STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		**SUPERIOR COURT**
	(Filed: December 7, 2012)	
LAURA ROMO, M.D.	:	
	:	**C.A. No. PB-08-7204**
V.	:	
	:	
ROMAN KLUFAS, M.D. and	:	
ADVANCED RADIOLOGY, INC.	:	
	:	

DECISION

SILVERSTEIN, J. Before this Court are Cross-Motions for Partial Summary Judgment. Plaintiff Laura Romo ("Romo") seeks Partial Summary Judgment on both of two Counterclaims brought by Defendant Advanced Radiology, Inc. ("Advanced"): (1) Count I, alleging Breach of Contract, and (2) Count II, alleging Breach of Fiduciary Duty and Loyalty. Defendants Roman Klufas ("Klufas") and Advanced (collectively, "Defendants") seek Partial Summary Judgment on four of six counts in the Plaintiff's Complaint: (1) Count I, alleging Failure to Produce Corporate Documents and/or Information; (2) certain allegations of Count II, alleging Breach of Fiduciary Duties; (3) Count IV, alleging Breach of Contract; and (4) Count VI, also alleging Breach of Contract.[1]

I

Facts and Travel

At the outset, it is helpful to preview the parties, relevant non-parties, and their relationships given the intricacies of this case. Plaintiff Laura Romo and Defendant Roman Klufas are radiologists. They worked together at the Brigham and Women's Hospital in Boston

[1] In the Complaint, both Advanced and Klufas are defendants as to Count I; Counts II and VI are against Klufas only; and Count IV is against Advanced only.

(the "Brigham") in the 1990's. (Romo's Ans. to Interrog. 3; Romo Dep. 83:11-23) In August 1998, Klufas and his physician brother, Michael Klufas ("Dr. Michael"), established Open MRI of New England, Inc. ("Open") in Cumberland, Rhode Island. (Klufas Dep. 115:9-117:1; Klufas Ans. ¶ 9.) In 1999, Romo began reading MRI's on nights and weekends—also known as "moonlighting"—for Open on a per case basis. Klufas formed Advanced in 1999 or 2000. See Klufas Dep. at 121:20-122:11. Advanced is a separate company, but it provides the physician services component of Open: Advanced's physicians read the images taken at Open's facilities. See Klufas Dep. 10:22-11:19; Countercl. ¶ 4. In July 2000, Romo left her position at the Brigham to work for Advanced. Later that month, Klufas also hired another radiologist, David Cheng, to work for Advanced. (Romo Dep. 71:6-8, 84:4-9.) In 2002, Romo, Klufas, Cheng, Dr. Michael, and the Klufas' brother-in-law, Michael Tkach, formed Imaging Realty Investment Company, LLC ("Imaging"), which purchased a building for Advanced and Open's use. Id. at 86:22-87:11. In 2003, Klufas made Romo and Cheng shareholders in Advanced. The breakdown of the relationship between Romo and Klufas—stemming from issues with their relative ownership interests in Advanced and the relationship between Advanced and Open—is the impetus for this litigation.

A

The Building of the Relationship

Romo and Klufas worked together at the Brigham in the 1990's. (Romo Ans. to Interrog. 3; Romo Dep. 83:11-23.) Klufas worked five days per week and Romo worked three days per week at the Brigham. (Romo Ans. to Interrog. 3; Romo Dep. 83:11-23.) Romo also worked two days per week at the Massachusetts Eye and Ear Infirmary ("Mass Eye and Ear") and held a teaching position at Harvard Medical School. (Romo Ans. to Interrog. 3; Romo Dep. 96:10-13.)

In 1998, Klufas and his brother Dr. Michael—an internist—started Open in an office building owned by Dr. Michael and where Dr. Michael operated his internist office. (Klufas Dep.115:9-117:1, 120:22-23.) The Klufas brothers each have equal, 50 percent shares in Open, and Klufas serves as President. Id. at 116:20-117:24. Additionally, Tkach helped establish Open and has been employed as an administrator since its founding. Id. at 115:13-118:10. Open performs magnetic resonance imaging ("MRI") services for referred patients. See id. at 10:23-11:19, 16:1-3.

In 1999 or 2000, Klufas formed Advanced to provide radiology professional services. See Klufas Dep. at 121:20-122:25. While Open provides the technical component of the radiology service—e.g., equipment and technical costs—Advanced provides the professional service, i.e., the doctor's service. Id. at 10:23-11:19. Klufas formed Advanced with no accounting or legal advice and no business plan. Id. at 123:10.

While starting both Open and Advanced, Klufas retained his full-time position at the Brigham. (Romo Dep. 83:8-84:3.) Klufas recruited Romo to "moonlight" for Open on nights and weekends in 1999. (Romo Ans. to Interrog. 3.) Romo was compensated on a per case basis. (Romo Dep. 80:21-23.) In early 2000, Klufas offered Romo a salaried, three days per week position at Advanced to start in July 2000. (Romo Ans. to Interrog. 3.) Romo accepted the position, which required her to leave her employment at the Brigham. Id. Later that month, Klufas also hired a radiologist, David Cheng, to work full-time for Advanced; Cheng also left the Brigham. (Romo Dep. 71:6-8, 84:4-9.) Although they read images from Open, Romo and Cheng were compensated only through their Advanced salaries. Id. at 82, 84-85.

In a physician's practice, it is expected that a doctor's professional employment will change from an employer-employee relationship to a partnership type of relationship after a

number of years.[2] (Klufas Dep. 307:8-308:9.) Some time after the start of her employment, Romo was advised by Klufas that it would take about two and a half years for her to become an owner. (Romo Dep. 98:12-23.) In 2000 or 2001, Romo began to ask Klufas about an ownership interest in Advanced and Open. (Romo Ans. To Interrog. 3.) In 2003, Klufas gave Romo an ownership interest in Advanced only, telling her it would make no financial difference to her to have a share in Open as well. Id. Klufas also gave Cheng an ownership interest in Advanced. Id. The precise interest allocation is unclear; however, it seems as if Klufas and Cheng each held approximately a thirty-six percent interest, while Romo held approximately a twenty-eight percent interest.[3] (Romo Dep. 99:9-100:17.) Klufas paid himself and Romo equal salaries, which were sixty percent of Cheng's salary because Cheng worked five days per week while Romo worked three days per week, and Klufas allegedly worked even fewer hours. Id. at 164:8-166:18. However, significant profit distributions were allocated in accordance with relative ownership interests. Id. at 145:25-148:20. Since distributing the new shares to Romo and Cheng, Klufas has remained Advanced's President. See Kulfas Dep. at 127:25-128:1.

In the early years at Advanced, Romo and Cheng participated in marketing and networking efforts, which included telephone calls to referring physicians. (Romo Dep. 74:20-76:12; 326:18-25.) In January 2001, Advanced hired Romo's husband, Dr. John Romo ("Dr.

[2] Despite the corporate form, Advanced's shareholders referred to each other as "partners." (Klufas Dep. 9:2-19.) The Court will use the parties' nomenclature, although the Court notes that "shareholders" own a corporation, and "members" own a limited liability company ("LLC").

[3] Both sides seem to adopt these percentages. In her deposition, Romo was unsure of her exact number of shares or percentage interest. (Romo Dep. 99:9-100:17.) While she thinks that she had 600 shares, and a stock certificate with that number exists, she also stated "I think my shares were like—I owned, like, 27 percent initially, 27 or 28 percent." Id. at 99:22-24; Berk. Aff. in Opp., Ex. F. However, Romo seemed to think that Klufas and Cheng had 1000 shares each; 600 of 2600 shares is only about a twenty-three percent interest. (Romo Dep. 99:10-19.)

John"), to interact with referring physicians and grow the business. (Romo Dep. 127:19-128:12.) As the business expanded, Dr. John took on increasing responsibilities, such as hiring staff for the offices and negotiating equipment leases with vendors. (Romo Dep. 128:14-20.)

While Advanced and Open were growing, many of the involved parties got involved in real estate acquisitions to benefit the companies. In 2002, Romo, Cheng, Klufas, Dr. Michael Klufas, and Tkach formed Imaging Realty to purchase a building for office space in Warwick for Advanced and Open. Id. at 86:22-87:11. Each partner invested $25,000 and received a twenty percent interest in the company. Id. at 88:10-25. They took out a mortgage to cover the rest of the cost. Id. Imaging currently owns two properties, one in Warwick and one in North Smithfield. (Klufas Dep. 40:16-21.) Imaging Realty is governed by the "Imaging Realty Investment Company, LLC Operating Agreement" ("Operating Agreement").[4] (Klufas Aff., Ex. F.)

B

The Gradual Breakdown of the Relationship

Romo became skeptical with the allocation of work and profits when the business was expanding. Around the time that Cheng and she became shareholders, Romo told Klufas and Cheng that she did not think that the profit distributions were fair. (Romo Ans. to Interrog. 3.) Klufas was reading fewer cases than Cheng and Romo because he was only moonlighting, yet he still collected the same profit distributions as Cheng and the same salary as Romo, in addition to his full-time salary from the Brigham. Id.

[4] This fact is undisputed. The Court, however, notes an inconsistency in timing. Romo testified that Imaging was formed in 2002. (Romo Dep. 87:6-11.) The Operating Agreement itself only states that it is "dated as of _____, 2001 . . . ." (Klufas Aff., Ex. F.) The five members signed on the undated "Page 22 of 21." Id.

The hiring of additional radiologists also concerned Romo. In 2003, although Klufas was still working full-time at the Brigham, Klufas hired an additional radiologist, Kris Gupta. (Romo Dep. 93:1-2.) This meant another radiologist's salary on the payroll as an expense and eventually an additional ownership interest likely to mature in early 2006; thus, everyone else's profit distributions could go down. In the fall of 2005, Klufas discussed a need for yet another radiologist to start in July 2006. (Romo Ans. to Interrog. 3.) After some dissention over what type of radiologist to hire, Klufas decided to hire Donnella Comeau—a neuroradiologist, like Klufas and Romo—who would complete her fellowship at the Brigham in June 2006. Id.

In 2006, before Gupta became a shareholder in Advanced, Romo expressed her concern to Cheng about the impending change to profit distributions. Id. Romo viewed her potential decrease as unfair given Klufas's additional ownership interest in Open. Id. Cheng, however, seemed concerned about being replaced if they complained. Id. Gupta became a shareholder in Advanced in 2006. Id. Gupta received an interest equal to Klufas and Cheng because he worked full-time. (See Romo Dep. 99:22-100:2.) As a result, Klufas, Cheng, and Gupta presently each own 27.778 percent of the Advanced shares, while Romo owns 16.666 percent.[5] Id.

As her ownership interest was diluted, the financial relationship between Open and Advanced increasingly troubled Romo. There is no written agreement between the two corporations. (Klufas Dep. 8:9-12.) Klufas came up with the agreement between the two corporations by himself, although he alleges that all of the Advanced members knew about it from the time that they started working at Advanced. Id. at 8-10. According to Klufas, the job of Advanced radiologists is to "cover Open MRI, provide physician services, all the doctor coverage, [and] reporting." Id. at 10:23-25. As compensation, Open pays twenty percent of its

[5] As with footnote 3, the record does not reveal how many shares each person has, but the parties do not dispute the percentages.

gross revenue to Advanced minus the expenses common to both practices. Id. 11:20-12:1. Klufas based the twenty percent number on discussions with individuals at other practices and the Medicare and United Health Care rates. Id. 13:17-15:24. He claims that this arrangement is favorable to Advanced. Id. at 12:2-6.

Profits went down in the second quarter of 2007 as compared to the second quarter of 2006. (Romo's Ans. to Interrog. 3.) Romo's profit distributions from Advanced ranged between $240,000 to $329,807 from 2003-2006. (Berk Aff. in Opp., Ex. G.) After Gupta became a shareholder and Klufas hired Comeau in 2006, Romo's 2007 distribution dropped to $171,000. Id. Advanced shareholders received only nominal distributions in 2008. Meanwhile, as an Open shareholder, Klufas received distributions over $1 million each year from 2003-2006, and $806,000 in 2007. (Klufas Dep., Ex. 14.)

In addition to a lack of clarity on the arrangement between the two companies, Klufas alone controlled much of the financial information for Advanced. Aside from a five to six month period in 2006, Klufas has entered the QuickBooks transaction data himself for Advanced. (Klufas Dep. 151:3-22.) Tkach enters QuickBooks data for Open. Id. at 151:23-152:3. After Gupta became a shareholder, he suggested regular dinner meetings with all of the shareholders to discuss all of the business agenda together. (Romo's Ans. to Interrog. 3.) Romo refers to the first of such meetings as a "shareholder meeting," while a Gupta email refers to them as "Partners Strategic Planning dinners." (Romo Mem. Supp. Mot. Summ. J. 9; Klufas Dep. Ex. 31.)

The tensions between Romo and Klufas escalated in July 2007. Klufas blamed the lower 2007 profit distributions on an imaging tax, pre-authorization procedures, and declining Medicare reimbursements. (Romo Dep. 287:25-288:21.) The Romos then found out from Janet

Thomas, a biller at Advanced, that there had not been a significant decrease in revenues. (Romo Dep. 131:17-132:19.) Based on this information, the Romos asked Thomas "if she can print something up for us that would show us how things are relative to where they have been . . . ." Id. at 132:12-15. Thomas then gave an aging report to the Romos that showed $4.2 million in Advanced's accounts receivable. Id. at 132:20-22. The Romos distributed the aging report to the other partners and when Klufas found out, "All hell broke loose." Id. at 136:20-24. Gupta requested that the partners meet to discuss the information. Id. at 11:7-25. A meeting took place on July 31, 2007. (Romo's Ans. to Interrog. 3.) While topics other than the aging report were discussed, the meeting resulted in one change in billing: Klufas assigned Katie Lagor, an Open human resources employee, to manage Advanced's billing. (Romo Dep. at 13:19-14:22; Klufas Dep. 94:14-95:25.) Romo expressed concern because of Lagor's lack of billing experience. (Romo Dep. 13:19-14:22.) After Romo repeatedly asked, Klufas gave a checking account password to Romo in the fall of 2007 so that she could have access to information regarding Advanced's deposits and withdrawals.[6] Id. at 285:17-286:20. Additionally, Lagor was giving billing updates to Romo. Id. at 16:22-17:1.

Romo alleges that Advanced's billers were next told to stop providing information to her husband and her. Advanced's billers Nina Jarrett and Janet Thomas were allegedly told by Kathy Cardi, Open's billing manager, not to print any more aging reports and not to talk to John Romo. Id. at 137:1-138-21.

[6] While not explicitly stated, it appears that the password to the checking account would provide online viewing access. (Romo Dep. 285:17-286:20). Klufas claims that Advanced's shareholders had ATM debit cards and the ability "to sign and write" checks on the account. (Klufas Dep. 92:3-14.)

On September 12, 2007, Klufas sent a letter to John Romo. The letter placed John on probation for thirty days, expressed concerns about his employment with Advanced, and notified him that a meeting would be scheduled with Klufas, Cheng, and Gupta.[7] Id. at Ex. J. The first concern listed noted that John was told "not to get involved in the billing office" and deviation from that directive would be considered insubordination. Id. Romo alleges that, at John's meeting with the other partners, the other partners told John that both he and she (Laura Romo) were to stay out of billing. Id. at 16:17-18. After the probation letter, Lagor stopped updating Laura Romo on billing's progress. Id. at 16:22-17:7; 140:19-141:2.

Romo and Cheng shared email passwords for work-related reasons. Id. at 3:1-5:19. In going through Cheng's emails in late 2007, Romo uncovered email exchanges between Cheng and an Advanced ultrasound technician where the technician suggested that John should be "rubbed out" or, alternatively, steps should be taken to "limit his abuse." (Romo Dep. 246:25-248:3.) Nothing in the deposition describes what is meant by "abuse." There are also other emails referencing a lack of concern for the Romos. For example, Gupta wrote to Cheng "This will undoubtedly ruin our relationship with Laura, but I don't care anymore." Id. 248:4-10. No context is given to describe "this." Additionally, Klufas wrote to Cheng that many technicians are more important than John Romo and that "we have to take steps to limit his power over our employees. I know it will hurt our relationship with Laura, but it's a risk I'm willing to take for the sake of the company." Id. at 248:10-18. Although no date is given, it seems as though these conversations may precede the probation letter.

[7] While Laura Romo was "shocked" that she did not know anything about the letter before John received it (Romo Dep. 16:3-7), the letter references Advanced's policy manual, which states that "[o]nly in extraordinary circumstances, with management approval, should a relative directly or indirectly supervise an employee." (Id. at Ex. J.)

In January 2008, there was a partners' meeting where salary reductions were discussed. (Romo Dep. 289:10-20.) The proposal was to reduce the per pay period salaries of all the physicians: Cheng and Gupta from $12,000 to $10,000; Romo and Klufas from $8750 to $7200; and Comeau from $13,000 to $10,000 or less. Id. 289:21-290:4. Additionally, John's salary would be cut from $7000 to $3500. Id. At a meeting in February, Gupta noted that the proposed salary reductions were not commensurate with the agreement that Romo and Klufas' salaries would be sixty percent of full-time physicians' salaries; accordingly, their salaries were reduced to $6000. Id. at 292:7-19. These pay cuts were imposed on shareholders in February 2008. Id. at 44:15-17. In April 2008, Laura and John Romo's salaries were again reduced so that each household would earn $10,000 per pay period. Id. at 152-53. The April meeting was the last that Romo attended. Id. at 207:15-208:9. In July 2008, however, salary increases were given to technicians. Id. at 204:21-205:21. Despite her complaints about salary reductions and profit allocations, Romo testified in her deposition that she was fairly compensated for her work. (Romo Dep. at 96:7-9.)

C

The End of the Relationship

After what Romo views as her being forced out, she began to look for new employment. In late June or early July 2008, Romo accepted a position at the Brigham at a salary of $163,000 starting August 25, 2008. Id. at 180-83. On August 11, 2008, Romo sent a letter[8] to Klufas. (Berk. Aff. in Supp., Ex. D.) In the letter, she informed him of her position at the Brigham, her

[8] This Court does not decide the legal effect of the letter. Klufas contends that Romo tendered her resignation in this letter. Romo contends that she did not resign in this letter, but merely requested to only moonlight. Whether the letter actually ends Romo's association with Advanced or whether the association continued until Klufas's September 11, 2008 letter is an issue of fact.

request to continue to work at Advanced moonlighting, and her desire to have her shares purchased:

> "Based upon my concerns, I have decided to accept another position as of August 25th. However, I will stay on staff at my current salary and work in the early mornings and/or evenings, as well as continue to do my weeknight and weekend call, until the matters of my shareholder interest in [Advanced] and my membership interest in Imaging Realty are resolved.
>
> I would like to be bought out of my interests in [Advanced], as well as Imaging Realty, for a fair price, as soon as possible. I am concerned about the business practices of these entities, and do not wish to continue my future association. If necessary, I am prepared to bring legal action to force a buyout, and I have sought counsel in this regard." Id.

Romo noted that she expected to receive the "fair market value" for her ownership interest in Advanced. Id. John Romo also resigned from Advanced at the same time that Romo stopped working three days per week. (Mem. Supp. Summ. J. 16.)

After Klufas received the letter, he and Romo had a phone conversation, the contents of which are disputed. Klufas refused Romo's request to moonlight. (Romo Dep. 194:8-195:16.) They disagree on the reason. Romo contends that Klufas refused her outright. Id. Klufas contends that he told her that she could moonlight reading radiological images if she also covered injections[9] in the offices, but she refused. (Klufas Dep. 71-76.) Also in this conversation, Romo alleges that Klufas offered her severance. After denying her moonlighting request, Romo alleges that Klufas said, "What I'll do is I'll pay you until the end of September, because I know that's when you get paid from the Brigham." (Romo Dep. 195:12-15.) Finally, in the same conversation, Romo alleges that Klufas agreed to split the cost of an appraisal of

[9] For certain types of imaging that require an injection, a physician needs to be on site in case something goes wrong. See Romo Dep. at 128:21-129:9.

Imaging Realty and to buy out Romo for twenty percent of the total appraisal.[10] Id. at 195:17-196:4; Romo Ans. to Interrog. 15.

A battle for documents next ensued. In her August 11th letter, Romo stated, "Please provide me with financial statements, tax returns, and any other pertinent financial information regarding [Advanced] and [Open] within the next two weeks, so that we may begin the process of a buyout of my interests." (Berk Aff. In Opp., Ex H, Romo Letter.) On September 11, 2008, Romo's accountant, William Piccerelli, sent a letter to Klufas requesting a number of specific documents relating to both Advanced and Open to help value Romo's interest. (Klufas Aff., Ex. B, Piccerelli Letter.) On the same day, Klufas sent a letter to Romo. (Klufas Aff., Ex. G.) First addressing Imaging Realty, Klufas stated that Romo's twenty percent interest was worth $124,422 based on appraisals from the previous year. Id. He noted that the market had since declined and he would "talk to the others to see what is acceptable." Id. Addressing Advanced, Klufas stated that Romo would receive no severance because of an agreement between Romo, Cheng and Klufas in 2003 that required an employee to remain at Advanced for ten years to trigger severance. (Klufas Aff., Ex. G.) Klufas asserts that this agreement was memorialized in a written but unsigned document, referred to as the "Shareholder Agreement." (Berk. Aff. In Opp., Ex. D.) Finally, Klufas went on to say, "Advanced Radiology is forced to terminate you as

[10] Notably, Romo is inconsistent in her description of this part of the conversation as to whether Klufas was speaking in his individual capacity or for all Imaging shareholders. In the Complaint, Romo seems to allege that Klufas was making the purchase in his individual capacity and not on behalf of Imaging Realty, LLC because Romo uses singular pronouns. (Compl. ¶ 65.) Romo also uses singular pronouns in her answer to Interrogatory 15. (Compl. ¶¶ 65-68.) However, in her deposition, Romo testified that Klufas said that "they would give me twenty percent" and "we'll split the cost of appraisals with you." (Romo Dep. 195:17-196:4.) "They" and "we" could be construed as the LLC or all of the other LLC shareholders. Also, in a later letter, Klufas states that he "will talk to the others and see what is acceptable," which seems to imply that he meant for the agreement to encompass the other LLC members.

an employee effective August 25, 2008." (Klufas Aff., Ex. G.) Romo was paid through that date, but nothing more. See Klufas Aff. ¶ 4.

On October 6, 2008, Romo's attorney, Karen Pelczarski, sent a letter to Klufas requesting a copy of the purported Shareholder Agreement under which Klufas claimed Romo was not entitled to severance. (Klufas Aff., Ex. D, Pelczarski Letter.) Pelczarski sent another letter to Klufas on the same day, requesting the documents requested by Piccerelli within five days and specifically invoking R.I.G.L. § 7-1.2-1502. (Klufas Aff., Ex. E, Pelczarski Letter.) At this time, Klufas engaged an attorney, Joseph Keough. Keough responded to Pelczarski that he would provide her with information addressing her request. (Keough Aff., ¶¶ 11-4.) After alerting Pelczarski to reasons for a delay, on November 6, 2008, Keough emailed Pelczarski that he "had requested financial information, which will be provided to [Pelczarski]." (Keough Aff., Ex. A.) No documents were produced prior to Romo's filing of the Complaint in this case. However, on November 26, 2008, thirteen days after the Complaint was filed, Keough provided Pelczarski with Advanced's tax returns for 2003 through 2007; balance sheets and profit and loss statements for 2004 through August 20, 2008; an income distribution work sheet for 2003 through 2008; an unsigned copy of the alleged Shareholder Agreement; and the Imaging Operating Agreement. (Keough Aff. ¶ 17.)

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

Plaintiff's Motion for Partial Summary Judgment on Defendants' Counterclaims

1

Count I: Breach of Contract (Shareholder Agreement)

In its Counterclaim, Advanced alleges that Romo breached a Shareholder Agreement which governs the terms of stock ownership in Advanced. See Countercl. Count I. Advanced claims that the agreement regarding ownership was memorialized by the parties in a written but unsigned document. See Countercl. ¶ 10; Berk Aff. in Opp., Ex. D, Agreement. That unsigned document provides:

> "If an employee voluntarily terminates his or her own employment with the Corporation within ten (10) years of the date of the Agreement or is involuntarily terminated for cause during any time of his or her employment, the Employee will receive no severance or other compensation upon such termination." (Berk Aff. in Opp., Ex. D, § 8.1.)

If an employee works for more than ten years, he or she is entitled to eighteen months pay. Id. § 8.3. Romo argues that Rhode Island's Statute of Frauds renders the alleged agreement unenforceable.

Rhode Island's Statute of Frauds provides:

> "No action shall be brought . . . [w]hereby to charge any person upon any agreement which is not to be performed within the space of one year from the making thereof . . . unless the promise or agreement upon which the action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him or her thereunto lawfully authorized." G.L. § 9-1-4.

Interpreting § 9-1-4, the Rhode Island Supreme Court has held that a contract is "not obnoxious to the statute of frauds" when it is "for an indefinite term, terminable by either party at will, and could not possibly have been fully performed in one year." Powless v. Pawtucket Screw Co., Inc., 116 R.I. 158, 162, 352 A.2d 643, 646 (1976). Here, the purported agreement is for an indefinite term. Nothing in the severance provisions—or anywhere else—requires that the parties continue their relationship beyond one year; they merely provide the mechanism by which severance is determined depending on length of employment. See Berk Aff. in Opp., Ex. D, §§ 8.1, 8.3. Romo could have voluntarily left her employment with Advanced in less than one year. Therefore, the Statute of Frauds does not apply, and the lack of a signed writing does not preclude proof of an agreement.

The terms of any alleged Shareholder Agreement and whether such an agreement was memorialized in a written document, are disputed issues of material fact. Klufas alleges that Romo, Cheng, and he agreed on terms which were memorialized in a document that was simply never signed. (Countercl. ¶¶ 10-12; Klufas Dep. 24:6-22.) Conversely, Romo alleges that no such agreement existed and that she never even saw the document that Advanced alleges is the memorialized Shareholder Agreement. (Romo Dep. 68:4-12; 213:4-7; 215:17-217:15.) Thus, summary judgment is not appropriate at this time. See Super. R. Civ. P. 56. Therefore, the Court denies Romo's Motion for Summary Judgment on Count I of Advanced's Counterclaim.

2

Count II: Breach of Fiduciary Duty

Romo moved for summary judgment on Advanced's Counterclaim for Breach of Fiduciary Duty. (Pl.'s Mem. Supp. Mot. Summ. J. 21.) Advanced did not oppose the motion.

(Defs.' Mem. Opp. Summ. J. 2, n.1.) Therefore, the Court grants summary judgment for Romo on Count II of Advanced's Counterclaim.

B

Defendants' Motion for Partial Summary Judgment on Plaintiff's Claims

1

Count I: Failure to Produce Corporate Documents

Romo alleges that the Defendants failed to produce corporate documents and/or information to her, pursuant to her rights as a shareholder under § 7-1.2-1502. Section 7-1.2-1502(b) provides:

> "Any director, shareholder . . . upon written demand stating the purpose for the demand, has the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its relevant books and records of account, minutes, and record of shareholders, and to make extracts from those books and records of account, minutes and record of shareholders."

Applying this statute to the undisputed facts in this case requires the court to address three questions: (a) To which documents is Romo entitled; (b) Did Romo make a proper request for those documents?; and (c) Was Romo actually denied access to those documents?

a

To Which Documents Was Romo Entitled?

Romo alleges that four separate written requests for documents and/or information were made by her or on her behalf in the following documents: (1) Romo's termination letter on August 11, 2008; (2) Piccerelli's letter on September 11, 2008; (3) Pelczarski's first letter on October 6, 2008; and (4) Pelczarski's second letter on October 6, 2008. Over the course of these letters, requests were made for the following documents (unless parenthetically noted, the request is from Advanced only):

- Financial statements (Annual and interim, for both Advanced and Open)
- Tax returns (Both Advanced and Open)
- Any other pertinent financial information regarding Advanced and Open
- Disc of QuickBooks transaction data (Both Advanced and Open)
- Checking account statements
- Cancelled checks
- Aged accounts receivable listing
- Credit card statements
- Supporting data relative to payments from Open to Advanced (from Open only)
- W2's for compensation to shareholder employees
- Copies of any shareholder buy-sell agreements
- Shareholder Agreement

(Berk Aff. in Opp., Ex H, Romo Letter; Klufas Aff., Exs. B, D, E, Piccerelli Letter & Pelczarski Letters.) The Defendants argue that Romo is not entitled to these documents because they are not "relevant books or records of account." Romo argues that courts broadly construe the meaning of "books" and "records." Therefore, the question for this Court to address is whether the requested documents fall within the statutory term "relevant books or records of account."

There is a dearth of Rhode Island case law on the issue. The most instructive Rhode Island case is Gregson v. Packings & Insulations Corp., 708 A.2d 533 (R.I. 1998).[11] In Gregson, the proper purpose of the demand was to "evaluate any bonus/dividend distribution." Id. at 536.

[11] Gregson was analyzed under an older version of the statute, but the only substantive difference between the former and the current versions is not relevant to this case: the removal of a requirement that the requester be a shareholder of record for six months or own five percent of outstanding shares. Compare Gregson, 708 A.2d at 535-36 (citing § 7-1.1-46) with § 7-1.2-1502.

The Court held that the plaintiff was "clearly entitled to review Packings' records of salaries and expenses and any other financial information relevant to an assessment of the propriety of making a dividend distribution." Id. However, the Court also held that the plaintiff was not entitled "to review any proprietary information such as customer and supplier lists, information on contract bids, or information on profit margins and discounts." Id. Thus, the Court allowed access to more documents than a very strict reading of "books and records of account" would allow, but it did not allow unfettered access. See id.

Romo presses this Court to look favorably upon foreign cases. In possibly the most extensive analysis of a shareholder's right of inspection statute, the Oregon Supreme Court gave a "broad and liberal interpretation" to the phrase "books and records of account." Meyer v. Ford Industries, Inc., 539 P.2d 353, 358 (Ore. 1975). The Oregon Supreme Court relied heavily upon Illinois case law to find that "books and records of account" is "not limited to 'books and records of account' in any 'ordinary,' literal or otherwise limited sense, but to be the subject of a broad and liberal construction so as to extend to all records, contracts, papers and correspondence to which the common law right of inspection of a stockholder may properly apply." Id. The documents sought and granted in that case included: agreements with other companies; preliminary year end statement with attached commentary sheet; records relating to a specific investment contributed to employee pension plan; "papers and written documents" relating to a specific debenture; agreements between the company and any former employee; records relating to a loan increase; and "any written documents relating to an offer to purchase, merge with or underwrite any portion of [the company]". Id. at 534.

Romo cites cases from New York, Georgia, Alabama, and the Third Circuit (applying Pennsylvania law) granting access to a broad range of documents. See Bohrer v. International

Banknote Co., 540 N.Y.S.2d 445, 446 (N.Y. App. Div. 1989) (liberally construing statute to include "record of shareholders"); Riser v. Genuine Parts, 258 S.E.2d 184, 186 (Ga. App. 1979) (holding error to deny records relating to the investment of the amount which the company contributed to its employee pension plan but affirming denial of tax returns, profit and loss statements of subsidiaries, and data relating to a merger among other things); Bank of Heflin v. Miles, 318 So.2d 697, 701 (Ala. 1975) (holding shareholders entitled to "any and all records and writings of any kind or nature relating to [the corporation]"); Friedman v. Altoona Pip & Steel Supply Co., 469 F.2d 1212, 1213 (3d Cir. 1972) (holding plaintiff entitled to corporation's federal income tax returns among other things). Nevertheless, the stew of statutes in these cases is missing one key ingredient: the word "relevant." See Bohrer, 540 N.Y.S.2d at 196-97 (analyzing only "record of shareholders"); Riser 258 S.E.2d at 503 (analyzing "books and records of account"), Bank of Helfin, 318 So.2d 697 (noting applicable statute "not limited to 'relevant' books and records"); Meyer, 539 P.2d at 533 n.1; Friedman, 469 F.2d at 1212.

The use of "relevant" is of great significance. "The statutory right depends on the language of the governing statute and the judicial interpretation of that right." Fletcher Cyclopedia Corporations § 2239. The Rhode Island General Assembly chose to limit this right to the "relevant books and records of account." Sec. § 7-1.2-1502(b); see also Fletcher § 2239. The purpose of such a relevancy limitation is to "protect[] against the possibility of expensive and vexatious 'fishing' expeditions." Fletcher § 2239. In Bank of Helfin, the Alabama Supreme Court specifically noted that the Alabama statute did not include the word "relevant" when it liberally construed the statute. Bank of Helfin, 318 So.2d at 701 ("The applicable statute is not limited to 'relevant' books and records; it is to be liberally construed.")

The word "relevant" means relevant to the purported purpose stated by the shareholder. In Gregson, the proper purpose of the demand was to "evaluate any bonus/dividend distribution" and the Court held that the plaintiff was entitled to review "any other financial information relevant to an assessment of the propriety of making a dividend distribution." Gregson, 708 A.2d at 536 (emphasis added).

Here, Romo's stated purpose is to value her stock. (Compl. ¶ 39; Klufas Aff., Ex. B, Piccerelli Letter; Klufas Aff., Ex. E, Pelczarski Letter). Stock valuation is clearly a proper purpose for the right of inspection. See Fletcher § 2224. When seeking to ascertain the value of one's stock, a "[s]hareholders' right of inspection should be limited to those books and records relevant and necessary to establish the book value of the corporation's stock. It is limited to those documents, which in the trial court's exercise of reasonable discretion, the situation requires be reviewed." Id. Therefore, Romo is entitled only to those documents that are relevant to establishing the value of her stock in Advanced.

First, this Court finds that Romo is not entitled to any documents from Open. The statute grants the right of inspection to shareholders, and Romo is not a shareholder of Open. See § 7-1.2-1502. While shareholders may have a right to "investigate the conduct of management," and while other allegations of wrongdoing are made in this Complaint, Romo's only purpose accompanying her demand for documents was to value her stock. Sarni v. Meloccaro, 113 R.I. 638, 638-39, 324 A.2d 648, 652-53 (1974).

Furthermore, the Court finds that Romo is not entitled to inspect the following documents from Advanced because they are more detailed than necessary to aid in stock valuation: checking account statements, cancelled checks, credit card statements, W2's for compensation to

shareholder employees. Additionally, Romo is not entitled to "any other pertinent financial information regarding Advanced and Open" because that request is too broad.

The Court does find, however, that Romo is entitled to inspect the following documents from Advanced: financial statements,[12] tax returns, disc of QuickBooks transaction data, aged accounts receivable listing, copies of shareholder buy-sell agreements, shareholder agreements, loan documents, and asset appraisals.

b

Did Romo Make a Proper Request?

While the Court finds that Romo is entitled to some of the requested documents, it must next consider whether she made a proper request for those documents. Section 7-1.2-1502(b) provides: "Any director, shareholder . . . upon written demand stating the purpose for the demand, has the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose . . . ." Thus, the clear statutory language grants a right to examine in person at a reasonable time. It does not grant a right to receive copies. The relevant and primary definition of "examine" is "to observe carefully or critically; inspect." American Heritage Dictionary 617 (5th Ed. 2011). Additionally, no sense of "examine" has a synonym that would suggest that a third party is required to do anything. See Roget's International Thesaurus §§ 27.14, 938.24 (7th Ed. 2010). "To examine" is to take an action on one's own. See id.

A number of purported requests to inspect were made between August 11, 2008 and October 6, 2008. In her resignation letter, Romo requests, "Please provide me with [certain

[12] Romo is entitled to all financial statements. However, if the annual statements were due out a short period of time after a demand, failure to produce the interim reports may not constitute denial of the records. See Gregson, 708 A.2d at 537.

documents]." (Berk Aff. in Opp., Ex. H, Romo Letter.) On September 11, 2008, Romo's accountant requested that Klufas "please furnish us with the information listed below." (Klufas Aff., Ex. B, Piccerelli Letter.) On October 6, 2008, Pelczarski's first letter to Klufas requested that Klufas "[p]lease forward the [alleged shareholder] agreement" and to "[p]lease consider this a request for corporate documents pursuant to R.I. GEN. LAWS § 7-1.2-1502(b)." (Klufas Aff., Ex. D, Pelczarski Letter.) Finally, in her second October 6, 2008 letter, Pelczarski first noted that "[b]ased upon her shareholder status, pursuant to R.I. GEN. LAWS § 7-1.2-1502(b), she is entitled to demand financial information regarding the corporation and for a stated purpose." (Klufas Aff., Ex. E, Pelczarski Letter.) Four paragraphs later Pelczarski requests, "Once more, we would ask that you provide the information requested within five business days of the date hereof." Id.

All of these requests clearly state a desire to have documents provided directly to Romo. None mention an in person examination, viewing, or anything of the like. None posit a reasonable time. While Pelczarski invoked the statutory section, she still failed to mention the statutory requirement of a request to examine in person at a reasonable time. The Court disagrees with the characterization that a shareholder is "entitled to demand financial information." (Klufas Aff., Ex. E, Pelczarski Letter.) The statute does not grant a right "to demand" that documents be produced to a shareholder; it grants a right "to examine" (the operative verb) in person via a written demand (the noun). See § 7-1.2-1502(b). The burden is on the shareholder to make a demand that complies with the statute; it is not on the corporation to discern what the shareholder wants.

Rhode Island statutory construction principles require this Court "to ascertain the intent behind a legislative enactment and to give effect to that intent." State v. Delaurier, 488 A.2d

688, 693 (R.I. 1985). Additionally, "if a mechanical application of a statutory definition produces an absurd result or defeats legislative intent, this court will look beyond mere semantics and give effect to the purpose of the act." Id. at 694; see also Kaya v. Partington, 681 A.2d 256, 260 (R.I. 1996) (noting that court may depart from mechanical application when semantics defeat the purpose of the act).

In this case, an application of the plain statutory language does not reach an absurd result. As Romo correctly points out, the legislature clearly intended that shareholders be able to protect their interests through a right to corporate information. See § 7-1.2-1502. Nevertheless, the legislature also clearly intended that right not be unfettered. See id. Section 7-1.2-1502 is littered with limitations on the shareholder's right of inspection: (1) the demand must be in writing; (2) the reason for the demand must be proper; (3) the examination be conducted in person; (4) the examination be at any reasonable time or times; and (5) the examination is limited to "relevant books and records of account, minutes, and record of shareholders." Id.; see supra Part III.B.1.a.

Additionally, the legislature did not create this right of inspection ex nihilo. At common law, Rhode Island recognized that a shareholder had a "privilege" to inspect the "books and condition of the company;" this privilege became a right when "the inspection is sought at proper times and for proper purposes . . . ." Lyon et al. v. American Screw Co., 16 R.I 472, 17 A. 61, 61 (1889); see also Sarni v. Meloccaro, 110 R.I. 566, 567, 294 A.2d 844, 845 (1972). The proper time and proper purpose requirements were prerequisites to the right, as the Court in Sarni noted in its remanding of the case because the plaintiff has not satisfied those elements. Id. at 567, 845. Before remanding, however, the Court noted that while that case was governed by the common law given its genesis was in 1966; the legislature had passed the Rhode Island Business

Corporations Act in 1969. Id. Most notably, immediately after describing the newly enacted statutory language, the court framed the remand: "The plaintiff has yet to satisfy the 'time' and 'purpose' elements of the rule first promulgated in Lyon." Id. (emphasis added). The use of "first promulgated" in this instance, shows that the Sarni Court read the time element in the statute as merely a second promulgation of the elements at common law from Lyon. See id. Therefore, the requirement that the demand to examine include a reasonable time is still a perquisite to the invocation of a shareholder's right under § 7-1.2-1502.[13]

Therefore, the legislature sought to balance the shareholders interest with the burden on the corporation when forced to allow that examination. This Court sees no reason to disavow the balance struck by the language chosen by the legislature. Because Romo did not make a proper request under the statute, she was not denied access to the documents. Accordingly, the Court grants summary judgment to the Defendants on Count I of the Plaintiff's Complaint.[14]

2

Count II: Breach of Fiduciary Duty

a

Consideration on Summary Judgment

The precise relief that Klufas seeks as to "certain allegations of Count II" is unclear. In his subheading on the issue, Klufas states that "Romo's breach of fiduciary duty claim should be narrowed because there is no evidence to support several of the allegations." (Mem. Supp.

[13] While the statutory language has been altered, the clauses relevant here have remained the same. Compare § 7-1.2-1502(b) with Gregson, 708 A.2d at 535-36 (quoting § 7-1.1-46(b)); Sarni, 110 R.I. 567. 294 A.2d at 845 (describing § 7-1.1-46).

[14] Because the Court finds that Romo did not make a proper request, she could not have been actually denied the documents. Therefore, the Court need not consider whether the Defendants' delay in providing access to the documents constitutes a denial of access.

Summ. J. 20.) After listing six factual allegations made in the Complaint, Klufas argues that "[t]hese allegations should be dismissed in order to narrow the scope of the Romo's breach of fiduciary duties claim because there is no evidence in the record to support them." Id. Intermixed with further subheadings, Klufas requests that the allegation that the allocation of rents was unfair "should be dismissed as a matter of law" and that "Romo should be precluded from arguing at trial" that Klufas breached his fiduciary duties by failing to adequately compensate its physicians. Id. at 21, 22. Finally, in concluding this section, the Defendants request that this Court "find as a matter of law that Klufas did not breach his fiduciary duties to Romo by refusing to produce financial information or failing to account for transactions between Advanced and Open." Id. at 24. Moreover, at oral argument, counsel seemed to argue that cumulative actions may not constitute a breach of fiduciary duty when no individual action rises to the level of a breach of fiduciary duty.

"The purpose of summary judgment is issue finding, not issue determination." Saltzman v. Atlantic Realty Co., Inc., 434 A.2d 1343, 1345 (R.I. 1981). "[T]he correct judicial role in a summary judgment motion hearing is simply to identify disputed material fact issues, and not to resolve them." Hendrick v. Hendrick, 755 A.2d 784, 792 (R.I. 2000). Therefore, this Court will not dismiss allegations, rather it will endeavor to identify whether issues of material fact remain. See Shelter Harbor Conservation Soc'y, Inc., 21 A.3d at 343.

b

Breach of Fiduciary Duty and Cumulation of Actions

To determine whether a fact is material, the Court must first identify the legal principles to be applied to the facts. See Grimes v. Kennedy Krieger Institute, Inc., 782 A.2d 807, 833 (Md. 2001) ("A material fact is a fact the resolution of which will somehow affect the outcome

of the case.") (citations omitted). Rhode Island has long recognized that corporate directors and officers are corporate fiduciaries and owe a duty of loyalty to the corporation and its shareholders. A. Teixeira & Co., Inc. v. Teixeira, 699 A.2d 1383, 1386 (R.I. 1997); Boss v. Boss, 98 R.I. 146, 152, 200 A.2d 231, 236 (R.I. 1964). "Such a fiduciary relationship is one of trust and confidence and imposes the duty on the fiduciary to act with the utmost good faith." Hendrick, 755 A.2d at 789. Klufas was an officer of Advanced via his position as President; therefore, he owed a fiduciary duty to Romo in her position as a shareholder. (Kulfas Dep. 127:25-128:1.)

Furthermore, "shareholders in a close held family corporation may have a fiduciary duty toward one another. See A. Teixeira & Co., Inc., 699 A.2d at 1387 (emphasis original). "The existence of such a fiduciary duty is a fact-intensive inquiry." Id. While holding that the five shareholders in A. Teixeira & Co., Inc. owed fiduciary duties to one another, the Court specifically drew its conclusion on the basis of the small number of shareholders, the active participation by shareholders in management decisions, the close and intimate working relations, and the parties acting as if they were partners. Id. The Court went on to note that "when the shareholders in a less-than-thirty-shareholder corporation act among themselves as partners in a business venture for mutual profit or loss, the law ought treat them as fiduciaries." Id.

The reason for imposing a fiduciary duty on shareholders in a close corporation is because of "the potential for oppression by the majority toward the minority shareholders by simple virtue of majority voting share power, coupled with the absence of a ready market for closely held corporation's shares." Hendrick, 755 A.2d at 789. This Court has noted that "[b]y deciding to operate as if they are partners, shareholders of a close corporation assume the same fiduciary duties as if they were partners. Grady v. Grady, C.A. No. PB-2009-0367, 2012 WL

171006, slip op. at 9 (Jan. 17, 2012) (Silverstein, J.). Furthermore, "[b]ecause of their close working relationship and mutual dependence on each other for the success of the partnership, the duty owed between partners is one of utmost care and loyalty, a higher duty than corporate officers." Id. at 8.

Advanced is a close corporation, acting like a partnership. It has only four shareholders: Romo, Klufas, Cheng, and Gupta. All of the shareholders are doctors, specifically radiologists, and as a group, they complete most of the income-generating work. They clearly intended a partnership-type relationship among them, as they frequently refer to each other as "partners." And although Klufas seems to make the final decisions, the number of shareholder meetings and discussions regarding company decisions—such as whether and whom to hire, and whether to reprimand Dr. John—show active participation by the shareholders. Thus, Klufas should be held to the same partnership fiduciary standard.

The duty of loyalty requires contracts entered into by a director or officer to be fair to the corporation. Tomaino v. Concord Oil of Newport, Inc., 709 A.2d 1016, 1021 (R.I. 1998). "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." Id. Such a transaction "may be challenged if it was not entered into in good faith and/or was unfair to the corporation." Id. "To be valid, the transaction must have been assented to by the disinterested officers and/or stockholders of the corporation with full knowledge of all the facts." Id. Ratification, however, "may be implied from a corporation's course of conduct . . . ." Id.

Klufas also owed a duty of candor to Romo. In the partnership context, the duty of disclosure is "a hallmark of the fiduciary relationship." Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 6.06 (2006). Closely related to this duty is a partner's

access to books. Id. § 6.05(c). "A managing partner who controls the books has an affirmative duty to disclose the details." Id. In the less rigorous corporate context:

> "'Even in the absence of a request for shareholder action, shareholders are entitled to honest communication from directors, given with complete candor and in good faith.' When there is no request for shareholder action, a shareholder plaintiff can demonstrate a breach of fiduciary duty by showing that the directors 'deliberately misinform[ed] shareholders about the business of the corporation, either directly or by a public statement.'" In re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106, 132 (Del. Ch. 2009) (citations omitted).

Finally, "oppressive conduct can manifest itself in a range of actions designed to disadvantage or freeze out a minority shareholder." Hendrick, 755 A.2d at 791. Without deciding whether to view oppressive conduct under either a heightened good faith analysis or a reasonable expectation analysis, the Rhode Island Supreme Court has stated:

> "[O]ppression within a closely held corporation can manifest itself as a series of acts or a pattern of conduct by majority shareholders that can have the cumulative, overall effect of freezing out or depriving the minority shareholder of a voice in the corporation, as well as manifesting itself in more distinct, identifiable actions." Id. at 792 (emphasis added).

The Supreme Court went on to suggest that a court should conduct "an appropriate broader inquiry into an alleged pattern or series of acts" from which a fact finder could conclude rose to the level of oppression. Id.

c

Issues of Fact Remaining

Genuine issues of material fact remain as to Romo's breach of fiduciary duty claim against Klufas. Given that the parties disagree about the meaning and significance of seemingly every detail in this case, the list of issues identified hereafter is not exhaustive. The Court is not

foreclosing the materiality of other facts or theories. However, these issues of fact are a broad conception of the significant allegations raised by Count II.

It is undisputed that Advanced and Open had a transactional relationship with each other and that Klufas sat on both sides of those transactions as the President of Advanced and as a fifty percent owner of Open. Klufas even admits to generating the agreement between the two corporations himself. (Klufas Dep. 10:2-12.) However, whether those transactions were entered into in good faith and/or were fair to the corporation is a genuine issue of material fact. Klufas alleges that Romo had full knowledge of the agreement and that it was more than fair to Advanced. Id. at 10:13-15:19. Romo alleges that Klufas structured the relationship between the corporations to favor Open so that he could disproportionately benefit from the mutual businesses. (Compl. ¶¶ 49-51.)

The parties dispute the information available to Romo. Romo claims that Klufas failed to provide her with financial information regarding Advanced. (Romo's Ans. to Interrog. 7.) Specifically, she alleges that Klufas failed to give her the details of the relationship between Advanced and Open, and he failed to respond to her inquires about the substantial amounts in accounts receivable in July 2007. Id. Klufas claims that he provided all Advanced shareholders with profit and loss statements, K-1's and tax returns every year around tax time. (Klufas Dep. 91:12-92:2.) Additionally, Klufas claims that shareholders had access to QuickBooks and checking accounts. Id. at 92:3-14.

Finally, the parties dispute whether Romo voluntarily resigned from her position at Advanced or she was forced out. Romo claims that she was constructively discharged from her employment at Advanced. (Romo's Ans. to Interrog. 7.) She argues that her disproportionate salary cut, Klufas' failure to address her business concerns, and Klufas' poor treatment of Dr.

John and her cumulatively forced her out. Id. Klufas claims that Romo was compensated fairly and she had access to information; therefore, she was not oppressed and voluntarily resigned. Id. at 96:7-9, 186:7-13; Klufas Dep. 92:3-14.

Therefore, genuine issues of material fact remain. Summary Judgment as to Count II of Romo's Complaint is not appropriate at this time.

3

Count IV: Breach of Contract (Severance)

Romo alleges that Klufas agreed to pay Romo severance: Advanced would pay her through the end of September 2008, even though Romo would stop working for Advanced on August 25, 2008. The only evidence of this agreement is Romo's description of a phone conversation with Klufas in her deposition. (Romo Dep. 194:8-195:16.) Advanced argues that Romo's breach of contract claim fails as a matter of law because it lacks consideration: Romo promised nothing in return for the alleged severance.

"It is well established that a valid contract requires competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." DeAngelis v. DeAngelis, 923 A.2d 1274, 1279 (R.I. 2007) (internal quotations and citations omitted). "In addition to mutual assent, bilateral contract requires mutuality of obligation, which is achieved when both parties are bound legally by the making of reciprocal promises. Mutuality of obligation fulfills the consideration requirement of contracts." Filippi v. Filippi, 818 A.2d 608, 624 (R.I. 2003). As a test for consideration, the Court has quoted and applied the Restatement (Second) of Contracts:

> "In determining whether there was sufficient consideration for a binding contract to have been formed, we employ the bargained-for exchange test; that test provides that something is bargained for, and therefore constitutes consideration, 'if it is sought by the

> promisor in exchange for his promise and is given by the promisee in exchange for that promise.'" DeAngelis, 923 A.2d at 1279 (quoting Filippi, 818 A.2d at 624); Filippi, 818 A.2d at 624 (quoting Restatement (Second) Contracts § 71(2) (1981)).

Romo argues that her consideration is her agreement "to stay on working at her day job for an additional two weeks after submitting her resignation letter." (Romo Mem. Opp. Summ. J. 32.) This claim, however, is unsupported by the record. In Romo's description of her conversation with Klufas, she does not mention remaining at Advanced for two additional weeks. See Romo Dep. 194:8-195:16. In fact, the conversation took place less than two weeks before she was to stop working at Advanced three days per week. See id. at 194:12-15. The continuation of Romo's work until August 25, 2008 could not have been sought by Klufas (the alleged promisor) or given by Romo (the purported promisee) in exchange for severance pay (the promise allegedly made by Klufas to Romo) because such an arrangement was never discussed. See Romo Dep. 194:8-195:16.

Viewing the evidence in the light most favorable to Romo, a jury still could not find that consideration exists in this case. See Sacco v. Cranston School Dept., 53 A.3d 147, 150 (R.I. 2012) (noting on summary judgment that the Court "view[s] the evidence in the light most favorable to the nonmoving party . . ."). Immediately after Klufas allegedly refuses Romo's request to moonlight, Klufas allegedly says, "What I'll do is I'll pay you until the end of September, because I know that's when you get paid from the Brigham. You get paid once a month." See Romo Dep. at 195:12-15. Romo did not respond to Klufas' offer. See id. at 195:15-16 ("So I didn't really have anything else to add."). Romo did not give anything in exchange for Klufas' severance offer, and she was not obliged or bound to do anything, or refrain from doing anything, to receive severance pay. Thus, Romo did not provide consideration to support a contract for severance pay. See DeAngelis, 923 A.2d at 1279; Filippi,

818 A.2d at 624. Therefore, the Court grants Advanced's Motion for Summary Judgment on Count IV of the Plaintiff's Complaint.

4

Count VI: Breach of Contract (Imaging Realty Buyout)

In the same conversation with Klufas, Romo also alleges that Klufas agreed to buy Romo's twenty percent share of Imaging Realty—they would split the costs of the appraisal of the properties and Klufas would pay her twenty percent of the appraised value. It is unclear whether Romo alleges that Klufas was binding himself individually or for Imaging Realty on behalf of the other shareholders. In the Complaint, Romo seems to allege that Klufas was making the purchase in his individual capacity and not on behalf of Imaging Realty because Romo uses singular pronouns. (Compl. ¶ 65.) Romo also uses singular pronouns in her answer to Interrogatory 15. However, in her deposition, Romo testified that Klufas said that "they would give me twenty percent" and "we'll split the cost of appraisals with you." (Romo Dep. 195:17-196:4.) "They" and "we" could be construed as the Imaging or all of the other Imaging shareholders. Also, in a later letter, Klufas states that he "will talk to the others and see what is acceptable," which implies that he meant for the agreement to encompass the other Imaging shareholders. (Klufas Aff., Ex. G.) Notably, Imaging is not a party to this lawsuit.

Klufas argues that Romo's alleged agreement to sell to Klufas is barred by Imaging Realty's Operating Agreement. Alternatively, Klufas claims that he never agreed to buy Romo's shares.

The Complaint alleges that "Klufas has failed and refused to pay for his share of the cost of those appraisals as he had agreed, and has failed and refused to purchase Romo's twenty (20%) percent interest in Imaging Realty . . ." (Compl. ¶ 68.) As this actually alleges two

separate agreements—an agreement to pay half of the cost of appraisals and an agreement to buy shares—the Court will consider their viability separately.

a

Alleged Agreement to Buy Shares

Regardless of whether the allegation is against Klufas individually or on behalf of the other shareholders, Romo claims that Klufas agreed to buy her shares, in some capacity. Regarding the transfer of members' interests, Imaging Realty's Operating Agreement provides:

> "No member may sell, transfer, assign, pledge, hypothecate or otherwise dispose of all or any part of its interest in the LLC (whether voluntarily, involuntarily or by operation of law) unless Members owning one hundred percent (100%) of the Percentage Interest in the LLC previously consented to such assignment in writing, granting or denying of which consent shall be in the other Members' absolute discretion." (Klufas Aff., Ex. F, § 6.01(a).)

No such consent in writing occurred. Additionally, Section 6.01 does not apply to an interest transferred under Section 6.04, which cover's Imaging's right of first refusal. Section 6.04 provides that: "Any member who desires to transfer . . . [any portion of his interest], shall be under an obligation, before selling or otherwise transferring such interest, to offer such interest in writing to the LLC for liquidation by it at the then fair value of such interest . . . ." Thus, Romo had to offer her interest back to the LLC in writing. She never made such an offer. Therefore, no matter the content of the oral agreement with Klufas, any oral agreement is invalid under Imaging's Operating Agreement. Therefore, the Court grants summary judgment to Klufas on Romo's claim that she agreed to sell her Imaging Realty shares to Klufas.

b

Alleged Agreement to Split Cost of Appraisal

Romo alleges that Klufas agreed to split the cost of an appraisal of the properties with her. (Romo Dep. 195:17-196:4.) Romo had the appraisals done, but Klufas never paid her half

of the cost. Klufas denies that he agreed to split the costs. (Klufas Ans. ¶¶ 65-66.) Therefore, there is a genuine issue of material fact—whether there was an agreement between Romo and Klufas regarding the appraisals—and summary judgment is not appropriate at this time.

IV

Conclusion

Based on the foregoing, the Court grants summary judgment (1) for Romo on Count II of Advanced's Counterclaim; (2) for the Defendants on Count I of Romo's Complaint; and (3) for Advanced on Count IV of Romo's Complaint. Because genuine issues of material fact remain, the Court denies summary judgment on (1) Count I of Advanced's Counterclaim, and (2) Count II of Romo's Complaint. As to Count VI of Romo's Complaint, the Court grants summary judgment to Klufas on Romo's claim that she agreed to sell her Imaging Realty shares to Klufas, but the Court denies summary judgment on her claim that Klufas agreed to split the cost of the appraisals because there is a genuine issue of material fact. Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.