STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-RE-17-11

OLD TOWN UTILITY & TECHNOLOGY PARK, LLC, et al.

Plaintiffs,

v.

MFGR, LLC, et al.

Defendants.

COMBINED ORDER ON DEFENDANTS' MOTIONS TO DISMISS

This matter is before the Court on Defendants MFGR, LLC's ("MFGR") and William Firestone's ("Firestone") (collectively the "MFGR Defendants") motion to dismiss all counts against them and Defendants Old Town Holdings II, LLC's ("OTH") and Joseph Everett Deschenes's ("Deschenes") (collectively the "OTH Defendants") motion to dismiss all counts against them. Plaintiffs Old Town Utility and Technology Park, LLC ("OTU"); Relentless Capital Company, LLC ("Relentless"); and Samuel Eakin ("Eakin") oppose the motion. Oral argument was heard on January 5, 2018 at the Capital Judicial Center in Augusta, Maine. Clifford Ginn, Esq. appeared on behalf of Plaintiffs. Daniel Mitchell, Esq. appeared on behalf of the MFGR Defendants and Julia Pitney, Esq. appeared for the OTH Defendants.

FACTUAL BACKGROUND[1]

This case arises out of a disputed transaction for the sale and purchase of the former Expera Mill Facility (the "Facility") in the City of Old Town, Maine, ("Old Town," or the "City") which includes approximately 300 acres of land, roughly 400,000 square feet of warehouse building, a

[1] The information in this section is taken in large part from Plaintiffs' First Amended Verified Complaint (the "Complaint").

wastewater treatment plant, a 16MW biomass boiler, and other miscellaneous industrial assets. (Compl. ¶ 4.) MFGR purchased the Facility from its former owner on or about January 27, 2016. (Compl. ¶ 5.) Firestone is the principal of MFGR. (Compl. ¶ 3.)

Relentless, acting through Eakin, and James W. Sewall Company ("Sewall"), acting through its president and CEO David Edson ("Edson"), formed OTU on or about December 15, 2015, for the purpose of acquiring or leasing and redeveloping the Facility. (Compl. ¶ 6.) OTH later joined OTU through its principal, Deschenes, the former manager of fiber and logistics at the Facility. (Compl. ¶ 7.) When and to what extent OTH and Deschenes began working with or joined OTU is disputed, but by July 15, 2016, the three members executed an operating agreement for OTU giving each member equal one-third ownership of OTU and naming Edson, Eakin, and Deschenes its managers. (*Id.*)

Eakin's work on acquiring or leasing and redeveloping the Facility went three directions in 2016. One project involved securing contracts for the provision of steam and power from the Facility's power and boiler assets with the University of Maine (the "University"). (Compl. ¶¶ 14-17.) Eakin undertook this work through Relentless and partnered with another entity, Consolidated Edison Solutions ("ConEd"). (*Id.*) This "ConEd Team" was ultimately invited to participate in "Phase II" of the University's bidding process. (Compl. ¶¶ 19, 68.) Sometime thereafter Relentless was removed from the team. (Compl. ¶ 68.)

Meanwhile, OTU was negotiating with MFGR (the Facility's owner) and Old Town to facilitate the sale of the Facility's wastewater treatment plant and warehouses. (Compl. ¶ 9-10, 20.) In March 2016, MFGR and OTU executed an agreement whereby OTU would provide services for compensation (the "Advisory Agreement") to that end. (Compl. ¶¶ 20-21.) Pursuant

to the Advisory Agreement, OTU secured[2] financing and developed a transactional framework agreeable to all parties. (Compl. ¶¶ 22-29, 32.) The terms of this proposed transaction were reduced to writing in an offer letter dated April 28, 2016 from the City to MFGR which was countersigned by Firestone. (Compl. ¶ 32.) This letter was a binding[3] letter of intent and is thus styled the "4/28/16 Agreement" by Plaintiffs, and will be so referenced in this Order. The letter proposes purchase of the Facility by the City "and/or its assigns;" Plaintiffs allege that MFGR, the City, and OTU understood the City's "assigns" to mean OTU. (Compl. ¶ 33.)

Through Relentless, Eakin was simultaneously developing a business model for the Facility. (Compl. ¶ 35.) As part of this process, OTU's managers met with representatives of the Carrier, Varney, and Gardner families (the "CVG families") regarding securing timber assets to fuel the facility because these three families owned substantial timberland in the State of Maine. (Compl. ¶ 37-38.) The CVG families formed CVG, Inc. ("CVG") in January 2015 to pursue their joint interests. (Compl. ¶ 38.) CVG allegedly came to view Relentless's proposal as a threat and recognized that acquiring the Facility would better serve its interests. (Compl. ¶ 43.) CVG also became part of the ConEd team, as Relentless was removed from the ConEd team and replaced with Penobscot Energy and Fiber, LLC, which was formed by CVG and its partners to redevelop the Facility. (Compl. ¶ 68.)

Meanwhile, in June through October 2016, OTU continued to work with the City and MFGR to close the sale of the Facility in accordance with the 4/28/16 Agreement. (Compl. ¶ 51.)

---

[2] The Court appreciates that whether and to what extent OTU was successful in securing financing for the sale of the Facility is a central issue in this litigation and disputed by the parties. The Court uses "secured" here because Plaintiffs allege they were able to secure adequate financing for the transaction and for purposes of a motion to dismiss, the Court must accept all well-pleaded allegations as true. *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123.

[3] The MFGR Defendants challenge whether they are bound by the terms of this letter. (Def's Reply Mot. Dismiss at 1 n. 1.) *See* note 2 *supra*.

Problems arose. Changes to the State of Maine's regulatory approach to regulation of stormwater treatment necessitated changes to the proposed ownership structure. (Compl. ¶¶ 52-54). On or about July 5, 2016, OTU's closing attorney circulated a draft buy-sell instrument to the parties; MFGR raised certain concerns, which OTU's closing attorney addressed. (Compl. ¶¶ 54-56.) In early August 2016, OTU and the City discovered that the Facility's tissue building warehouse roof required substantial repairs and they began working with MFGR to address the issue. (Compl. ¶ 62.) By September 1, 2016, emails had been circulated among various representatives of the three parties indicating that the City was waiting only on closing documents discussed in a prior conference call. (Compl. ¶ 70). The City's mayor had subsequently requested those documents from Firestone and the September 1 emails charged MFGR with producing these "exhibits." (*Id.*)

By early October 2016, no closing had occurred. Firestone informed OTU that a competing buyer had emerged, and on October 10, 2016, gave OTU two weeks to respond with a counter-offer. (Compl. ¶¶ 77-78.) On October 24, 2016, Firestone raised issues with the proposed closing that OTU claims dealt with well-settled matters. (Compl. ¶¶ 84-86.) Shortly thereafter MFGR elected to sell the Facility to CVG. (Compl. ¶ 87.)

Plaintiffs filed their nine-count Complaint on September 5, 2017; although much has transpired since then regarding the sale of the Facility, as of that date and up until the entry of this Order, MFGR has not closed a sale of the Facility. (Compl. ¶ 95.) Supplemental briefing and letters to the Court, as well as assertions made at oral argument, suggest that in the time since the Complaint was filed: (1) The deal with CVG failed; (2) e4research.org, a non-profit corporation with a relationship with Sewall emerged as a potential new buyer; (3) that agreement expired by its terms at the end of 2017; and (4) CVG has emerged resurgent in the new year as the prospective buyer. OTU maintains that it is still willing and able to purchase the Facility from MFGR; MFGR

has indicated that it is ready to move toward a closing with CVG.

OTU alone brings six counts against only MFGR in this lawsuit: Count I (Breach of Contract: 4/28/16 Agreement), Count II (Specific Performance: Sale of the Facility from MFGR to OTU), Count III (Breach of Contract: Advisory Agreement), Count IV (Promissory Estoppel: Sale of the Facility), Count V (Promissory Estoppel: Advisory Fees), and Count VI (Unjust Enrichment). All Plaintiffs bring two counts against OTH and Deschenes: Count VIII (Breach of Contract: OTU Operating Agreement) and Count IX (Breach of Fiduciary Duty). One Count is brought by all Plaintiffs against all Defendants: Count VII (Restraint of Trade/ Monopoly).

STANDARD OF REVIEW

In reviewing a motion to dismiss under M.R. Civ. P. 12(b)(6), courts "consider the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp*., 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id*. (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id*.

DISCUSSION

I. MFGR DEFENDANTS' MOTION TO DISMISS: COUNTS I - IV

The MFGR Defendants have moved this Court to dismiss all counts against them on the grounds that Plaintiffs have failed to state a claim upon which relief can be granted. M.R. Civ. P. 12(b)(6). Plaintiffs counter that they have adequately pled sufficient facts to state a cause of action as to each count. The Court considers each count in turn.

A. Count I: Breach of Contract (4/28/16 Agreement) and Count II: Specific Performance (Sale of the Facility by MFGR to OTU)

MFGR urges this Court to dismiss Counts I and II[4] on the grounds that OTU's breach of contract claim alleged in Count I is barred by Maine's statute of frauds, which states that no action can be maintained for the sale of land unless the promise, contract, or agreement is in writing and signed by the party to be charged therewith. 33 M.R.S.A. § 51(4). OTU responds that the 4/28/16 Agreement satisfies the statute of frauds, and that because OTU has standing to enforce that agreement, the statute of frauds is satisfied. In the alternative, OTU argues that the doctrine of part performance applies, and operates as an exception to the statute of frauds.

The 4/28/16 Agreement is a letter of intent from Old Town to Firestone (and countersigned by same) regarding the City's proposed purchase of the Facility (or the "Old Town Mill Site," as it is referred to in the letter).[5] The 4/28/16 Agreement does not mention OTU by name. OTU alleges that where the letter refers to the "[City of Old Town] and/or its assigns," it is referring to OTU as the City's assignee in the proposed transaction. MFGR argues that even if the 4/28/16 Agreement is an enforceable written contract for the sale of the Facility, OTU lacks standing to enforce the agreement, because it is between MFGR and the City.

OTU claims it has standing to enforce the agreement under two theories. First, OTU claims an independent right to enforce the agreement as the City's "assign." OTU alleges that all parties to the agreement understood that OTU was the City's assign under the 4/2816 Agreement. (Compl. ¶ 33.) OTU further alleges that from the time the 4/28/16 Agreement was entered into, OTU acted on behalf of both OTU and the City, with the City and OTU determining which assets the City

[4] As the MFGR Defendants point out in their motion, specific performance is an equitable remedy, not a cause of action. (Mot. Dismiss at 3 n. 2.) The Court therefore treats Count II as a prayer for relief for MFGR's breach of the 4/28/16 Agreement plead in Count I.

[5] Plaintiffs attached a copy of the 4/28/16 Agreement to the Complaint as Exhibit D, and it is central to OTU's breach of contract claim. The Court thus may consider the document without converting the MFGR Defendants' motion to one for summary judgment. *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 10, 843 A.2d 43.

would purchase and lease to OTU and which assets OTU would purchase outright. (*Id.*) The Complaint alleges further facts tending to establish that the City in fact assigned its rights under the 4/28/16 Agreement to OTU. (*See* Compl. ¶¶ 51-58, 62-66)

OTU also argues that even if these facts are insufficient to establish an independent right to enforce the 4/28/16 Agreement as the referenced "assign," they at least establish a course of dealing among OTU, MFGR, and the City sufficient to establish that OTU is an intended third-party beneficiary of the 4/28/16 Agreement. In *F.O. Bailey Co. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992), Maine adopted the Restatement (Second) of Contracts § 302 test for whether a third party beneficiary is an intended beneficiary with a right to enforce the agreement: "A beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." The *F.O. Bailey* Court cautioned that while an intent to create an enforceable benefit in third party must be "clear and definite," it is nonetheless a factual determination and such intent may be "expressed in the circumstances surrounding" the contract's execution. *Id.*

This Court rules that OTU has alleged sufficient facts to establish its standing to enforce the 4/28/16 Agreement, whether as a party to the contract or as a third party beneficiary thereto.[6] OTU has alleged that it is the "assign" referenced in the 4/28/16 Agreement, and corroborated that allegation with further factual assertions indicating that OTU, MFGR, and the City all understood OTU to be the City's "assign" under the 4/28/16 Agreement. The Court therefore **denies** Defendant

[6] Because the Court rules that OTU has alleged sufficient facts to establish standing to enforce the signed 4/28/16 Agreement, the Court declines to consider whether the doctrine of part performance would otherwise operate to except the purported agreement to sell the Facility from the requirements of 33 M.R.S.A. § 51(4). The Court further expresses no opinion on whether the 4/28/16 Agreement is binding on any party, an argument that MFGR reserved but did not raise in its motion to dismiss. *See* note 3 of this Order *supra*.

MFGR's motion to dismiss as to Count I and Count II.

B. Count III: (Breach of Contract- Advisory Agreement)

MFGR claims that OTU has inadequately pled a breach of the advisory agreement. It argues that the Advisory Agreement expired by its terms prior to OTU's performance, triggering MFGR's right to terminate the Advisory Agreement. OTU counters that it performed under the agreement prior to the contract deadlines, or, in the alternative, that any deficiency in meeting those deadlines was waived by MFGR.

The Advisory Agreement provides that MFGR will pay fees to OTU if OTU "facilitate[s] the sale" of two Facility assets (the wastewater treatment plant and the warehouse) to the City or "another buyer acceptable to MFGR but not previously known to MFGR."[7] The Advisory Agreement gives both parties the right to "terminate [the agreement] with respect to any [p]roperty for which there is no executed purchase agreement by the applicable Contract Deadline or no sale as described herein prior to the applicable Closing Deadline." Firestone signed the Advisory Agreement on behalf of MFGR.

The Contract Deadline and Closing Deadlines for both assets are disputed by the parties. The Contract Deadline for the wastewater treatment plant is defined as "within 60 calendar days of the Effective Date;" the Closing Deadline is defined as "within 90 days of the Effective Date." The Contract Deadline for the warehouse is defined as "within 30 days of the Effective Date" and the Closing Deadline is defined as "April 30, 2016." The Effective Date of the Advisory Agreement is defined as "March __, 2016." Both Closing Deadlines are followed by the parenthetical "(or such later closing date, if any, to which MFGR and the applicable buyer have

[7] Plaintiffs attached a copy of the Advisory Agreement to the Complaint as Exhibit A, and it is central to OTU's breach of contract claim. The Court thus may consider the document without converting the MFGR Defendants' motion to one for summary judgment. *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 10, 843 A.2d 43.

agreed)."

This parenthetical language renders the Closing Deadlines ambiguous on the face of the Advisory Agreement, and OTU has pled facts that suggest that MFGR and the applicable buyer (that is, the City and OTU) agreed to a later closing date. (Compl. ¶¶ 22-29, 32-34, 51-58, 63-64, 70.) Although MFGR points out that the Advisory Agreement includes an integration clause that states the agreement "cannot be amended, modified, or varied except by the written agreement of MFGR and [OTU]," the parenthetical language allowing for a later closing date is already a part of the integrated document.

The Contract Deadline, however, is a date certain, albeit fixed in relation to the undefined Effective Date. While the Effective Date is clearly ambiguous, the plain language of the contract indicates that the parties intended that date to be some day in March of 2016. Even assuming the Effective Date was March 31, 2016, OTU does not allege that it succeeded in obtaining an executed purchase agreement with the City or any other buyer within the Contract Deadline for either party.

OTU first argues that its success in "securing the City as a purchaser" within the Contract Deadline was sufficient performance under the terms of the Advisory Agreement such that MFGR did not have a right to terminate. This is inconsistent with the plain language of the applicable provision, which expressly gives either party the right to terminate the agreement in the event that no purchase agreement is executed by the Contract Deadline, and is silent about the effect of "securing" a purchser. OTU next argues that it has nonetheless stated a claim for breach of contract under the theory "that any deficiency in meeting those deadlines was waived by MFGR's conduct."

Maine has long recognized the principle that one who "by his own act, deprived himself of the power of fulfilment," cannot then escape his obligations under a contract. *Richards v. Allen*, 17 Me. 296, 299 (1840). The modern doctrine of waiver maintains this principle. Waiver is the

voluntary or intentional relinquishment of a known right. *Indus. Unif. Rental Svc., Inc. v. Couri Pontiac, Inc.*, 355 A.2d 913, 919 (Me. 1976). If a party entitled to a contractual right acts inconsistent with that right, the party "is estopped form asserting that right if renunciation of the waiver would prejudice the party who has relied on it." *Id.* To bar enforcement of a contractual right, the waiver "must have induced a belief in the party who is claiming reliance on that waiver that the waiving party intended voluntarily to relinquish his rights." *Id.* Waiver may be inferred from the conduct of the waiving party. *Id.*

Read in the light most favorable to OTU, OTU has plead sufficient facts to give rise to the inference that MFGR waived its right to terminate the Advisory Agreement for OTU's failure to perform by the Contract Deadline. OTU has alleged that MFGR continued to work with OTU and the City toward the execution of a purchase contract well after the Contract Deadline had run. (Compl. ¶¶ 22-29, 32-34, 51-58, 63-64, 70.) OTU's reliance on this purported waiver is reflected in these same allegations.

OTU has stated a claim for breach of contract for MFGR's failure to perform under the Advisory Agreement. The Court therefore **denies** the MFGR Defendants' motion to dismiss as to Count III.

C. Count IV: (Promissory Estoppel: Sale of the Facility)

Plaintiffs plead this claim as an alternative avenue of relief if the Court determines that the purported contract between MFGR and OTU for the sale of the Facility is otherwise unenforceable. *See* Part I.A. of this Order, *supra*. "The doctrine of promissory estoppel applies to promises that are otherwise unenforceable, and is invoked to enforce such promises so as to avoid injustice." *Harvey v. Dow*, 2008 ME 192, ¶ 11, 962 A.2d 322. Maine has adopted the definition of promissory estoppel set out in Section 90(1) of the Restatement (Second) of Contracts:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Id. Maine allows promissory estoppel to enforce promises to convey land that lack a signed writing as required by the statute of frauds. *See Chapman v. Bomann*, 381 A.2d 1123, 1127 (Me. 1978). However, our Law Court has since allowed the exception only where the "action induced" involves substantial, physical improvement to the real estate by the promisee. *See Harvey v. Dow*, 2008 ME 192, ¶ 13, 962 A.2d 322 (purchaser built house on lot); *Tozier v. Tozier*, 437 A.2d 645, 648-49 (Me. 1981) (donee built house and outbuildings on lot). *See also Nappi v. Nappi Distrib.*, 1997 ME 54, ¶ 9, 691 A.2d 1198 ("In the context of the transfer of land, when the donee has made *substantial improvements to the land* in 'reliance upon the promise to convey the land, courts will enforce the promise to convey.'") (quoting *Tozier*, 437 A.2d at 648) (emphasis added).

OTU does not allege that it has made any physical improvements to the land. Instead, OTU argues that it expended substantial time and resources enhancing the value of the Facility in intangible ways (*i.e.* by finding tenants, developing a business plan, and securing financing), and that this induced action is sufficient to enforce the alleged promise to sell the Facility to OTU. However, based on the holdings of *Harvey* and *Tozier*, as well as the dictum from *Nappi* cited above, this Court holds that under Maine law, promissory estoppel operates as an exception to the statute of frauds only where the party seeking to enforce the promise to convey has made substantial, physical improvements to the land in reasonable reliance on the promise.

While the purchasers in *Chapman* did not make substantial improvements to land in reliance on a seller's promise to convey, that case is distinguishable from this one. There, one of the sellers made a specific promise to sign and return the written contract for the sale of property

in direct response to an inquiry being specially made because the purchasers were about to undertake a substantial financial commitment in furtherance of the deal. *Chapman*, 381 A.2d at 1127. The *Chapman* Court was explicit that "the doctrine of promissory estoppel [applied] to raise issues of material fact concerning . . . whether [this] *separate ancillary promise* became a contract binding on [the sellers.]" *Id*. at 1126 (emphasis in original). Here, OTU has not alleged that MFGR promised to sign a purchase and sale agreement for the transfer of the Facility. There is thus no separate, ancillary promise by which MFGR can be bound, and the rule since propounded in *Harvey*, *Tozier*, and *Nappi*—that substantial improvement to the land by the promisee is a necessary element for promissory estoppel to except a contract for the sale of land from the statute of frauds' writing requirement—applies in this case.

Because OTU has failed to allege that it made substantial, physical improvements to the Facility or the land on which it sits, OTU has failed to state a claim for promissory estoppel regarding the sale of the Facility by MFGR to OTU. The Court thus **grants** MFGR Defendants' motion to dismiss as to Count IV.

D. Count V: (Promissory Estoppel-Advisory Fees)

The elements of promissory estoppel are recited in Part I.C. of this Order, *supra.* In their Complaint, Plaintiffs allege that MFGR promised to pay OTU fees and costs in return for advisory services pursuant to the Advisory Agreement, that MFGR should have reasonably expected that promise to induce action on the part of OTU, Relentless, and Eakin, and that MFGR's promise in fact did induce action on the part of Plaintiffs. (Compl. ¶ 120-121.) MFGR argues that this count should be dismissed for failure to state a claim because MFGR could not have reasonably expected that OTU would perform outside the terms of the Advisory Agreement (*i.e.* by failing to perform by the contract deadline) and still expect compensation. MFGR further argues that no injustice

would result if the purported promise to pay fees was not enforced because Plaintiffs have not performed under the Advisory Agreement, as there has not yet been a closing on the sale of the Facility.

Plaintiffs counter that MFGR should have reasonably expected its promise to induce action on their part because MFGR breached its promise of good faith and fair dealing pursuant to the Advisory Agreement. In other words, Plaintiffs argue that they were induced to continue performance under the Advisory Agreement in bad faith, and that as such expectation of payment was reasonable given the long course of dealing that is alleged in some detail in the Complaint. (*See* Compl. ¶¶ 22-29, 32-34, 51-58, 63-64, 70.)

Viewing these facts in the light most favorable to the Plaintiffs, the inference can be drawn that it was not unreasonable for Plaintiffs to continue to perform under the Advisory Agreement in hopes of future payment based on MFGR's conduct during and after the period for performance recited in the written contract. OTU has alleged that they were induced to continue performing under the Advisory Agreement by MFGR's promise to pay. That is enough to survive MFGR's motion to dismiss. The Court therefore **denies** the MFGR Defendants' motion to dismiss Count V.

E. Count VI: (Unjust Enrichment)

OTU pleads unjust enrichment as an alternative avenue to recovery if the Court finds the Advisory Agreement unenforceable. *See June Roberts Agency, Inc. v. Venture Properties, Inc.,* 676 A.2d 46, 49 n. 1 (Me. 1996) (stating that the existence of a contractual agreement "precludes recovery on a theory of unjust enrichment"). "Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice the law compels performance of a legal and moral duty to pay. . . ." *Paffhausen*

v. Balano, 1998 ME 47, ¶ 6, 708 A.2d 269. The elements that a plaintiff must prove to recover for unjust enrichment are (1) that the plaintiff conferred a benefit on the other party (2) the defendant had appreciation of the benefit and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 14, 760 A.2d 1041.

MFGR moves to dismiss Count VI on the grounds that there has been no benefit conferred on them because Plaintiffs' work related to the sale and development of the Facility amounted to "an elaborate marketing proposal . . . that was ultimately rejected." *Id.* ¶ 15. Plaintiffs allege that their labor has enhanced the value of the Facility by millions of dollars above the auction price MFGR would have received absent the Plaintiffs' efforts, thereby conferring a significant benefit on MFGR.

MFGR claims that *Forrest Assocs.* compels dismissal of Count VI. Although this case resembles *Forrest Assocs*. in some respects, the plaintiffs in that case had an opportunity to fully develop the record at a bench trial. Plaintiffs here have alleged facts which, if true, would distinguish Plaintiffs' claim from that brought by the plaintiffs in *Forrest Assocs*. Specifically, the *Forrest Assocs.* Court held that the plaintiffs could not recover under an unjust enrichment theory because "[a]lthough [the plaintiff] created a comprehensive plan and presented it to the [defendants], there [was] no evidence that the [defendants] benefitted from either the presentation or the information contained in the plan" and the evidence demonstrated that the plan was ultimately rejected. *Id.* Under those facts, the evidence failed to establish that the plaintiff had conferred a benefit on the defendant.

In contrast, Plaintiffs here have alleged with some particularity how MFGR benefitted from Plaintiff's plans and proposals. Specifically, Plaintiffs allege that they "laid the foundation for

financing from the City and others, recruited and negotiated terms with future tenants that increased the Facility's value and creditworthiness, and played an instrumental role in the winning ConEd [bid]." (Compl. ¶ 124.) Plaintiffs further allege that MFGR knew of and appreciated the value of that benefit, and that the circumstances render the retention of that benefit unjust without compensation paid to Plaintiffs. (Compl. ¶¶ 125-126.)

Plaintiffs have thus stated a claim for unjust enrichment. The Court therefore **denies** MFGR's motion to dismiss as to Count VI.

II. COUNT VII: RESTRAINT OF TRADE/ MONOPOLY

In Count VII, Plaintiffs allege that MFGR's plan to sell the Facility to CVG is a contract in restraint of trade or commerce in Maine and that a consummated transaction would be a combination in restraint of trade or commerce in Maine, both in violation of 10 M.R.S.A. § 1101.[8] Plaintiffs allege Defendants are all liable as co-conspirators for attempting to facilitate CVG's purchase of the Facility. *Id.*

Defendants move to dismiss on the grounds that (1) Plaintiffs have not alleged an antitrust injury and (2) Plaintiffs have not alleged that Defendants entered into a contract, combination, or conspiracy which restrained trade or commerce in Maine. The Court considers each argument in turn.

A. Plaintiffs Have Not Alleged An Antitrust Injury

"Maine's antitrust act provides that a plaintiff must prove injury or damage before the plaintiff can recover." *McKinnon v. Honeywell Int'l, Inc*., 2009 ME 69, ¶ 19, 977 A.2d 420. Maine courts may consider federal antitrust law as persuasive authority when construing Maine's antitrust statute. *Id.* In the federal context, the U.S. District Court for the District of Maine has clarified that

[8] Plaintiffs are not entitled to the injunctive relief they seek under this count. That remedy is available only to the Attorney General. *State v. MaineHealth*, 2011 ME 115, ¶ 8, 31 A.3d 911.

a plaintiff "must prove an *antitrust injury*, which is to say an injury of the type the antitrust laws were intended to prevent . . . ." *In re Compact Disc Min. Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131, 148 (D. Me. 2006) (quoting *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 10 (1st Cir. 1999)) (emphasis added). *See also Int'l Ass'n of Machn's & Aerospace Workers, AFL-CIO, Local. L. No. 1821 v. Verso Paper Co.*, 80 F. Supp. 3d 247, 272 (D. Me. 2015) (citing *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977)). This Court has previously imposed the same requirement on plaintiffs bringing an antitrust action. *See Central Distribs., Inc. v. Labatt USA Opn'g Co.*, No. BCD-CV-12-33, at 10 (Bus. & Consumer Ct. Oct. 15, 2012, *Horton*, *J.*). The "presumptive proper" plaintiff to allege an antitrust injury "is a customer who obtains services in the threatened market or a competitor who seeks to serve that market." *In re Compact Disc*, 456 F. Supp. 2d at 146 (citing *SAS of P.R. v. P.R. Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995)).

Plaintiffs' antitrust claim stems from the allegation that CVG's acquisition of the Facility would allow it to charge elevated prices for its forest products and prevent the rest of Maine's forest products industry from selling forestry products to another operator of the Facility. (Compl. ¶ 129.) Plaintiffs do not allege that they are consumers of forest products or competitors in the forest products industry who would be harmed from this anticipated anticompetitive behavior. Plaintiffs' alleged damages resulting from CVG's proposed purchase of the Facility are rather "deprivation of the value of purchasing the Facility, exclusion from the team implementing the [ConEd team] bid, and expenditure of time, money, and resources in pursuing the transaction . . . ." (Compl. ¶ 139.) Significantly, these are identical to the damages attributed to the breach of contract count. (Compl. ¶ 101.) The U.S. District Court for the District of Maine—as well as this Court—have held that breach of contract damages are insufficient to establish an antitrust injury. *In re Compact Disc*, 456 F. Supp. 2d at 147-48 ("[Plaintiff's] injuries flow from an alleged breach

of contract, unlawful transfer of proprietary information, and breach of fiduciary duty. These are not the type[s] of injury that the antitrust laws were meant to protect [against]."); *Central Distribs.*, BCD-CV-12-33, at 10 ("The gist of this claim is really a restatement of a breach of contract action . . . the complaint fails to state a claim for antitrust statute violations.").

This Court thus rules that Plaintiffs lack standing to bring the antitrust claim alleged in Count VII. Regardless of whether CVG's purchase of the Facility could amount to a violation of Maine's antitrust statute, as alleged, Plaintiffs have failed to allege how they have been injured by this purported anticompetitive activity.

B. Plaintiffs Have Not Alleged Necessary Action On The Part Of The Alleged Co-Conspirators

To establish a prima facie case pursuant to 10 M.R.S.A. § 1101, a plaintiff must show: "(1) that the defendants entered into a contract, combination, or conspiracy; (2) which restrained trade or commerce in Maine; and (3) that they were injured thereby for each allegation." *Pease v. Jasper Wyman & Son*, No. KNOSC-CV-00-015, at 18 (Me. Super. Ct., Knox Cty., July 31, 2002). The third element is discussed above, in Part II.B. of this Order, *supra*. Defendants in this case further argue that Plaintiffs have failed to allege facts satisfying the first two elements, and have thus failed to state a claim for antitrust violation on that ground.

The "contract, combination, or conspiracy" alleged by Plaintiffs is the acquisition of the Facility by CVG. (Compl. ¶ 131.) All parties agree that that has not happened, although CVG has apparently resurfaced as the proposed purchaser of the Facility. (Compl. ¶ 95.) Plaintiffs nonetheless argue that MFGR's contract to sell the Facility to CVG is itself a contract in restraint of trade or commerce in Maine. (Compl. ¶ 132.) However, beyond this conclusory allegation, Plaintiffs plead no further facts to show how the purported contract for the sale of the Facility to CVG, standing alone, restrains trade in Maine. Instead, the Plaintiffs suggest that, once

consummated, the transaction would "substantially lessen competition or tend to create a monopoly of lines of commerce in Maine . . ." (*Id.*)

The Court rules that Plaintiffs have failed to adequately allege the existence of a "contract, combination, or conspiracy . . . which restrained trade or commerce in Maine." *Pease*, No. KNOSC-CV-00-015, at 18. On its face, the Complaint alleges that a "consummated transaction . . . would" result in a violation 10 M.R.S.A. § 1101—conceding that the Defendants have not yet entered into a contract that has restrained trade in Maine. Factual allegations that some future contract, once consummated, would eventuate an anticompetitive result does not state a claim for a violation of Maine's antitrust statute.[9]

By reason of the foregoing, the Court hereby **grants** the Defendants' motions to dismiss Count VII.[10] Plaintiffs have failed to state a claim for violation of Maine's antitrust laws, 10 M.R.S.A. §§ 1101-1108.

III. OTH DEFENDANTS' MOTION TO DISMISS: COUNTS VIII AND IX

Although Count VIII and Count IX recite two separate causes of action—breach of contract and breach of fiduciary duty, respectively—there is factual and legal overlap between the two claims. Count VIII alleges that the OTH Defendants breached OTU's operating agreement *"as well as* their duty of loyalty, their duty not to exploit a business opportunity without first disclosing it to OTU, and their duty of confidentiality" by "facilitat[ing] CVG's opportunity to purchase the

[9] Notwithstanding the issues of standing and ripeness on which the Court decides to dismiss Count VII, Plaintiffs have not alleged how this transaction would result in an antitrust violation in any event. In essence, Plaintiffs allege that CVG's acquisition of the Facility would give CVG an advantage over its competitors by substantially lessening competition. That alone is insufficient to allege an antitrust violation. *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 875 F. Supp. 8, 13 (D. Me. 1994) ("[G]aining an advantage over your competitors is not, in itself, a violation of antitrust laws.").

[10] Because the Court rules that Plaintiffs have failed to state a claim against any defendant for violating Maine's antitrust statute, the issue of whether Firestone or Deschenes could be individually liable for the alleged violation is moot. The OTH Defendants also argued grounds for dismissal that were unique to them. This argument is also moot, for the same reason.

Facility from MFGR." (Compl. ¶ 143 (emphasis added).) Count IX alleges that the OTH Defendants "breached their fiduciary duty *and* duty of loyalty to OTU through self-dealing, usurpation of corporate opportunity, misrepresentation and omission of material facts, inducement, disclosure and misuse of confidential information, misuse of superior knowledge, failure to disclose, and rendering inappropriate advice." (Compl. ¶ 147 (emphasis added).) As in Count VIII, Plaintiffs allege this breach was committed through the OTH Defendants "facilitation" of CVG's opportunity to purchase the Facility from MFGR. (*Id*.)

It is unclear whether Plaintiffs are pleading a breach of OTU's operating agreement apart from OTH's alleged breach of its fiduciary duties in Count VIII. It is also unclear whether Plaintiffs allege that the OTH Defendants' breached only their duty of loyalty to OTU in Count IX or whether Plaintiffs are alleging a breach of fiduciary duty beyond the expressly stated breach of the fiduciary duty of loyalty. *See Sargent v. Buckley*, 1997 ME 159, ¶ 1, 697 A.2d 1272 (defining duty of loyalty as a fiduciary duty). As grounds for the alleged breach of duty of loyalty, Count IX alleges "misrepresentation and omission of material facts," which sounds in fraud. *See Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979). Allegations of fraud are subject to a heightened pleading standard: "In all averments of fraud . . . the circumstances constituting the fraud . . . shall be stated with particularity . . . ." M.R. Civ. P. 9(b). The facts which could give rise to a fiduciary relationship must likewise be pled with particularity. *Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 6, 54 A.3d 710.

Plaintiffs have alleged that Deschenes sought to terminate OTH's membership in OTU in August 2016, falsely promised not to act in competition with OTU, and used that false promise to procure Eakin's waiver of OTU's nondisclosure/ noncompete provisions. (Compl. ¶ 59.) This is the only affirmative fraud pled with any particularity in the Complaint. Plaintiffs allege that

fiduciary duties were expressly provided for in OTU's operating agreement,[11] and cited to Maine statutory law that suggests Deschenes as manager (and, apparently, OTH as a "member active in management," *see* Pl's Opp. Mot. D. at 5) may have owed fiduciary duties to OTU as a matter of law. *See* 31 M.R.S.A. §§ 1521(3)(A), 1559(3). Plaintiffs allege that Deschenes sought a report on the Facility's tissue building warehouse roof on CVG's behalf. (Compl. ¶¶ 66-67.) Plaintiffs further allege that Deschenes "facilitated" CVG's letter of intent to purchase the Facility from MFGR after Deschenes and OTH had left OTU. (Compl. ¶ 61.) Beyond this, the Complaint contains only general insinuations that the OTH Defendants were working against OTU's interest, and in CVG's interest, while OTH was still a member of OTU. (Compl. ¶¶ 60.)

The Court rules that Plaintiffs have not met the elevated pleading requirements for fraud or the existence of a fiduciary relationship in their Complaint against the OTH Defendants. Particularly, Plaintiffs have alleged nothing to suggest that the OTH Defendants owed Plaintiffs any duty when Deschenes allegedly facilitated the letter of intent between CVG and MFGR. Together with the lack of clarity regarding whether Count VIII alleges a breach of contract beyond the breach of fiduciary duty alleged in Count IX, the Court finds that the OTH Defendants cannot reasonably be required to frame a responsive pleading to these Counts in their current form.

Because the Court finds that the allegations supporting Counts VIII and IX lack sufficient particularity under the heightened pleading standard required by M.R. Civ. P. 9(b) and *Ramsey*, Plaintiffs ask the Court to treat the OTH Defendants' motion to dismiss as a motion for a more definite statement. M.R. Civ. P. 12(e). A motion for a more definite statement is used to remedy pleadings that are "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading" and must "point out the defects complained of and the details desired." *Id.*

[11] OTU's operating agreement was not attached to the Complaint and is not currently before the Court.

When such a motion is granted, the pleading party must file a more definite statement within 10 days to remedy the defects highlighted in the motion. *Id.*

Although the Court rules that the causes of action pled in Counts VIII and IX are too vague or ambiguous to allow the OTH Defendants a reasonable opportunity to respond, the Court agrees with Plaintiffs that allowing them an opportunity to plead these counts with the requisite level of particularity and sufficient factual support is appropriate here. Plaintiffs are thus **ordered** to file a more definite statement pursuant to M.R. Civ. P. 12(e). Plaintiffs' more definite statement should plead with sufficient particularity the factual basis for the alleged fiduciary relationship, and to the extent that Plaintiffs allege a breach of a fiduciary duty through fraud, the fraudulent acts of which they accuse the OTH Defendants. Plaintiffs should also clarify whether they are alleging a breach of contract beyond the OTH Defendant's alleged breach of the fiduciary duty of loyalty in Count VIII.

CONCLUSION

Based on the foregoing the entry will be:

1. The MFGR Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART as follows:
    a. The MFGR Defendants' motion to dismiss is GRANTED as to Count IV and Count VII.
    b. The MFGR Defendants' motion to dismiss is DENIED as to Count I, Count II, and Count III, Count V, and Count VI.
2. The OTH Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART as follows:
    a. The OTH Defendants' motion to dismiss is GRANTED as to Count VII.

b. The OTH Defendants' motion to dismiss is DENIED as to Count VIII and Count IX. As to those Counts, Plaintiffs are hereby ORDERED to file within 10 days of the entry of this Order a more definite statement pursuant M.R. Civ. P. 12(e) as described in Part III, *supra*, of this Order.

January 31, 2018
DATE

/s
SUPERIOR COURT JUSTICE
BUSINESS AND CONSUMER COURT