendants must formally prepare and adopt budgets.

9. Defendants must formally calculate and set assessments based on formally adopted budgets.

10. The Defendants must promptly provide Plaintiffs with inspection and copying of Association records upon request.

11. Defendants must promptly clean the laundry and ensure all machines are working properly, and then keep the laundry clean and in properly working order.

12. Defendants must promptly clean, repair, and maintain the pool.

Defendants shall not construe the above list to suggest they are not responsible to comply with any other applicable obligations under the Declaration, Bylaws, and Maine law, even if not specifically mentioned above.

Attorney Fees Under Maine's Nonprofit Corporation Act (Complaint, Count V)

The Association was organized and exists as a nonprofit corporation. The Maine Nonprofit Corporation Act provides in relevant part as follows:

> Each corporation shall keep correct and complete books and records of accounts and shall keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors and shall keep at its registered office or principal office in this State a record of the names and addresses of its members entitled to vote. All books and records of a corporation may be inspected by any officer, director or voting member or the officer's, director's or voting member's agent or attorney, for any proper purpose at any reasonable time, as long as the officer, director or voting member or the officer's, director's or voting member's agent or attorney gives the corporation written notice at least 5 business days before the date on which the officer, director or voting member or the officer's, director's or voting member's agent or attorney wishes to inspect and copy any books or records. The only proper purpose for which a voting member may inspect and copy books or records under this section is the purpose of enabling the member to fulfill duties and responsibilities conferred upon members by the articles of incorporation or the bylaws of the corporation or by law.

13-B M.R.S. § 715(1). Prior to commencing this litigation, Plaintiffs had repeatedly asked to inspect and copy Association records. As of the date Plaintiffs initiated this litigation, Defendants had repeatedly refused to allow Plaintiffs to inspect and copy the Association's books and records. Accordingly, in Count V of their Complaint, Plaintiffs requested a court order for inspection and copying of the records demanded. The Court grants judgment in favor of Plaintiffs on Count V, and orders Defendants to permit the requests for inspection and copying.

As part of their request, Plaintiffs sought an award of attorney fees. Section 715(2)(A) provides in relevant part as follows:

> If the court orders inspection and copying of the records demanded, the court shall also order the corporation to pay . . . reasonable attorney fees, incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the officer, director or member to inspect the records demanded.

13-B M.R.S. § 715(2)(A). The Court finds Plaintiffs had a proper purpose in seeking to inspect and copy the Association's records, in order to fulfill their duties and responsibilities as unit-owner members of the Association. The Court further finds Defendants failed to prove they refused inspection in good faith because they had a reasonable basis for doubt about the right of Plaintiffs to inspect the records demanded.

Defendants object to an award of attorney fees on the grounds that the Court did not order inspection and copying, and a court order is a necessary prerequisite to an award of attorney fees. To that effect, the Court has ordered Defendants to permit inspection and copying, and has further ordered the Association to allow Plaintiffs to inspect and copy any and all Association records they wish to inspect and copy, provided Plaintiffs' requests comply with 13-B M.R.S. § 715. *See* this Order at 31 ¶ 10 (granting Plaintiffs specific performance and ordering Defendants to comply with any of Plaintiffs' proper requests to view or copy Association records).

Defendants stonewalled Plaintiffs' document requests for years, and only finally allowed Plaintiffs to inspect and copy Association records under the compulsory obligations of discovery. In argument, Defendants seem to assume that this resolved Plaintiffs' claim for specific performance pursuant to 13-B M.R.S. § 715(2), but the Court concludes that it did not. The Defendants never moved for dismissal or for a summary judgment on mootness grounds. The parties' joint pretrial statement included only a stipulation that "the Association provided the

requested records during discovery." Plaintiffs never conceded that this defeated their claim, and Plaintiffs in fact put on evidence in support of this claim at trial, as summarized briefly above.

In any event, Plaintiffs' claim is not moot. "An issue is deemed to be 'moot' when there is no real and substantial controversy, admitting of specific relief through a judgment of conclusive character." *Anthem Health Plans of Maine, Inc. v. Superintendent of Ins.*, 2011 ME 48, ¶ 4, 18 A.3d 824 (quotation omitted). "When determining whether a case is moot, [the court] examine[s] whether there remain sufficient potential effects flowing from resolution of the litigation to justify application of the court's limited resources." *Id.* 13-B M.R.S. § 715(2) In this case, the Court has already heard evidence and argument on Plaintiffs' claim, undercutting the policy rationale behind the mootness doctrine. *See id.* More importantly, as addressed above in the preceding section, Plaintiffs convinced the Court by a preponderance of the evidence that they were entitled to an order requiring Defendants to comply with their contractual and statutory obligations on an ongoing basis. In other words, Defendants' belated acquiescence to Plaintiffs' proper record requests neither took the issue out of controversy nor gave Plaintiffs the specific relief to which they proved they are entitled at trial. *See Anthem Health Plans of Maine, Inc*., 2011 ME 48, ¶ 4, 18 A.3d 824.

The Court grants Plaintiffs' request for an award of reasonable attorney fees for time expended to obtain inspection and copying of Association records. Counsel for Plaintiffs can submit an attorney fees affidavit no later than seven business days after the date this decision is docketed. The Association and the Declarant, because the Declarant still controls the Association, are joint and severally liable for paying the award of attorney fees.

Declaratory Judgment (Complaint, Count IX)

Pursuant to the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951-5963, Plaintiffs seek a declaration regarding Defendants' violations of the Declaration, Bylaws, and corresponding provisions of the Maine Condominium Act, 33 M.R.S. §§ 1601-101 through 1604-118, and the Maine Nonprofit Corporation Act, 13-B M.R.S. §§ 101-1406. Defendants correctly point out that the claim is similar to Plaintiffs' breach of contract claim, and Defendants thus argue the claim for declaratory relief "fails for the same reasons noted above." (Def.'s Proposed Findings of Fact and Conclusions of Law p. 12.) In other words, Defendants do not seriously dispute that the violations Plaintiffs assert actually occurred; instead, Defendants object on the grounds of materiality, causation, and damages. Those grounds, however, have little applicability to declaratory relief. The Court concludes that a justiciable controversy exists, *see Annable v. Bd. of Envirnmnt'l Protec.*, 507 A.2d 592, 595 (Me. 1986), and grants Plaintiffs the declaratory relief sought.

The Declaration and the Bylaws constitute enforceable contracts, through which Plaintiffs are granted real property rights incorporated into their respective deeds. Defendants are bound by the terms of the Declaration and Bylaws, and by the applicable provisions of the Maine Condominium Act and the Maine Nonprofit Corporation Act. Defendants have violated the Declaration, Bylaws, and corresponding provisions of the Maine Condominium Act and the Maine Nonprofit Corporation Act in all the ways set forth above in the section discussing breach of contract. Defendants' violations are material, and go to the heart of the Declaration, Bylaws, and the two Acts.

The Court further declares that Mr. Maples was justified in stopping payment of assessments to Defendants as of December 2013. Ms. Brown was justified in stopping payment of assessments to Defendants as of September 2014. By those points in time, Defendants' material

violations of the applicable contracts and statutory provisions had become so all-encompassing that Plaintiffs were excused from any obligation to pay assessments.[6] Plaintiffs have no obligation to pay over to Defendants any escrowed assessments. Plaintiffs shall further have no obligation to pay current and future assessments until Defendants substantially comply with all the provisions of the Declaration, Bylaws, and applicable provisions of the Acts.[7] Defendants must nevertheless pay for and continuously provide all necessary services to common areas; services include but are not limited to electricity, propane, trash pick-up, landscaping, maintenance and repair, cleaning of the laundry room, plowing, and pool maintenance. Defendants must pay for assessments owed by Mr. McConomy to the Association notwithstanding the backroom agreement between Mr. McConomy and Mr. Contorakes, and the Declarant must not claim any credit against its assessments for the improper deal with Mr. McConomy. Defendants must not impose or attempt to impose or collect any special assessment to pay for their attorney fees and litigation costs, or for the damages awarded in this action. Additionally, Defendants must promptly provide a resale certificate to Plaintiffs, in a form satisfactory to Plaintiffs, in the event Plaintiffs wish to sell their units.

Violation of Unfair Trade Practice Act (Complaint, Count X)

The Maine Unfair Trade Practices Act ("UTPA") declares that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." 5 M.R.S. § 207. Section 213 of the UTPA provides that:

> Any person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by

[6] The Court stops short of ordering Defendants to disgorge assessments paid by Plaintiffs prior to the dates they stopped making payments. The evidence establishes that Defendants were providing minimal services for the common areas, and so the Court declines to order disgorgement.

[7] If Plaintiffs refuse to pay assessments once Defendants believe they have become substantially compliant, Defendants can petition this Court for supplemental relief pursuant to 14 M.R.S. § 5960.

> another person of a method, act or practice declared unlawful by section 207 or by any rule or regulation issued under section 207, subsection 2 may bring an action either in the Superior Court or District Court for actual damages, restitution and for such other equitable relief, including an injunction, as the court determines to be necessary and proper. There is a right to trial by jury in any action brought in Superior Court under this section.

5 M.R.S. § 213. In this case, Plaintiffs purchased their condominium units for personal or household purposes. As discussed above in the section on breach of contract, Plaintiffs suffered the actual loss of real property rights as a result of Defendants' conduct. Defendants' conduct, especially Defendants' backroom deal with Mr. McConomy and the Declarant's failure to pay assessments for its fifteen condominium units while demanding payment of assessments by Plaintiffs for their two condominium units, constitute unfair or deceptive acts or practices in the conduct of commerce. Accordingly, Plaintiffs have proven that Defendants violated the Maine Unfair Trade Practices Act.

For the reasons set forth in the section on breach of contract, Mr. Maples is awarded damages in the amount of $134,900, which is equivalent to 80% of the price he paid for his unit. Ms. Brown is awarded damages in the amount of $106,801, which is equivalent to 80% of the price she paid for her unit.[8] Since the Contorakeses do not have any personal liability, Declarant and the Association are joint and severally liable to each Plaintiff for their respective amount of damages. Additionally, Plaintiffs are excused from any obligation to pay to Defendants the assessments Plaintiffs withheld and paid into escrow accounts.

Plaintiffs seek an award of attorney fees and costs, pursuant to 5 M.R.S. § 213(2). Defendants object, on the basis that Plaintiffs failed to serve on Defendants the written demand for relief described in 5 M.R.S. § 213(1-A). Defendants' objection, however, is unavailing. Failure

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[8] Alternatively, in the event of any challenge to the award of damages under the UTPA, the Court awards restitution to Plaintiffs in the same amounts.

to comply with section 213(1-A) does not bar an award of attorney fees, although denying a request for attorney fees is one remedy the Court has at its disposal for noncompliance. *Oceanside at Pine Point v. Peachtree*, 659 A.2d 267, 273 (Me. 1995). In this case, attorney Carleton's letter of December 3, 2015, functionally served as the equivalent of the written demand contemplated by section 213(1-A). Attorney Carleton's letter did not specifically mention the UTPA, but it did identify specific claims and referenced the possibility of other claims. The letter certainly put Defendants on notice that Plaintiffs were considering litigation, and provided Defendants with the opportunity and incentive to engage in settlement negotiations. *Cf. id.*

As a result, Plaintiff's failure to make the specific written demand envisioned by section 213(1-A) does not bar an award of attorney fees on the facts of this case. The Court grants Plaintiffs' request for an award of reasonable attorney fees for time expended in prevailing on their UTPA claim. Counsel for Plaintiffs can submit an attorney fees affidavit no later than seven business days after the date this decision is docketed. Since the Contorakeses have no personal liability, the Association, and because the Declarant still controls the Association , the Declarant, are joint and severally liable for paying the award of attorney fees.

<u>Breach of Contract (Counterclaim, Count I)</u>

Defendants seek damages for what they allege is Plaintiffs' breach of contract for failure to pay assessments. However, "[o]ne cannot recover damages for a failure to pay under a contract if the non-paying party rightfully withheld payment because the party seeking damages has materially breached the contract." *Island Terrace Owners Ass'n v. Unit 91*, No. RE-10-257, 2012 Me. Super. LEXIS 54, *9-10 (March 22, 2012) (citing Restatement (Second) of Contracts § 237 (1981)). "A material breach is non-performance that is so important that the other party is justified in regarding the whole transaction at an end." *Id.* (citing *Cellar Dwellers, Inc. v.*

D'Alessio, 2010 ME 32, ¶ 16, 993 A.2d 1). In this case, Defendants materially breached the Declaration and Bylaws, justifying Plaintiffs refusal to pay assessments. Judgment is granted to Plaintiffs on Count I of Defendants' counterclaim.

Unjust Enrichment and Quantum Meruit (Counterclaim, Counts II & III)

As discussed above, the Declaration and Bylaws constitute valid contracts, which Defendants materially breached. Under Maine law, the existence of a valid contract precludes claims for unjust enrichment. *Lynch v. Ouellette*, 670 A.2d 948, 950 (Me. 1996); *Top of the Track Assocs. v. Lewiston Raceways, Inc.*, 654 A.2d 1293, 1296 (Me. 1995); *Crop Prod. Servs. v. Me. Apple Co.*, No. CV-14-179, 2015 Me. Super. LEXIS 154, at *10-11 (Aug. 28, 2015); *Sav. Bk. of Me. v. Edgecomb Dev.*, No. CV-09-582, 2010 Me. Super. LEXIS 58, at *18-19 (May 18, 2010) (dismissing claim for unjust enrichment); *Kane v. Potter*, No. BCD-WB-RE-08-20, 2009 Me. Bus. & Consumer LEXIS 30, at *14-17 (Feb. 9, 2009); *Developers v. Lacroix*, No. BCD-WB-CV-08-24, 2008 Me. Bus. & Consumer LEXIS 13, at *7 (Oct. 10, 2008) (dismissing claim for unjust enrichment); *see also Hodgkins v. New Eng. Tel. Co.*, 82 F.3d 1226, 1232 (1st Cir. 1996). Under Maine law, the existence of a valid contract also precludes claims for quantum meruit. *Paffhausen v. Balano*, 1998 ME 47, ¶ 9, 708 A.2d 269, 272; *Prest v. Inhabitants of Farmington*, 104 A.2d 521, 524 (Me. 1918); *Crop Prod. Servs.*, 2015 Me. Super. LEXIS at *9-10; *see also Hodgkins*, 82 F.3d at 1232. The law is especially clear when the parties pressing claims for unjust enrichment and quantum meruit are the same parties who materially breached the contracts. *See e.g. Lynch*, 670 A.2d at 950. Accordingly, the Court enters judgment in favor of Plaintiffs on Counts II and III of Defendants' Counterclaim.

CONCLUSION

For the reasons discussed above, the Court awards Mr. Maples damages in the amount of $134,900, and awards Ms. Brown damages in the amount of $106,801.[9] The Declarant and the Association are joint and severally liable to Plaintiffs for the damages awards. The Court also awards attorney fees to Plaintiffs, pursuant to the Maine Nonprofit Corporation Act (Count V) and the Unfair Trade Practices Act (Count X), as well as for the Declarant's breach of fiduciary duty (Count II). Counsel for Plaintiffs may submit an attorney fees affidavit, and the affidavit should separately specify the fees incurred under each Act and in support of their claim for breach of fiduciary duty. The Court also awards to Plaintiffs the specific performance and declaratory judgment described herein. The Court grants judgment to Plaintiffs on all Counts of the Counterclaim, and grants judgment to Defendants on Count III of the Complaint (unjust enrichment).

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

So Ordered.

Dated: July 22, 2019

____/s_________
Michael A. Duddy
Judge, Business and Consumer Court

[9] The awards of damages under the various claims are in the alternative, and not cumulative. *See Steadman v. Pagels*, 2015 ME 122, ¶ 30, 125 A.3d 713.