STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

FILED: NOVEMBER 5, 2012

RHODE ISLAND RESOURCE RECOVERY CORPORATION	:	
	:	**C.A. No. PB-10-4503**
V.	:	
VAN LIEW TRUST COMPANY, VAN LIEW CAPITAL, INC., and ALFRED B. VAN LIEW	:	

DECISION

SILVERSTEIN, J. Before this Court is Plaintiff Rhode Island Resource Recovery Corporation's ("RIRRC") Motion for Partial Summary Judgment, pursuant to Super. R. Civ. P. 56. RIRRC seeks judgment against Defendant Van Liew Trust Company ("VLTC") on the following counts of RIRRC's Complaint: (1) Count I.A, alleging breach of contract; (2) Count II, paragraphs 80-82, 84, alleging breach of fiduciary duty; (3) and Count III, alleging aiding and abetting breach of fiduciary duty.[1]

I

Facts and Travel

The facts of this case were described in considerable detail in Rhode Island Resource Recovery Corporation v. Van Liew Trust Company, Van Liew Capital Inc., and Alfred Van Liew, C.A. No. PC-10-4503, slip. op. at 1-7 (R.I. Super. Ct. filed May 13, 2011) (ruling on

[1] Although claims against Van Liew Capital and Alfred Van Liew remain, RIRRC moves only for partial summary judgment against VLTC.

Motion to Dismiss). This Decision sets forth only those facts necessary for context, together with pertinent new facts that have come to light since the Motion to Dismiss decision.

RIRRC, formerly known as Rhode Island Solid Waste Management Corporation ("RISWMC"), is a quasi-public corporation established by legislative enactment in 1974. (Compl. ¶ 1.) RIRRC manages solid waste in Rhode Island with a goal of setting high industry standards for recycling and waste disposal. See G.L. 1956 § 23-19-1.1 to -9. VLTC is a private trust company and a subsidiary of Van Liew Capital, Inc. (VLC). (VLTC's Answer ¶¶ 2-3.) VLTC has "extensive experience in managing fixed income assets." (VLTC's Response to RFP Nos. 924, 946.)

Between 1996 and 2004, RIRRC entered into four contracts with VLTC (the Contracts). See VLTC's Answer ¶¶ 19, 31, 32, 48, 62. The Contracts were awarded to Van Liew through a public procurement process, whereby VLTC responded to RIRRC's Requests for Qualifications/Requests for Proposals ("RFQ/RFP"). See id. ¶ 11. The RFQ/RFPs required VLTC to certify that "[n]o officer, agent, or employee of [RIRRC] has a pecuniary interest in the Proposal or has participated in contract negotiations on part of the Respondent." Id. ¶ 72. In response to RFQ/RFP Nos. 924, and 946, and 840, VLTC made this certification three separate times. Id. The terms of each Proposal were incorporated into the Contracts. Id. ¶¶ 33, 62, 73. Under the Contracts, VLTC managed RIRRC's pension plan and provided management and trustee services for two RIRRC trust funds. See id. ¶¶ 19, 31, 32, 48, 62. VLTC remained RIRRC's pension fund manager until December 2007 and remained investment advisor and trustee to the two RIRRC trusts until January 2008. Rhode Island Resource Recovery Corporation, C.A. No. PC-10-4503, slip. op. at 4, 6, 7.

During the time that each contract was bid for and entered into, John St. Sauveur (St. Sauveur) served as (i) a Commissioner on RIRRC's Board of Commissioners ("RIRRC Board") and (ii) a member of VLTC's Board of Directors ("VLTC Board"). (VLTC's Answer ¶ 22.) Additionally, St. Sauveur held stock in Van Liew Capital ("VLC"), the parent company of VLTC. (Pl.'s Ex. F, Apr. 27, 1995 Letter from Alfred Van Liew; Pl.'s Ex. G., May 18, 1995 St. Sauveur Check; Pl.'s Ex. H, Dec. 6, 1996 Letter from Alfred Van Liew; Pl.'s Ex. I, Dec. 19, 1997 St. Sauveur Check.) The Chairman of RIRRC had appointed St. Sauveur as Chairman of the RIRRC Personnel Subcommittee on October 24, 1995. (Pl.'s Reply, O'Connell Aff. Ex. 1, Letter from Dominic Ragosta.)

RIRRC filed the Complaint in this case on July 30, 2010. On May 13, 2011, this Court dismissed Counts I and V (Breach of Contract and Indemnity) as to Alfred Van Liew individually. Rhode Island Resource Recovery Corporation, C.A. No. PC-10-4503, slip. op. at 19. However, the Court denied VLC's Motion to Dismiss the same counts and denied a Motion to Dismiss Counts I (Breach of Contract), II (Breach of Fiduciary Duty), and III (Aiding and Abetting Breach of Fiduciary Duty) by both Van Liew and VLC. RIRRC filed this Motion for Partial Summary Judgment on July 20, 2012, and the Court heard oral argument on September 20, 2012. RIRRC seeks summary judgment on (1) Count I.A, alleging breach of contract; (2) Count II, paragraphs 80-82, 84, alleging breach of fiduciary duty; (3) and Count III, alleging aiding and abetting breach of fiduciary duty.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or mere legal opinions and conclusions. Hill, 11 A.3d at 113.

When it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "Summary judgment is an extreme remedy that should be applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)). "Nevertheless, Rule 56 of the Superior Court Rules of Civil Procedure constitutes a procedural device that, in the proper circumstances, plays an appropriate role in separating the wheat from the chaff in the litigation process." Young v. Warwick Rollermagic Skating Center, Inc., 973 A.2d 553, 557 (R.I. 2009).

III

Discussion

A

Breach of Contract

"It is well settled that a breach of contract claim requires the existence of a valid contract, a breach of the contract, and damages resulting from the breach." Petrarca v. Fidelity & Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005)). VLTC does not contest the existence of a valid contract. See VLTC's Answer ¶¶ 33, 62, 73. The parties, however, disagree on whether the Contracts were breached. This issue boils down to the interpretation of the RFQ/RFP certification requirement: "No officer, agent, or employee of [RIRRC] has a pecuniary interest in the Proposal or has participated in contract negotiations on part of the Respondent." (VLTC Answer ¶ 72.) If this certification required VLTC to disclose St. Sauveur's dual positions as a VLTC Board Member and as an RIRRC Commissioner or Chairman of the RIRRC Personnel Subcommittee, then VLTC's nondisclosure constitutes a breach of contract. If the certification did not require disclosure, however, then VLTC did not breach the Contracts.

"Whether a contract is clear and unambiguous is a question of law." Haviland v. Simmons, 45 A.2d 1246, 1258 (R.I. 2012). "When a contract is clear and unambiguous, then 'the meaning of its terms constitute a question of law for the court * * *.'" Young, 973 A.2d at 558 (quoting Cassidy v. Springfield Life Insurance Co., 106 R.I. 615, 619, 262 A.2d 378, 380 (1970)). "Whether a party has breached a contract is a question of fact." Turacova v. DeThomas, 45 A.3d 509, 517 (R.I. 2012). "If the issue of material breach, however, 'admits of only one reasonable answer, then the court should intervene and resolve the matter as a question

of law.'" Parker v. Byrne, 996 A.2d 627, 632 (R.I. 2010) (citing Credit Union Central Falls v. Groff, 966 A.2d 1262, 1267 (R.I. 2009)).

1

Was St. Sauveur an Officer of RIRRC?[2]

In its memoranda and at oral argument, RIRRC frequently failed to specify which of the three terms—officer, agent, or employee—that St. Sauveur's RIRRC Commissioner position matched. For example, RIRRC's Reply Memorandum states that "the RIRRC's commissioners' powers and authority are such that they concurrently function as officers, agents or employees of the corporation." (Pl.'s Reply Mem. 2.) At oral argument, RIRRC seemed to connect this argument most closely to an "officer"; likening the RIRRC position to an officer of a corporation, such as a CEO. This argument fails to describe specifically how VLTC would have known that St. Sauveur was an "officer" under the Contracts. Nothing in the Rhode Island Resource Recovery Corporation Act (the statute) makes all commissioners officers, and seems to imply that only the chair, vice chair, and treasurer are officers. See G.L. 1956 § 23-19-6(g).

Alternatively, the statute provides that "[t]he commissioners shall annually elect from among their number a chair, vice chair and a treasurer, and any other officers that they may determine." G.L. § 23-19-6(g). On October 24, 1995, St. Sauveur was appointed Chairman of the RIRRC Personnel Subcommittee. RIRRC argues that this position constitutes an "other

[2] Only the terms "officer" and "agent" are discussed because RIRRC did not specifically argue that St. Sauveur met the "employee" term. Regardless, St. Sauveur was not an employee of RIRRC because he was involved in the management of RIRRC as a commissioner. See Blue Cross/Blue Shield of Rhode Island v. State Dept. of Business Regulation, C.A. No. 04-5769, 2005 WL 1530449, at *7 (June 23, 2005) (Silverstein, J.) (citing Chavero v. Local 241. Division of Amalgamated Transit Union, 787 F.2d 1154, 1157 (7th Cir.1986) ("Directors are traditionally employer rather than employee positions unless they perform traditional employee duties.")); infra Part III.C.1 (comparing RIRRC Board of Commissioners to corporate Board of Directors).

officer" under § 23-19-6(g). This argument is unavailing to RIRRC because St. Sauveur was "appointed" by the Chairman of RIRRC, not "elected." (Pl.'s Reply Mem. Ex. 1.)

2

Was St. Sauveur an Agent of RIRRC?

RIRRC argues that St. Sauveur was an agent of RIRRC in his position as a Commissioner because Commissioners have the authority to bind the Corporation. G.L. § 23-19-6(c) provides that the "powers of the corporation shall be vested in eight (8) commissioners . . . ." G.L. § 23-19-6(g) provides that "any action taken by the corporation under the provision of this chapter may be authorized by resolution approved by majority of the commissioners present and voting at any regular or special meeting." Finally, new contracts over $20,000 require a majority vote of the RIRRC Board. (Pl.'s Reply, O'Connell Aff. ¶ 4.)

RIRRC's agency argument stretches the authority granted under the statute, imputing powers vested in the duly organized body to a single member. "'Agency' has been defined as 'the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" Lawrence v. Anheuser-Busch, Inc., 523 A.2d 864, 867 (R.I. 1987) (quoting Restatement (Second) Agency § 1(1) (1958)). While the authority to act on the corporation's behalf is nominally in the "commissioners," rather than the "commission," any agency authority is vested in eight commissioners acting together. See G.L. § 23-19-6(c). For example, four commissioners constitute a quorum. G.L. § 23-19-6(g). Further, "any action taken by the corporation under the provisions of [§ 23-19] may be authorized by resolution approved by a majority of the commissioners present and voting at any regular or special meeting." Id. At no point does the statute grant any specific authority to any one commissioner. See id. Aside from

the chair position—which St. Sauveur did not hold—it even takes two commissioners simply to call a meeting. Id. Therefore, St. Sauveur, in his role as a commissioner, was not an agent of RIRRC.

Alternatively, RIRRC argues that St. Sauveur's position as Chairman of the RIRRC Personnel Subcommittee makes him an agent of RIRRC. The only document in the record that discusses the committee chairmanship is the letter in which RIRRC Chairman Dominic Ragosta offered the position to St. Sauveur.[3] (Pl.'s Reply Mem. Ex. 1, Oct. 24, 1995 Letter of Dominic Ragosta.) In that letter, Ragosta states that the committee—consisting of three members plus the RIRRC Chairman serving ex officio—is "to make decisions," "to authorize any hiring of temporary help," and to "set personnel policies." Id. However, nothing in the letter indicates that St. Sauveur could act unilaterally in his chair position; the described duties are vested in the committee as a body rather than in the chairman of the committee himself. See id. Therefore, St. Sauveur, in his role as the Chairman of the Personnel Subcommittee, was not an agent of RIRRC.

3

The Role of the Certification's Purpose

In its reply memorandum and at oral argument, RIRRC stressed the purported purpose of the certification requirement. RIRRC argues that "the certification requirement was part of RIRRC's public procurement process and was aimed at preventing an official acting on behalf of a public entity from benefiting from the award of a contract to an entity in which that official has

[3] RIRRC provided no documentary evidence of St. Sauveur's acceptance of the position. However, VLTC did not contest the claim that St. Sauveur served as Chairman of the Personnel Subcommittee; therefore it seems undisputed that St. Sauveur actually served in this position.

a personal stake."[4] (Pl.'s Reply Mem. 2.) Further, RIRRC claims that finding this certification did not require disclosure "would render this critical provision intended to ensure public integrity largely ineffective." Id. These arguments are not lost upon the Court. Additionally, the Court notes that RIRRC commissioners are "subject at all times to the provisions of chapter 12 of title 36": the Code of Ethics. Title 36 governs "Public Officers and Employees."

Nevertheless, this is a breach of contract claim. While statutory interpretation may require the court to "attempt to harmonize each statute with the other so as to be consistent with their general objective scope," Kaya v. Partington, 681 A.2d 256, 261 (R.I. 1996), there is no requirement that the Court harmonize contracts involving quasi-public corporations with their public procurement purpose, enabling statutes, and ethical codes at the expense of the plain language of the Contracts. Here, the language of the contract must govern. See Young, 973 A.2d at 558. The Contracts required only "officers, agents, and employees" to be disclosed. (VLTC's Answer ¶ 72.) The statute listed a number of "officers"; the term "commissioner" was not on the list. See G.L. § 23-19-6(g). The statute vested no agency power in the commissioners individually. See G.L. § 23-19-6(c). The term "employee" was not even raised by RIRRC. In drafting the RFQ/RFP certification, RIRRC did not include "commissioners." This Court will not delve into the possible reasons for not including "commissioners" in the list of required positions to be disclosed or whether the omission was intentional. See Westinghouse Broadcasting Co. v. Dial Media, Inc., 122 R.I. 571, 581 n. 10, 410 A.2d 986, 991 n.10 (1980) (noting that when interpreting a contract, the court does not seek "some undisclosed intent that may have existed in the minds of the contracting parties but . . . instead seeks the intent that is expressed in the language of the contract."). Thus, the express, clear, and unambiguous language

[4] While this argument is logical, the Court points out that RIRRC provided no authoritative support for this statement.

of the Contracts leaves the court with no other choice but to conclude that the Contracts did not require a "commissioner" to be disclosed.[5] Furthermore, if there had been ambiguity in the Contract, the Court would construe the ambiguity against the drafter, RIRRC. See Haviland, 45 A.2d at 1259-60 (noting ambiguities must be construed against the drafter of the document).

B

Breach of Fiduciary Duty

"To prevail on a claim for breach of fiduciary duty, a party must establish '(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.'" Griffin v. Fowler, 260 Ga. App. 443, 445, 579 S.E.2d 848, 850 (Ga. Ct. App. 2003); Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1076 (N.D. Iowa 2003); 37 Am. Jur. 2d Fraud & Deceit § 31 (2010) (stating that the elements of a breach of fiduciary duty claim are "(1) the existence of a fiduciary relationship; (2) a breach of the duty owed by the fiduciary to the beneficiary; and (3) harm to the beneficiary"). RIRRC claims that VLTC breached their fiduciary duty by not disclosing St. Sauvuer's VLTC position, while VLTC contends that its fiduciary duty did not require disclosure.

1

Existence of a Fiduciary Duty

As this Court noted in its decision on the Motion to Dismiss, "It is well settled that the existence of a fiduciary duty does not depend on the existence of a contract." Rhode Island Resource Recovery Corporation, C.A. No. PC-10-4503, slip. op. at 14-15 (citing Bullmore v. Ernst & Young Cayman Islands, 45 A.D.3d 461, 463, 846 N.Y.S.2d 145, 148 (N.Y. App. Div.

[5] Because the Court finds that the Contracts did not require VLTC to disclose St. Sauveur's positions because he was not an "officer, agent, or employee" of RIRRC, the Court need not address whether St. Sauveur had a "pecuniary interest" in VLTC.

2007) (explaining that "[p]rofessionals such as investment advisors, who owe fiduciary duties to their clients, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties," since in "these instances, it is policy, not the parties' contract, that gives rise to a duty of care")). A fiduciary relationship may be found between two parties "when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." See Restatement 2d Torts § 874 (2010). The term "fiduciary" is broadly defined. See A. Teixeira & Co., Inc. v. Texeira, 699 A.2d 1383, 1387 (R.I. 1997); 37 Am. Jur. 2d Fraud and Deceit § 32 (2001). "Fiduciary duties arise as a matter of law in certain formal relationships, including . . . trustee relationships." 37 Am. Jur. 2d Fraud and Deceit § 32.

Here, VLTC served as a trustee of two RIRRC trusts. Thus, VLTC owed a fiduciary duty to RIRRC as a matter of law because of the trustee relationship. See id. Furthermore, VLTC gave advice on investments regarding the pension plan. See VLTC's Answer ¶¶ 19, 31, 32, 48, 62. Therefore, the Court finds that VLTC was also under a fiduciary duty because of its financial management position. See Restatement 2d Torts § 874.

2

Breach of the Duty

The Rhode Island Supreme Court has described the policy underlying the duty of loyalty as follows:

> "Broadly speaking it is clearly established that a trustee must give undivided loyalty to the trust confided to his care and to its beneficiaries. It is the policy of the law to see that in administering the trust he shall not be tempted in any way by conduct or circumstances to act otherwise than with complete loyalty to the trust and its interests. He must at all times exercise a high standard of honor and avoid all situations and transactions that tend to call his good faith into question and to create in himself rights possibly conflicting with those of the beneficiaries." Dodge v. Stone, 76 R.I. 318, 323-24, 69 A.2d 631, 634-35 (1949).

The Restatement (Third) of Trusts provides the most modern description of a trustee's duty of loyalty:

> "(1) Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose.
>
> (2) Except in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.
>
> (3) Whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter." Restatement (Third) of Trusts § 78 (2007).[6]

At a minimum, the nondisclosure of St. Sauveur's conflicting positions calls VLTC's good faith into question. See Dodge v. Stone, 76 R.I. at 324, 69 A.2d at 634-35. St. Sauveur simultaneous service in high level positions on each side of the Contract transactions makes his dual positions a material fact. It is of particular importance because St. Sauveur was one of only eight commissioners running RIRRC. See G.L. § 23-19-6(c). Thus, VLTC had a duty to communicate this information to RIRRC. See Restatement (Third) of Trusts § 78(3); see also 37 Am. Jur. 2d Fraud and Deceit § 207 ("A duty to disclose may arise when one party has information that the other party has a right to know because of a fiduciary [relationship] . . .

[6] The Rhode Island Supreme Court has not cited to the Second Restatement in a majority opinion since 1989. See Chenot v. Bordeleau, 561 A.2d 891, 894 (R.I. 1989). The Third Restatement has been cited once recently in a Supreme Court dissenting opinion, and it has been cited by Superior Court judges. Barrett v. Barrett, 894 A.2d 891, 900 n.9 (R.I. 2006) (Robinson, J., dissenting); see, e.g., Romano v. Reopell, C.A. No. KC 2004-0705, 2006 WL 3293783, (R.I. Super. Nov. 8, 2006) (Thompson, J.); Prince v. Lynch, C.A. No. P.C. 99-5806, 2006 WL 1073413, at *2 (R.I. Super. Apr. 20, 2006) (Silverstein, J.). Given that the Restatement (Second) of Trusts was published in 1959 and the current version of the Restatement Third of Trusts was published in 2007, this Court considers the Third Restatement's description of the duty of loyalty as the most complete, modern understanding of the duty.

between them."). A further indication of the impairment of VLTC's loyalty is that VLTC used St. Sauveur's knowledge of RIRRC internally. For example, St. Sauveur commented on a draft version of a VLTC letter that VLTC ultimately sent to RIRRC. (Pl.'s Mem. Supp. Summ. J., Youman Aff., Ex. Q.) Additionally, St. Sauveur received copies of other correspondence sent to RIRRC from VLTC. (Pl.'s Mem. Supp. Summ. J., Youman Aff., Ex. O, P.) The fact that VLTC used St. Sauveur—in his position as an VLTC Board Member—in such a way implicates RIRRC's interest in the disclosure of St. Sauvuer's dual positions; thus, a lack of disclosure calls VLTC's good faith into question. See Dodge v. Stone, 76 R.I. at 324, 69 A.2d at 634-35. Therefore, VLTC's nondisclosure of St. Sauveur's conflicting positions constitutes a breach of fiduciary duty.

Because St. Sauveur played conflicting roles for VLTC and RIRRC, and VLTC failed to disclose that conflict to RIRRC, VLTC breached its fiduciary duty to RIRRC.[7]

3

Damage Proximately Caused by the Breach

RIRRC's opening memorandum states, "If RIRRC had been made aware of Mr. St. Sauveur's conflict of interest, VLTC would not have been eligible to control the investments and management of the Plan and the Trust Funds. Thus, any damages suffered by RIRRC associated with the Contracts were proximately caused by the breach." (Pl.'s Mem. Supp. Summ. J. 14.) In its Reply Memorandum, RIRRC states that "demonstrating the full extent of RIRRC's damages as a result of Van Liew's breach will require expert testimony, but that, at a minimum, RIRRC is

[7] Although RIRRC argued that adverse inference drawn from St. Sauveur's Fifth Amendment invocations support this finding, the Court can reach this decision on Count II without considering the adverse inferences. Adverse inferences are considered in the Court's analysis of Count III and described in Part III.C.3.

entitled to disgorgement of fees paid to Van Liew." (Pl. Reply Mem. 5.) Regardless, RIRRC seeks to disgorge fees paid by RIRRC to VLTC. (Pl.'s Mem. Supp. Summ. J. 16-18.)

Disgorgement is a traditional equitable remedy for breach of fiduciary duty. Grant v. Nyman, 2004 R.I. Super. LEXIS 130, at *5-6 (noting traditional remedy for breach of fiduciary duty is "accounting," which requires the one owing the duty "to disgorge" money taken in derogation of that duty). While disgorgement may be appropriate, the Court will consider the amount thereof along with the other damages that RIRRC may be able to show. Therefore, the Court grants summary judgment as to liability for breach of fiduciary duty. RIRRC must still prove an amount of damages proximately caused by the breach, including an entitlement to disgorgement.

C

Aiding and Abetting a Breach of Fiduciary Duty

It is well settled that "[a]iding and abetting a breach of fiduciary duty requires proof that: (1) there was a breach of fiduciary duty; (2) the defendant knew of the breach; and (3) the defendant actively participated or substantially assisted in or encouraged the breach to the degree that he or she could not reasonably be held to have acted in good faith." Professional Servs. Grp., Inc. v. Town of Rockland, 515 F. Supp. 2d 179, 192 (D. Mass. 2007) (citing Arcidi v. Nat'l Ass'n of Gov't Emps., Inc., 447 Mass. 616, 623-24, 856 N.E.2d 167, 174 (2006)). RIRRC argues that St. Sauveur breached his fiduciary duty to RIRRC, and that VLTC aided and abetted his breach.

1

Breach of Fiduciary Duty

The first two elements are clearly met in this case. St. Sauveur owed a fiduciary duty to RIRRC by virtue of his position as an RIRRC Commissioner. RIRRC is "a public corporation of the state," and its powers are vested in its eight commissioners. G.L. § 23-19-6. "Corporate officers and directors of any corporate enterprise, public or close, have long been recognized as corporate fiduciaries owing a duty of loyalty to the corporation . . . ." Texeira, 699 A.2d at 1386. Although not nominally an "officer" or "director," RIRRC does not have a "Board of Directors" and the commissioners act like such a board. Compare G.L. § 7-1.2-801(a) (describing that "the business and affairs of a corporation are managed by a board of directors") with § 23-19-6(i) ("The commissioners of [RIRRC] shall at regular intervals at least eight (8) times a year conduct business meetings for the purpose of carrying out general business . . . ."). Thus, St. Sauveur owes a fiduciary duty to RIRRC merely by the similarity of the function of an RIRRC Commissioner to that of a typical member of a corporate board of directors.

Additionally, the terms "officer" and "director" are not the only terms that describe a fiduciary of a corporation. The Rhode Island Supreme Court has explicitly held that a broader range of corporate actors owe fiduciary duties to a corporation:

> "Officers and directors are naturally the most readily apparent fiduciaries of a corporation because of their unique relation to the corporation itself, its stockholders, and fellow directors or officers and not simply because of their titles. We are of the opinion that the term 'fiduciary' is a broad concept that might correctly be described as 'anyone in whom another rightfully reposes trust and confidence.'" Texeira, 699 A.2d at 1387 (quoting Francis X. Conway, The New York Fiduciary Concept in Incorporated Partnerships and Joint Ventures, 30 Fordham L. Rev. 297, 312 (1961)) (emphasis added).

Clearly, the State, through the RIRRC, reposed confidence in St. Sauveur given that he was one of only eight individuals charged with the management of solid waste in Rhode Island. Therefore, St. Sauveur owed a fiduciary duty to RIRRC.

St. Sauveur clearly breached his duty by failing to disclose his position on the VLTC Board to RIRRC. As the Rhode Island Supreme Court has described:

> **"**The duty of loyalty requires, inter alia, that a director or an officer act in good faith toward the corporation and that transactions or contracts into which he or she enters with the corporation be fair to the corporation. Good faith in this context means full and honest disclosure by the fiduciary of all material facts to allow for a disinterested decision maker to exercise its informed judgment. Fairness to the corporation requires that a transaction or contract benefit the corporation and the stockholders thereof and not confer undue or unjust advantage on the fiduciary." Tomaino v. Concord Oil of Newport, Inc., 709 A.2d 1016, 1021 (R.I. 1998) (applying Massachusetts law).

By not disclosing his conflicting positions, St. Sauveur did not make a full and honest disclosure to RIRRC. St. Sauveur's positions as a compensated VLTC Board Member and a VLC stockholder were material because St. Sauveur had the potential to financially benefit, at least indirectly, from actions taken by RIRRC. See Pl.'s Mem. Supp. Summ. J., Ex. J., Van Liew Dep. 35:10-24, 81:4-9.

St. Sauveur's breach is further evidenced by his violation of the state code of ethics. Under the Rhode Island Resource Recovery Corporation Act, RIRRC commissioners are "subject at all times to the provisions of chapter 14 of title 36." Title 36 governs "Public Officers and Employees" and Chapter 14 is described as the "Code of Ethics." The stated policy of the Code of Ethics is that public officials and employees, inter alia, must "avoid the appearance of impropriety, and not use their position for private gain or advantage." G.L. § 36-14-1. St. Sauveur violated this policy because his holding of a VLTC Board position and a VLC stockholder position while serving as an RIRRC Commissioner, at a minimum, gives the

appearance of impropriety. Furthermore, among the prohibited activities, the Code of Ethics delineates that "[n]o person subject to this code of ethics shall have any interest, financial or otherwise, direct or indirect, or engage in any business . . . or professional activity, . . . which is in substantial conflict with the proper discharge of his or her duties . . ." Id. § 36-14-5 (emphasis added). St. Sauveur's interest in the Contracts as a VLTC Board Member and VLC stockholder conflicted with the proper discharge of his duties as an RIRRC Commissioner.

Any argument that St. Sauveur did not breach his duty because he did not vote on the approval of the VLTC Contracts is unavailing for two reasons. First, the mere appearance of impropriety is sufficient to violate the Code of Ethics. See G.L. § 36-14-1. Second, St. Sauveur did not file a "Statement of Conflict of Interest" with the Rhode Island Ethics Commission. The Code of Ethics requires the following:

> "Any person subject to this code of ethics who, in the discharge of his or her official duties, is or may be required to take an action, make a decision, or refrain therefrom that will or can reasonably be expected to directly result in an economic benefit to . . . [a] business associate . . . shall, before taking any such action or refraining therefrom: (1) Prepare a written statement sworn to under the penalties for perjury describing the matter requiring action and the nature of the potential conflict . . .; and (2) Deliver a copy of the statement to the commission . . ." G.L. § 36-14-6 (emphasis added).

VLTC qualifies as a "business associate" of St. Sauveur because VLTC and St. Sauveur had a common financial objective. G.L. § 36-14-2(3) (defining "business associate" as "a person joined together with another person to achieve a common financial objective"); G.L. § 36-14-2(7) (defining "person" as "an individual or business entity"). The award of the Contracts to VLTC directly economically benefited VLTC. See G.L. § 36-14-6. Therefore, because St. Sauveur did not file such Statement of Conflict of Interest with the Ethics Commission, he

violated the Code of Ethics even if he refrained from voting on the VLTC Contracts as an RIRRC Commissioner.

While the mere fact that St. Sauveur did not disclose his VLTC position to RIRRC is sufficient, RIRRC provided mounting evidence that inferentially showed direct improprieties. First, St. Sauveur was listed as the "referrer" of RIRRC on VLTC's "Prospect Forms."[8] (Pl.'s Ex. L, Prospect Forms.) Second, correspondence indicates that St. Sauveur received copies of documents sent from VLTC to RIRRC. For example, St. Sauveur received a copy of VLTC's letter to RIRRC CFO Joseph Judge regarding its "Statement of Qualifications to Serve as Trustee" for the Central Landfill Mediation Trust Fund.[9] (Pl.'s Ex. O.) St. Sauveur also received a copy of a letter modifying fees in the proposal for RFQ/RFP No. 946. (Pl.'s Ex. P.) Finally, St. Sauveur appears to have commented on a draft letter from Van Liew to Judge regarding the terms of the Central Landfall Remediation Trust Agreement. (Pl.'s Ex. Q.) These actions, taken together, further indicate that St. Sauveur played a role for VLTC in its communication with RIRRC while his position at VLTC was not disclosed to RIRRC. Therefore, St. Sauveur breached his fiduciary duty to RIRRC.

2

Knowledge of Breach of Fiduciary Duty

VLTC knew of St. Sauveur's breach of his fiduciary duty to RIRRC. Alfred Van Liew admitted that he knew that St. Sauveur was a RIRRC Commissioner before RIRRC entered into any of the Contracts with VLTC. (Pl.'s Ex. J, Van Liew Dep. 49:4-16.) As the Chairman of

[8] The forms also listed "Potential $$" of each prospect with most RIRRC listings in the ranging from $10 million to $17.5 million. Id.

[9] Additionally, the copy of this letter contained a handwritten note from Van Liew to St. Sauveur stating, "John FYI – stuff to Joe was on recycled paper ☺." Id.

VLTC and a principal person handling the trusts and accounts with RIRRC, Van Liew's knowledge of St. Sauveur's conflicting positions is sufficient to show that VLTC had knowledge of St. Sauveur's breach. (VLTC Response to RFP No. 924, ¶ 3; VLTC Response to RFP No. 946, ¶ 3).

3

Aiding and Abetting the Breach of Fiduciary Duty

As to the final element of Count III—"the defendant actively participated or substantially assisted in or encouraged the breach to the degree that he or she could not reasonably be held to have acted in good faith"—this Court finds that VLTC aided and abetted St. Sauveur's breach of fiduciary duty. Professional Servs. Grp., Inc., 515 F. Supp. 2d at 192. The Court does so for two separate reasons: (1) VLTC's failure to disclose the conflict to RIRRC substantially assisted St. Sauveur's breach, and (2) based on the cumulative evidence and adverse inferences drawn from St. Sauveur's invocation of the Fifth Amendment, VLTC actively participated in St. Sauveur's breach by actively concealing his dual roles.

a

Inaction as Substantial Assistance

Substantial assistance is sufficient to satisfy the third element of aiding and abetting a breach of fiduciary duty. See Professional Servs. Grp., Inc., 515 F. Supp. 2d at 192. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary

duty directly to the plaintiff."[10] Lerner v. Fleet Bank, 459 F.3d 273, 295 (2d Cir. 2006) (quoting Kaufman v. Cohen, 760 N.Y.S.2d 157, 170 (N.Y. App. Div. 2003)).

Here, VLTC failed to act when it was required to do so by not informing RIRRC of St. Sauveur's conflict. As discussed above, VLTC owed a fiduciary duty directly to RIRRC. Because of this duty, even VLTC's mere inaction of not disclosing the conflict constitutes substantial assistance. See id.

b

Actions Drawn from Adverse Inferences

To find the second basis for meeting the third element, the Court must conduct a two pronged analysis. First, the Court must determine whether it may draw adverse inferences from St. Sauveur's Fifth Amendment invocations. Second, if the Court is so permitted, the Court must draw the inferences and determine whether, when combined with all other evidence, there is sufficient evidence to meet the summary judgment standard.

i

Drawing Adverse Inferences from Fifth Amendment Invocation

RIRRC argues that the Court may draw adverse inferences from the Fifth Amendment invocation because St. Sauveur is a key figure in the litigation. VLTC contends that the adverse

[10] The Second Circuit was describing New York law, which formulates the elements slightly differently: "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." Id. (citations omitted). Despite the different formulation, the description of substantial assistance is still relevant because the elements are essentially the same. New York has combined the second and third elements of our formulation into their second element. See id. at 294 (noting that "a person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator") (citations omitted).

inferences are impermissible because "St. Sauveur's role in this litigation is simply as a witness." (Def. Mem. Opp. Summ. J.)

The Fifth Amendment does not forbid drawing adverse inferences against a witness's refusal to testify in civil actions. See U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .") (emphasis added); 81 Am. Jur. 2d Witnesses § 119. While some courts require independent evidence to draw an adverse inference against a party, drawing an adverse inference against non-party testimony "implicates Fifth Amendment concerns to an even lesser degree." RADD Services, Inc. v. Aetna Cas. and Sur. Co., 808 F.2d 271, 275 (3d Cir. 1986); see 81 Am. Jur. 2d Witnesses § 119 (citing Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258 (9th Cir. 2000) ("An adverse inference can be drawn from invocation of the Fifth Amendment privilege against self-incrimination in civil proceedings only when independent evidence exists of the fact to which the party refuses to answer.")); see also LiButti v. United States, 107 F.3d 110, 120 (2d Cir. 1997) (noting "the undeveloped posture of the law pertaining to adverse inferences when non-party witnesses invoke Fifth Amendment rights in civil litigation"). In its exhaustive discussion of the issue, the Second Circuit repeatedly noted that courts deal with a Fifth Amendment invocation by a non-party witness on a case-by-case basis by looking at the circumstances of a given case; they do not apply a bright-line rule. LiButti, 107 F.3d at 121-124. "[T]he overarching concern is fundamentally whether the adverse inference is trustworthy under all the circumstances and will advance the search for the truth." Id. at 124.

Courts have coalesced around four nonexclusive factors—first compiled in LiButti—to aid the determination of whether an adverse inference may be drawn against a party by reason of a non-party witness's invocation of his right against self-incrimination:

> "(1) the nature of the relevant relationship, i.e., whether the relationship is such that the witness would be inclined to invoke the privilege on behalf of the party;
>
> (2) the degree of control of the party over the witness asserting the privilege, i.e., whether the party's control over the witness regarding the facts and subject matter of the litigation warrant treating the witness's invocation as a vicarious admission;
>
> (3) whether the party and the witness have compatible interests in the witness's assertion of the privilege; and
>
> (4) the witness's role in the litigation." 81 Am. Jur. 2d Witnesses § 119.

In approving of these factors, the Massachusetts Supreme Judicial Court stated:

> "We think the analysis of the LiButti court strikes an appropriate balance between the right and the need to present relevant evidence, on the one hand, and the need to provide a safeguard against the inherent difficulty in responding to such powerful evidence, on the other hand. Ultimately, the test is whether any adverse inference sought is reasonable, reliable, relevant to the dispute, and fairly advanced against a party." Lentz v. Metropolitan Property and Cas. Ins. Co., 768 N.E2d 538, 543 (Mass. 2002).

The nature of the relationship is "the most significant circumstance," and VLTC and St. Sauveur had a very close relationship. LiButti, 107 F.3d at 123. At the beginning of this litigation, St. Sauveur had been a compensated VLTC Board Member for over fifteen years. (Pl's Ex. F, Letter from Alfred Van Liew.) As part of his role, St. Sauveur sought to bring in more business for VLTC. (Pl.'s Ex. K, Oates Dep 36:21-37:5.) In that role, St. Sauveur seems to have brought RIRRC and VLTC together. (Pl.'s Ex. L, Prospect Forms.) And he further provided guidance to VLTC regarding RIRRC. (Pl.'s Ex. O, P, Q.) Additionally, St. Sauveur held stock in the VLTC parent, VLC. After he was elected to the VLTC Board, he was given a "token equity position in VLC." (Pl.'s Ex. F, Apr. 27, 1995 Letter from Alfred Van Liew.) A little over a year later, St. Sauveur sought to acquire a greater interest in VLC. (Pl.'s Ex. H, Dec. 6, 1996 Letter from Alfred Van Liew.) In total, St. Sauveur invested $19,230 in VLC. (Pl.'s Ex. G., May 18, 1995 St. Sauveur Check; Pl.'s Ex. I, Dec. 19, 1997 St. Sauveur Check.) Thus, the VLTC-St. Sauveur relationship weighs heavily in favor of drawing an adverse inference.

Conversely, the second factor—degree of control of the party over the witness asserting the privilege—weighs against drawing the inference. There is no evidence of how, if at all, VLTC controlled St. Sauveur's actions as a board member. In fact, given his Board Member position, St. Sauveur would actually have a small measure of control over VLTC.

The third factor—the compatibility of the interests of the party and non-party in the outcome of the litigation—clearly weighs in favor of drawing the inference. There is no evidence the St. Sauveur is no longer a VLTC Board Member. Thus, he has a continuing interest in the VLTC position. Additionally, there is no evidence that St. Sauveur is no longer a VLC stockholder. Thus, in that regard, he may still hold a financial stake in the outcome of this case.

Finally, regarding the role of the non-party witness in the litigation, the Court disagrees with VLTC that "St. Sauveur's role in this litigation is simply a witness. He plays no other role." (VLTC's Mem. Opp. Summ. J.) While not a party, St. Sauveur is a the central character around whom the plot revolves in this case. If he had not acted on both sides of the coin, this case would not exist. Therefore, St. Sauveur's role weighs heavily in favor of drawing adverse inferences from his Fifth Amendment invocation.

Thus, three of the LiButti factors favor drawing the adverse inferences. One factor weighs against drawing the inferences; however, that factor—the degree of control of the party over the witness asserting the privilege—can be looked at with less significance because it informs the court as to whether the testimony could be viewed as a vicarious admission. LiButti, 107 F.3d at 123. In this specific circumstance, it could be viewed as a vicarious admission because of St. Sauveur's VLTC Director position. Based on this balancing of the LiButti factors, the Court deems it appropriate to draw adverse inferences from St. Sauveur's deposition testimony.

ii

Application of Adverse Inferences

St. Sauveur was asked a number of questions in his deposition that would have shed light on VLTC's level of activity or inactivity in regard to keeping his dual roles a secret. The most damning non-answer came to the question "Did you ever indicate that persons employed by [VLTC] should not mention your position on the [VLTC Board] to anyone at [RIRRC]?" (Pl.'s Ex. B, St. Sauveur Dep., 28:8-11.) The adverse inference from this question would be that persons at VLTC specifically knew of St. Sauveur's conflict and actively avoided telling anyone at RIRRC. Drawing that inference is the most direct evidence that people at VLTC actively concealed St. Sauveur's dual role. Given that VLTC knew that St. Sauveur was acting in both roles and was in the best position to blow the whistle, their concealment substantially assisted St. Sauveur's own breach of his fiduciary duty as a RIRRC Commissioner.

Drawing adverse inferences from other questions add to the evidence of active concealment on the part of VLTC. For example, St. Sauveur declined to answer the following questions: "Did you disclose your position as [VLTC] director to anyone at [RIRRC] either a fellow commissioner or employee, when [VLTC] was biding on RFQ No. 946?"; "To your knowledge, did anyone at [VLC or VLTC] disclose your role as a director to anyone on the board of directors or employees of RIRRC?"; "With respect to RFQ No. 840, did you ever indicate that persons with [VLTC] should not mention your position on the [VLTC] board of directors to [RIRRC]?." (Pl.'s Ex. B, St. Sauveur Dep., 27:6-9; 27:20-24; 42:15-19.) All of these tacit admissions by invoking the Fifth Amendment, combined with the evidence described above, leads the Court to find that VLTC aided and abetting St. Sauveur's breach of his fiduciary duty to RIRRC.

IV

Conclusion

The Court denies RIRRC's Motion for Partial Summary Judgment as to the breach of contract claim (Count II), and the Court grants RIRRC's Motion for Partial Summary Judgment as to liability on the breach of fiduciary duty (Count III) and aiding and abetting breach of fiduciary duty (Count IV) claims. RIRRC must still prove damages, including an entitlement to disgorgement, at trial. Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.