To commence the statutory time period of appeals as of right pursuant to (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

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BELLE HAVEN CAPITAL MANAGEMENT, INC,

Plaintiff,

-against-

MARK W. STEFFEN,

Defendant.

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Index No. 68897/2017
Motion Seq. #3, 4
Motion Date: June 7, 2019

DECISION AND ORDER

MARK W. STEFFEN,
directly and derivatively on behalf of
BELLE HAVEN CAPITAL MANAGEMENT, INC.,

Counterclaimant and Third Party Plaintiff,

vs.

JOSEPH M. DALTON and STEPHEN J. SCHUM,

Third Party Defendants,

-and-

BELLE HAVEN CAPITAL MANAGEMENT, INC.,

Counterclaim and Nominal Counterclaim Defendant.

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WALSH, J.

Plaintiff/Counterclaim Defendant Belle Haven Capital Management, Inc. ("BHCM") and Third Party Defendants Joseph M. Dalton and Stephen J. Schum ("Individual Defendants") move pursuant to CPLR 3212 for an order granting summary judgment against Defendant and Third Party Plaintiff Steffen ("Steffen") dismissing

Steffen's counterclaim and all claims in Steffen's Third Party Complaint and for them on Counts III and V of BHCM's Third Amended Verified Complaint dated September 7, 2018 ("TAC") (Mot. Seq. No. 003). Steffen moves pursuant to CPLR 3212 for an order granting summary judgment against BHCM dismissing all claims asserted in its TAC (Mot. Seq. No. 004). The motions have been consolidated for purposes of deliberation and determination.

FACTUAL AND PROCEDURAL HISTORY

BHCM commenced this action by filing a Summons and Complaint on November 13, 2017 and a Second Amended Complaint on July 16, 2018. BHCM then filed a Third Amended Verified Complaint on September 7, 2018. Steffen filed his Second Amended Answer, Counterclaim, and Third Amended Third Party Complaint on February 5, 2019. BHCM and the Individual Defendants[1] filed their Answer to Steffen's Amended Third Party Complaint on February 15, 2019.

The Instant Summary Judgment Motions

BHCM is a Connecticut corporation that serves as the General Partner of Belle Haven Investments, L.P. ("BHI"), an investment advisor and broker-dealer with its principal place of business in Rye Brook, New York. BHCM is a closely held corporation with no assets. It exists merely to operate BHI. Steffen was the Chief Compliance Officer for BHI and an Officer and Director of BHCM until being terminated purportedly for cause in 2013. Defendant Steffen is a minority shareholder of BHCM and Dalton and Schum are the only other shareholders. At its crux, this case concerns a dispute between Movants and Steffen about whether, under what circumstances, and at what price Steffen is obligated under the BHCM Shareholder Agreement to sell his shares back to BHCM. In terms of price, the major dispute between the parties involves Steffen's contention that BHCM's value necessarily includes the goodwill of BHI (*i.e.*, the Belle Haven business) whereas Movants contend that the value of BHCM does not include the goodwill of the Belle Haven business.

Movants move for summary judgment pursuant to CPLR 3212 seeking the dismissal of all claims in Steffen's Third Party Complaint. They also request that the Court grant them

[1] Where appropriate, BHCM and the Individual Defendants are referred to collectively as "Movants."

summary judgment with respect to their claims for breach of contract by virtue of Steffen's current employment by a competitor of BHCM and specific performance of sections 8.3 and 9 of the Amended and Restated Shareholders' Agreement dated June 1, 2005 (the "Shareholders' Agreement") due to Steffen competing with BHCM without permission and refusing to tender his shares when section 8.3 purportedly gives BHCM the power to compel the sale of his shares to itself or the remaining shareholders.

Steffen moves for summary judgment pursuant to CPLR 3212 seeking the dismissal of all of Movants' claims against Steffen.

THE PARTIES' PLEADINGS

A. BHCM's Third Amended Complaint

In BHCM's Third Amended Complaint it alleges, in essence, breaches of the Shareholders' Agreement with related claims for declaratory judgment and specific performance, along with abuse of process. BHCM alleges that Steffen breached the Shareholders' Agreement by refusing to tender his shares in purported accordance with the Shareholders' Agreement. It claims that it valued the shares in accordance with the procedures in the Shareholders' Agreement, but that Steffen has refused to accept this valuation. It brings related causes of action seeking a declaratory judgment that Steffen is only entitled to the fair value of his shares in the amount of $89,828.00 and that his refusal to tender the shares constitutes a breach of the Shareholders' Agreement. It seeks specific performance of the valuation procedure set forth in Article 9 of the Shareholders' Agreement. BHCM also alleges that Steffen breached the Shareholders' Agreement by violating the non-compete provisions in the Shareholders' Agreement through working for a direct competitor.

B. Steffen's Second Amended Answer, Counterclaim, and Third Amended Third Party Complaint

In Steffen's Second Amended Answer, Counterclaim, and Third Amended Third Party Complaint, he brings both derivative and direct claims. In his derivative claims brought on behalf of BHCM, he argues that demand is futile because Dalton and Schum (the only other shareholders) suffer from conflicts of interest and divided loyalties that preclude them from

exercising their independent business judgment, including that they are the sole beneficiaries of the breaches of fiduciary duty alleged and that they increased the number of outstanding shares of BHCM stock and sold them to themselves at grossly and unfairly low prices to enrich themselves at the expense of Steffen, a minority shareholder. He also alleges that Dalton, as the sole Director of BHCM, is unable to consider a demand independently and impartially because, due to his alleged conduct, there is a "substantial likelihood" that he will be personally liable for the purported wrongdoing.

Steffen alleges a derivative claim against Dalton and Schum for breach of fiduciary duty based on their purported deliberate undervaluing of BHCM to enable themselves to purchase BHCM stock at artificially low prices, thereby enriching themselves at the expense of BHCM and its minority shareholder Steffen. He also alleges an unjust enrichment claim for this conduct, based on their failure to pay BHCM fair value for the shares they received and the resulting alleged dilution of Steffen's ownership interest in BHCM. Steffen brings a derivative claim against Dalton alleging that he violated his fiduciary duties by compensating himself excessively rather than distributing BHI's net profits to the limited partners, including BHCM, as required by the Partnership Agreement, and that he should disgorge any compensation in excess of reasonable compensation. Steffen also seeks punitive damages.

In addition, Steffen claims direct injury from this conduct and brings a claim for breach of fiduciary duty against Dalton and Schum based on their fiduciary duties owed to him by virtue of their positions as officers and/or directors of BHCM and Dalton's status as majority shareholder of BHCM to him as a current minority shareholder. He also alleges that they owe fiduciary duties to him as a limited partner until at least 2016 as officers of BHCM's General Partner. He argues that they improperly enriched themselves by, among other acts: (1) undervaluing BHCM and purchasing shares at improperly low prices at Steffen's expense; and (2) refusing to pay Steffen for his ownership in BHCM. He alleges that this was a willful breach, which caused him monetary damages and diluted his ownership interest and he seeks punitive damages. He states that the harm is personal and distinct from that of the other shareholders, because Dalton and Schum are the only other

shareholders. Steffen brings a direct claim of unjust enrichment against Dalton and Schum alleging that they benefitted unfairly from their purchase of BHCM shares at prices well below the stock's true value, that his ownership interest in BHCM was wrongfully diluted by the fact that BHCM was not paid fair value for the shares, and that Dalton and Schum were unjustly benefitted by retaining for themselves the value of Steffan's ownership interest.

He also brings a counterclaim seeking inspection of certain books and records possessed by BHCM to which he argues to be entitled by virtue of being a shareholder of BHCM.

THE PARTIES' CONTENTIONS

A. Movants' Factual Contentions in Support of Motion for Summary Judgment (Mot. Seq. No. 003)

Defendant and Third Party Plaintiff Steffen is a minority shareholder of BHCM (*see* Movants' Statement of Undisputed Facts ["Movants' SOUF"] ¶ 1). Dalton and Steffen became shareholders in BHCM in 2001 (Steffen Compl., ¶¶ 114-15). BHCM is a Connecticut Corporation and acts as the corporate General Partner of BHI, a Connecticut limited partnership and an investment adviser and broker-dealer with its principal place of business in Rye Brook, New York (Movants' SOUF ¶¶ 3-5). BHCM is a closely held corporation with no assets; it exists merely to serve as the corporate General Partner of BHI (*id.* ¶ 3). After 2001, Steffen, Dalton, and Richard Bell were each Shareholders in BHCM and Limited Partners in BHI (*id.* ¶ 14). In 2004, Steffen, Dalton, and Bell executed an Amended Partnership Agreement, which is the operative Partnership Agreement for BHI (*id.* ¶ 10). Steffen, Dalton, and Bell also executed an Amended Shareholders' Agreement in 2005, which serves as the operative Shareholders' Agreement (*id.* ¶ 11).

Movants allege that, in amending the Shareholders' Agreement, Steffen, Bell, and Dalton agreed to re-allocate their existing shares and that their respective shares in BHCM would be proportionate to their respective capital contributions in BHI (*see, e.g.*, Palmeri Aff., Ex. N [Correspondence between Steffen and Robert Lehman]; Palmeri Aff., Ex. H [Cavanagh Dep. 113:14-21] "[W]hatever [the limited partners'] capital accounts as of those dates in Belle Haven Investments, L.P., would designate the percentage of ownership of the

shares of the corporate general partner]"). Correspondingly, Movants claim, Steffen and Dalton had purchased shares from Bell in order to make their shares in BHCM equal to their capital accounts in BHI (Movants' SOUF ¶ 12). Kevin Cavanagh, former BHI Chief Financial Officer, testified that he calculated the price of the shares purchased by Steffen and Dalton in connection with the Amended Shareholders' Agreement in 2004-2005 based on the parties' capital accounts in BHI (*id.* ¶¶ 13-16). Cavanagh also testified that when Bell left BHI/BHCM and tendered his shares (which were later purchased by Steffen and Dalton), Cavanagh had determined the price based on the parties' capital accounts in BHI (*id.*). Cavanagh further testified that he had never taken "goodwill" into account when determining the price-per-share (*id.*)

Steffen served as both the Chief Compliance Officer of BHI and an Officer and Director of BHCM until 2013, at which time he was terminated purportedly for cause (*id.* ¶¶ 7, 18). In 2015, Steffen sued BHI and BHCM in the Connecticut Superior Court for claims related to his partnership interest in BHI ("2015 Action") (Movants' SOUF ¶¶ 19-22). Movants allege that, in 2016, BHCM tendered—and Steffen accepted—payment in full satisfaction of Steffen's claims (*id* ¶¶ 23-24). Steffen then formally withdrew the 2015 Action (*id.*). Therefore, Movants argue, all claims related to Steffen's partnership interest have been extinguished by his acceptance of BHCM's check in "full satisfaction of [his] claims" in the 2015 Action (*id.*).

Movants allege that, while the foregoing was taking place, in April 2016, Dalton was issued more shares of BHCM pursuant to Unanimous Consent based on significant capital contributions Dalton made to BHI in 2013 and 2016 (*id.* ¶¶ 25-26). Additional capital contributions by Dalton totaled $850,000 (*id.*). Movants claim that, although Schum's shares were memorialized in 2016, issuance of stock to Schum was approved in 2007 by Dalton and Steffen (*id.* ¶¶ 17, 27). Movants allege that in July 2016, Schum's shares in BHCM were finally memorialized (*id.* ¶ 27). Movants claim that the purchases of shares by Dalton and Schum were the result of their capital contributions to BHI, and in accordance with past practices that the shares in BHCM be tied to the Capital Accounts in BHI (*id.* ¶¶ 28-31).

Movants argue that Steffen has been employed at firms which directly compete with BHI and BHCM since almost immediately after his termination from BHI (*id.* ¶¶ 31-32). Movants state that Steffen is currently employed by Clinton Investment Management, LLC—an investment manager registered with the SEC that claims to specialize in the management of municipal bond portfolios (*id.*). The Shareholders' Agreement, however, contains a Non-Competition provision (Palmeri Aff., Ex. A [BHCM Shareholders' Agreement] §§2.1, 4.1). Movants allege that the Shareholders' Agreement mandates that a shareholder obtain the written consent of BHCM for any endeavor that poses a conflict of interest (Movants' SOUF ¶¶ 31-32). Movants contend that, despite the fact that he is currently a BHCM shareholder and refuses to tender his shares, Steffen has never sought nor obtained written consent of BHCM for his subsequent employment with BHI and BHCM competitors *(id.)*

B. Steffen's Factual Contentions in Support of Motion for Summary Judgment (Mot. Seq. No. 4)

Steffen states that he joined BHCM's predecessor as an employee in 1995 (Steffen Rule 19-A Statement of Materials Facts ["Steffen SOMF"] ¶ 1), and Dalton joined in 1996 (*id.* ¶ 2). At that time, he alleges, BHCM's predecessor was a small broker-dealer focused on fixed income (*id.* ¶ 3). The business was structured as a Limited Partnership (Belle Haven Investments, LP ["BHI"]) operated and controlled by a General Partner (Christian Securities, Inc.) (*id.*). Steffen states that, at some point, he and Dalton became limited partners in BHI but neither they nor other limited partners were considered owners of the business. Instead, he contends, the business was owned by Dean Gestal, a majority shareholder in the General Partner, and Richard Bell, a minority shareholder (Steffen SOMF ¶¶ 3-4).

Steffen states that in or around 2001, Gestal left and Bell acquired 96% of the shares in the General Partner, which was renamed and reconstituted as BHCM (*id.* ¶ 5). He and Dalton each acquired 2% of the General Partner's shares (*id.*). Steffen contends that shortly thereafter, he and Dalton began to develop the investment management side of the business, which he claims required more work but promised greater and more reliable financial

rewards in the long term (Steffen SOMF ¶ 6). In this regard, he argues, their vision for BHCM differed from Bell's, and over time, he and Dalton began to take on greater leadership roles in the business (*id.*) Steffen states that on June 1, 2005, he, Bell, and Dalton executed an amended Shareholders' Agreement for the General Partner that reflected a new division of ownership (*id.* ¶ 7). Specifically, Steffen states that Bell and Dalton each then owned 42 shares, and he owned 20 (*id.*)

Steffen claims that shortly after Bell left BHCM in late 2005, he and Dalton became the sole co-owners of the business, with Dalton owning two thirds and Steffen owning one third (Steffen SOMF ¶¶ 8-10). He argues that, over the years, the BHCM investment advisory business took off, with Dalton serving as Chief Executive Officer and Steffen as Chief Operations Officer and later Chief Compliance Officer (*id.* ¶ 11). He claims that, under his and Dalton's management, BHCM was very successful and continued to grow even during the financial crisis and every year thereafter (*id.*). According to Steffen, BHCM's assets under management (and revenues) have increased exponentially such that BHCM currently has more than $8 billion assets under management.

Steffen argues that, beginning around the time of the financial crisis in 2008, significant tension developed between himself and Dalton (Steffen SOMF ¶ 12). He contends that Dalton began keeping notes regarding Dalton's dissatisfaction with him and that other BHCM employees, including Schum, contributed to a "file" on him (*id.* ¶ 13-14). Steffen also contends that Dalton directed Schum to attend meetings between him and Dalton, during which Schum took detailed notes (Steffen SOMF ¶ 14).

According to Steffen, the situation between Dalton and Steffen worsened and in early 2012, the two business owners agreed to seek help from a conflict resolution coach (*id.* ¶ 15). He states that efforts to repair their dysfunction were not successful (*id.* ¶ 16). He claims that, in March 2013, Dalton informed Steffen that he did not think it was fair that Steffen owned a third of the business and that he wanted to reduce Steffen's ownership interest (*id.*). Steffen also contends that when he asked how this would be accomplished, Dalton proposed reducing Steffen's shares in the General Partner (*id.*).

In August 2013, Dalton's counsel sent Steffen a proposed revised Shareholders'

Agreement that Steffen alleges would have stripped him of all his rights as a minority shareholder (*id.* ¶ 17). Among other things, the proposed agreement allegedly would have increased Dalton's ownership to approximately 80% and removed Steffen's rights to veto certain critical business decisions, such as a "sale of all or substantially all" of BHCM's assets, a "consolidation or merger," or a "dissolution or liquidation" (*id.* ¶¶ 17-18). On September 4, 2013, Steffen claims that he rejected the proposed agreement and sought to negotiate different terms (*id.* ¶ 19).

Steffen claims that, on September 27, 2013, just a few weeks after he rejected Dalton's proposed amended Shareholders' Agreement, Dalton terminated Steffen's employment, which Steffen characterizes as being "supposedly 'for cause"' (*id.* ¶ 20). Steffen claims that Dalton also "purported to remove Steffen as a limited partner in BHI" (*id.*).

Steffen states that BHCM had the right to compel the sale of Steffen's shares after his termination "for cause" (*id.* ¶ 21). He argues that BHCM declined to do so and that, on October 2013, BHCM's counsel wrote a letter stating: "Belle Haven has no current intention to seek to compel [Steffen's] sale of shares to the firm. To the extent he desires, Mr. Steffen is free to seek a bona fide written offer for his shares from a third party. Belle Haven and Mr. Dalton, however, reserve their rights, among other rights, to first and second offer, respectively" (*id.* ¶ 22). Steffen claims that, after his termination, he demanded the return of his BHI capital account, which he alleges was more than $650,000 (*id.* ¶ 23). He also argues that Dalton controlled BHCM and refused, citing certain "contingent liabilities" (*id.*). Specifically, Steffen argues that BHCM stated it would not return Steffen's capital in large part because there was an outstanding arbitration with claims up to $7.5 million (*id.* ¶ 24).

Steffen argues that, although BHCM told Steffen that BHCM faced these significant contingent liabilities, BHCM did not account for these liabilities in its financial statements. He contends that BHCM specifically represented to regulators in certified financial statements that "in the opinion of management [the arbitration] will not have a material adverse effect on the Company's financial condition" (*id.* ¶ 25). Steffen states that Schum testified that at the time he certified the financial statements, he did not believe the Potter

arbitration would have a material effect on the company's financial condition and that the arbitration BHCM had cited as a $7.5 million contingent liability to justify its withholding of Steffen's capital account was ultimately settled for a "*de minimis*" amount in 2015 (*id.* ¶ 26-27). He contends that BHCM still did not return his purported capital (*id.*).

On November 23, 2015, Steffen brought a lawsuit against BHCM to seek the return of his capital account (*id.* ¶ 28). Steffen contends that in 2016, more than three years after Steffen was terminated, BHCM returned Steffen's capital in the amount of $667,909.00. He argues that BHCM's payment reflected only the return of Steffen's capital and did not include any amount reflecting Steffen's equity interest in BHCM (*id.* ¶ 29). Steffen claims that, since his departure in 2013, Dalton has determined his own compensation by first paying all other employees and then paying himself "whatever's left" of the profits (either as direct compensation or as a capital contribution attributable to him). Steffen further argues that, in determining his own compensation, Dalton has never sought the advice of any independent advisor (*id.* ¶ 30).

Steffen claims that, in 2016, without notice to him, Dalton and Schum issued shares to themselves (*id.* ¶ 31). He contends that Dalton issued 11 shares to himself on January 29, 2016 at $18,711 (*id.* ¶ 32). He claims that Dalton issued an additional 6 shares to himself on April 1, 2016 at $10,206 and that 2 shares were issued to Schum on May 31, 2016 at a price of $1,848 per share (*id.* ¶ 33-34). Steffen alleges that neither Dalton nor Schum obtained an independent valuation to determine the prices at which they acquired their shares (*id.* ¶ 35). He claims that, as a result of these share issuances, Steffen was no longer identified on BHCM's 2017 Form ADV (*id.* ¶ 37). Steffen further argues that, after noting his removal from BHCM's Form ADV, Steffen learned that additional BHCM shares had been issued to Dalton and Schum, and he began demanding information about the business, including information about the share issuances (*id.* ¶ 38).

In October 2017, Steffen states that BHCM sent him a check for $89,828 with a cover letter stating that the payment was for the purchase of Steffen's BHCM shares and concluding "[o]nce you have cashed this check, your rights as a shareholder will cease and we will cancel your shares" (*id.* ¶ 39-40). Steffen states that, in the letter, BHCM

represented that the amount it was offering for Steffen's shares had been "calculated in accordance with the shareholder's agreement" (*id.* ¶ 40). He argues that, despite this representation, BHCM never obtained an independent valuation for Steffen's shares. According to Steffen, Schum calculated the price BHCM offered Steffen for his shares and in doing so, he did not take into account any goodwill or intangibles that belonged to the company (*id.* ¶ 41). Steffen states that he rejected the $89,823 offer for his shares, and following his rejection, BHCM brought the instant action (*id.* ¶ 42).

STANDARD OF REVIEW

The proponent of a motion for summary judgment "bears the initial burden of demonstrating its prima facie entitlement to the requested relief" (*Reyes v Arco Wentworth Mgt. Corp*, 83 AD3d 47, 50 [2d Dept 2011]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes*, *supra*, 83 AD3d at 50; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must "affirmatively demonstrate the merit of its claim or defense" (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega*, *supra* 18 NY3d at 504).

Since summary judgment is a drastic remedy, it should not be granted where there is

any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695 [2d Dept 2015]; *William J. Jenack Estate Appraisers & Auctioneers, Inc., supra*). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson,* 8 NY2d 8, 12 [1960]; *Collado, supra*). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion "if there is any doubt as to the existence of a triable issue" (*Herrin v Airborne Freight Corp.*, 301 AD2d 500, 501 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

CHOICE OF LAW

As a threshold matter, while the parties agree that Connecticut Law governs the majority of the claims at issue in the litigation based on the Connecticut choice-of-law provisions in both the Shareholders' Agreement and the Partnership Agreement, they disagree, however, as to whether New York or Connecticut law applies to BHCM abuse of process claim.

The BHCM Shareholders' Agreement contains a choice of law clause which provides in relevant part that "[t]his Shareholders' Agreement shall be governed by, and enforced and construed in accordance with, the laws of the State of Connecticut without giving effect to the principles of conflict of laws thereof" (Palmeri Aff., Ex. A at § 12.12). New York courts will typically enforce a choice-of-law clause if the chosen law bears a "reasonable relationship" to the parties in the transaction (*Welsbach Elec. Corp. v MasTec N.Am., Inc.*, 7 NY3d 624 [2006]; *see also AEI Life LLC v Lincoln Ben. Life Co.*, 892 F3d 126, 131 [2d Cir 2018] [holding that "under New York's center-of-gravity test" the laws of the state with the most significant relationship to the transaction shall govern]; *Ministers & Missionaries Ben Bd. v Snow*, 26 NY 3d 466, 470 [2015] [New York courts "will generally enforce choice-of-law clauses and that contracts should be interpreted so as to effectuate the parties' intent"]).

In addition, BHCM is a Connecticut corporation, and "[o]ne of the abiding principles of the law of corporations is that the issue of corporate governance, including the threshold demand issue, is governed by the law of the state in which the corporation is chartered"

(*Hart v General Motors Corp.*, 129 AD2d 179, 182 [1st Dept 1987]; *see Lerner v Prince*, 119 AD3d 122, 128 [1st Dep't 2014] ["New York choice-of-law rules provide that substantive issues such as issues of corporate governance, including the threshold demand issue, are governed by the law of the state in which the corporation is chartered"]). In upholding the concept of single-State resolution of issues of corporate governance, the Court noted: "[A] corporation—except in the rarest situations— is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation" (*Hart*, *supra* 129 AD2d at 183). Here, there is a reasonable relationship between Connecticut and the Shareholders' Agreement given that the BHCM was formed in Connecticut and no fundamental public New York policy would be violated by applying Connecticut law to all claims except the abuse of process claim (*see Wells v Shearson Lehman/American Express, Inc.*, 72 NY2d 11, 18 [1988]).

However, with respect to Movants' abuse of process claim, New York law governs. Under New York's choice-of-law rules, malicious prosecution and abuse of process claims are generally determined by the local law of the state where the proceeding complained of occurred (*Caldwell v Gutman, Mintz, Baker & Sonnenfeldt, P.C.*, 701 F Supp 2d 340, 344 [ED NY 2010]; *Heaney v Purdy*, 29 NY2d 157, 159 [1971] [where plaintiff is claiming that defendant used its legal machinery maliciously it would be almost unthinkable to seek the applicable rule in the law of some other place]; *Tripodi v Local Union No. 38, Sheet Metal Workers' Intl. Assn.*, 120 F Supp 2d 318, 319 [SDNY 2000] ["[T]he paramount interest in cases involving the tort[ ] of . . . abuse of process is that of the state whose courts were allegedly abused. Therefore, the general rule in such actions is that the governing law is that of the state where the proceeding complained of took place"]).

While Steffen commenced suit in Connecticut against BHCM, Dalton and Schum in 2017, he withdrew that case in favor of this action. The instant complaint was then filed in New York and the proceeding has taken place in New York state court. In their abuse of process cause of action, Movants argue that the allegations in Steffen's New York Third Party Complaint are patently frivolous, therefore this claim is governed by New York law.

DISCUSSION

Steffen's Motion for Summary Judgment

In his motion for summary judgment, Steffen alleges that BHCM is a profitable investment advisory business and that, since he was terminated in 2013, Dalton and Schum have tried to deprive him of his interest in the business. Steffen argues that he is not obligated to sell his shares to BHCM for the "unilaterally set price of $89,828" and that he is not obligated to comply with Article 9 because BHCM declined its repurchase right. Steffen also argues that he has not breached any obligation by "earning a living" and that Movants' abuse of process claim is "utterly frivolous." In his motion Steffen seeks dismissal of all of Movants' claims.

Count I: Declaratory Judgment

BHCM alleges in its TAC that the Shareholders' Agreement is a binding contract between BHCM and Steffen, that it offered Steffen Fair Value pursuant to the terms of the contract, and that Steffen refused to tender his shares for the alleged Fair Value of $89,828.00. Therefore, BHCM argues, it is entitled to a declaratory judgment that it is entitled to the Fair Value of Steffen's shares in BHCM amounting to $89,828.00 and that Steffen's refusal to tender his shares for such value constitutes a breach of the Shareholders' Agreement.

The Connecticut Rules of Practice define the scope of declaratory judgment actions as follows: "The judicial authority will, in cases not herein excepted, render declaratory judgments as to the existence or nonexistence (1) of any right, power, privilege or immunity; or (2) of any fact upon which the existence or nonexistence of such right, power, privilege or immunity does or may depend, whether such right, power, privilege or immunity now exists or will arise in the future" (Practice Book § 17–54).

Trial courts are afforded "wide discretion to render a declaratory judgment unless another form of action clearly affords a speedy remedy as effective, convenient, appropriate and complete" (*England v Town of Coventry*, 183 Conn 362, 365 [1981]; *see also O & G Indus., Inc. v Litchfield Ins. Group, Inc.*, 2013 WL 3871341, at *6 [Conn Super Ct 2013]). Where a plaintiff is essentially seeking a declaratory judgment that there was a valid

contract, a breach of a contract, and the defendant is liable to the plaintiff for losses it has suffered and will suffer as a result the court may dismiss or strike the claim. Here, as in *O & G Indus.,* BHCM's claim is based upon an alleged breach of the Shareholders' Agreement and there is no need to declare the rights of the parties because the Court's interpretation of the contract under Plaintiff's breach of contract claim will determine the parties' rights. Therefore, the breach of contract claim provides immediate and complete relief to Plaintiff. Accordingly, declaratory judgment is unnecessary and Steffen's motion for summary judgment with respect to the Count I is granted.

In any event, even if this claim is properly asserted as a declaratory judgment, because (as discussed *infra*) Movants have not established that Steffen breached the Shareholders' Agreement by refusing the buyout offer, this cause of action shall be dismissed.

Count II: Breach of Contract (Refusal to Tender Shares under Shareholders' Agreement)

Movants argue that the Shareholders' Agreement is a binding contract between BHCM and Steffen, that BHCM offered Steffen Fair Value pursuant to the terms of the contract, that Steffen refused to tender his shares for the alleged Fair Value of $89,828.00, and that this refusal was a breach of the Shareholders' Agreement resulting in damages, including attorneys' fees.

Section 8.3 of the Shareholders' Agreement provides:

> 8.3 Removal for Cause and Redemption or Sale of Shares. Except as expressly provided hereinabove, a Shareholder may only be compelled to sell his Shares to the Corporation (or if declined by the Corporation's Board of Directors (excluding the vote of the Shareholder who is the subject of the proposed removal), then offer all of his Shares to the remaining Shareholders, in accordance with Article IX herein below

Section 7.2 of the Shareholders' Agreement provides:

> 7.2. Transfer to Third Party. If any Shareholder (the "Offeror") wishes to transfer any of his Shares, he first shall secure a bona fide binding written offer (the "Outside Offer") for such Shares from a third party (the "Outside Offeror"), who shall he unrelated to the Offeror. Thereafter, the Offeror shall make a series of offers to sell all of his Shares as follows, at a purchase price per Share equal to the lesser of: (i) the price offered by the Outside Offeror, or (ii) the Fair Market Value of the Subject Shares (as hereinafter defined), and upon all the other terms and conditions as set forth in the Outside Offer, as follows:

(a) A first offer (the "First Offer") to the Corporation; and

(b) Following the expiration of the First Offer, a second offer (the "Second Offer") of each of the Offeror's Shares not to be purchased by the Corporation to the other Shareholders on a pro rata basis, or in such other proportions as the other Shareholders may unanimously agree.

All offers shall be made in writing with copies of the Outside Offer sent to the Shareholders and the Corporation, together with all material terms thereof and the identity of the Outside Offeror. Each offer shall state that the offerees shall have the right to purchase the offered Shares at the same price per Share and on the same terms as are contained in the Outside Offer. Each First Offer shall be irrevocable for a period of forty-five (45) days after the mailing thereof. Each Second Offer shall be irrevocable for a period of thirty (30) days after the mailing thereof. Acceptance by the Corporation of any First Offer shall require the vote of a majority of the directors of the Corporation, excluding, if applicable, the director making such First Offer. Acceptance by one or more offerees of the First Offer and/or Second Offers shall not be valid unless in the aggregate acceptance(s) shall have been given with respect to not less than all of the Shares included in the First Offer. Failure to accept a First Offer or a Second Offer in a timely fashion shall constitute a rejection thereof.

Exercise of any of the Offers referred to in this Section 7.2. shall be made by notice to all other parties within the applicable offer period. Any such exercise shall result in a binding and enforceable obligation by the accepting offerees to purchase that number of the Offeror's Shares as are stated in such acceptance.

According to Movants, Steffen was removed as an employee, director and officer of BHCM and BHI, purportedly for cause, effective October 31, 2013.[2]

After Steffen's termination, Dalton did not, either on behalf of the Corporation or on behalf of himself as the sole remaining shareholder, seek to compel Steffen to sell his shares. Instead, in a letter dated October 23, 2013, BHCM's counsel sent a letter to Steffen's counsel stating that: "With respect to Mr. Steffen's status, I write to confirm that while he has been terminated as an employee, director and officer, Belle Haven has no

[2] There is some dispute between the parties concerning the timing of Steffen's removal. Steffen alleges that Dalton terminated his employment on September 27, 2013 and then removed him as a director and limited partner effective October 31, 2013 (Steffen Resp. to Movants' SOUF ¶ 18).

current intention to seek to compel his sale of shares to the firm. To the extent he desires, Mr. Steffen is free to seek a bona fide written offer for his shares from a third party. Belle Haven and Mr. Dalton however, reserve their rights, among others rights, to first and second offer, respectively" (*see* 4/12/19 Gunnell Aff. Ex. 11). In another letter, dated January 4, 2016, BHCM confirmed that "Belle Haven decided to allow Mr. Steffen to remain a shareholder while removing him as a partner, director and officer" (*see* 6/6/19 Trzaskoma Aff. Ex. 4).

There is also no dispute that, on October 12, 2017, BHCM sent Steffen a check for $89,828 and claimed that this amount "represent[ed] the value of [Steffen's] shares in Belle Haven Capital Management" (*see* Steffen Reply 19-A Stmt. § 38; 4/12/19 Gunnell Aff. Exs. 22-23). In this correspondence BHCM states "[o]nce you cash this check your rights as a shareholder will cease and we will cancel your shares" and purported to calculate the value of Steffen's shares "in accordance with the shareholder's agreement" (*id.*). Prior to this date neither BHCM nor the remaining shareholders had sought to compel Steffen to sell his shares to them and, in the correspondence referenced above, had represented that they were *not* seeking to remove him as a shareholder or to compel a sale of his shares. When Steffen refused to accept the check in exchange for his shares, BHCM filed this lawsuit.

It is black letter law that when a "[contractual] right is given, and no time is prescribed for its exercise, a reasonable time is allowed" (*see Renoud v Daskam,* 34 Conn 512, 516 [1868]). While the reasonableness of a length of time is generally a question of fact for the trier, in some cases the delay is such that it is unreasonable as a matter of law and the contractual right expires (*Kelley v Ostrout*, 1993 WL 498924, at *3 [Conn Super Ct 1993] [requiring that an option to purchase be exercised in a "reasonable time" and concluding that any reasonable time had expired]; *Saraceno v Carrano*, 92 Conn. 563 [1918] [concluding that defendant had not exercised his option within a reasonable time and therefore the option had no longer any effect or validity]). Where the right relates to the sale of shares, time limitations are particularly important because the value of shares can increase substantially over time. Thus, courts have consistently limited the time during which a share purchase option can be exercised (*see, e.g., Martin v Martin's News Serv.,*

Inc., 9 Conn App 304, 309 [Conn App Ct 1986] ["Regardless of the ambiguity inherent in the term 'reasonable time,' this is a clear case of a lapsed offer. Nine months cannot be considered a reasonable time"]).

Any contractual right to compel the sale of Steffen's shares pursuant to the Shareholders' Agreement that BHCM may have had upon Steffen's termination in October 2013 expired well before BHCM's October 2017 letter purporting to compel the sale of his shares. Under these circumstances, BHCM and Dalton's delay of four years before purporting to exercise a contractual right to compel the sale of Steffen's shares is unreasonable as a matter of law, particularly in light of their representations in 2013 and again in 2016 that they were *not* seeking to compel a sale. Moreover, Schum was not even a shareholder in 2013 and therefore had no right to purchase Steffen's share as a remaining shareholder.

While Movants try to rely on the non-waiver provision in section 12.4, this general provision is irrelevant because any contractual right had expired as a matter of law. BHCM and its shareholders simply do not have a right to the section 8.3 purchase options in perpetuity. Generic nonwaiver provisions like the one in the Shareholders' Agreement do not "preclude a waiver by course of performance" (*see Liberty Bank v New London Ltd. Pship*, 2007 WL 1416944 at *9 [Conn Super Ct 2007] [a party's "conduct in toto regarding timeliness" can "sp[eak] louder than [the] words . . . of the 'anti-waiver' clause"]). For years, BHCM, Dalton, and Schum have confirmed that they had made a deliberate choice to allow Steffen to remain a shareholder by their course of conduct.

Moreover, the non-waiver provision in the Shareholders' Agreement specifically permits parties to waive their rights in writing. Thus, even if the nonwaiver provision applied to the Section 8.3 repurchase options, BHCM and Dalton clearly declined their rights in writing when they sent the October 2013 letter advising Steffen that he was free to seek third party offers.[3] Based on the foregoing, the Court shall grant the branch of Steffen's

[3] It also does not appear that Movants complied with the contractual Article IX valuation procedures properly in any event, including through following the process set forth for selecting an independent appraiser. However, the Court need not reach this issue because any contractual

motion seeking dismissal of Count II.

Count III: Breach of Contract (Violation of Non-Compete Provisions)

Movants argue that Steffen breached the non-compete provisions in the Shareholders' Agreement by being employed by a direct competitor of BHI without written consent while still holding shares in BHCM resulting in damages. Movants also argue that the non-compete provisions in the Shareholders' Agreement are sufficiently limited in time and scope to be enforceable.

Article II of the Shareholders' Agreement entitled "**Non-Competition**" provides in section 2.1:

> Each of the Shareholders covenants and agrees with the other Shareholders and the Corporation that he will not for ***as long as he remains a director or officer of the Corporation,*** singly or jointly with any other Shareholders, or other person, company or firm, directly or indirectly, carry on the business of or be employed, engaged or concerned or interested in any similar business or activity competing with the principal business of either the Corporation, the BH Partnership or the Loughlin Partnership; provided, however, that a Shareholder who is: (a) then merely a passive Shareholder of the Corporation and/or passive limited partner of BH Partnership and/or Loughlin, awaiting to be bought out by the Corporation, the remaining Shareholders ***or other third parties*** in accordance with the terms of this Agreement... shall not be deemed to be competing with the Corporation within the meaning of this Article.

Movants also point to Article IV entitled "General Restrictions On The Shareholders" to argue that Steffen's employment with a direct competitor breaches this provision of the Shareholders' Agreeement. Section 4.1 provides that "[it] is agreed by and between the parties that they will not individually or jointly participate in any other endeavor that in any way conflicts with the business affairs of either the Corporation, the BH Partnership or the Loughlin Partnership unless, prior to engaging in any such activities, full disclosure has been made to the other parties hereto and written consent obtained."

The parties do not dispute that Steffen was terminated as an employee and removed as a limited partner and director by October 31, 2013 (Movants' SOUF ¶ 18, Steffen Resp. to SOUF ¶ 18). Therefore, his sole role is as a shareholder. Section 2.1 plainly states that the

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right expired well before October 2017.

specific agreement not to compete applies so long as the individual "remains a director or officer." The term "passive Shareholder" is not defined in the Agreement and, while BHCM argues that to be "merely passive" a shareholder "necessarily must invoke the valuation procedures provided in the Shareholders' Agreement and await the result," (Movants' Opp. at 14), there is no such requirement in Article II. In fact, the language specifically contemplates the sale of shares to a third party to which the valuation provisions would be inapplicable and instead the right-of-first refusal procedures in section 7.2 would apply.

Movants also argue that, because Steffen is entitled to certain rights as a shareholder he therefore cannot be a passive shareholder. However, the clear and unambiguous terms of the Shareholders' Agreement controls the rights of shareholders and contemplates that a shareholder who is not also an officer or director can be considered a passive shareholder and, therefore, may be employed by a competitor and not be deemed to be competing.

Movants contend that Steffen breached the general restrictions provision set forth in section 4.1 by being employed by a competitor. Specific provisions of a contract will control over general provisions (*Sentra Sec. Corp. v Jackson*, 1998 WL 27841, at *5 [Conn Super Ct 1998]; *Mills v Forty-Seven Main St.*, LLC, 2012 WL 1511379, at *7 [Conn Super Ct 2012] [erroneous to conclude that general language can control over specific language]).

Section 4.1 is just such a general provision covering the restrictions on shareholders; section 2.1 specifically addresses the shareholders' obligations with respect to employment by competitors. Therefore, section 2.1 governs Steffen's obligations concerning his current employment. As discussed above, under the plain language of section 2.1, Steffen's employment with a direct competitor does not breach the non-compete provisions of the Shareholders' Agreement. Accordingly, the Court shall grant the branch of Steffen's motion for summary judgment seeking the dismissal of Count III.[4]

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[4] While the Court need not reach the enforceability of this restrictive covenant, it is likely that it would be found unenforceable under Connecticut law given its geographic scope and length. In effect Movants seek to hold Steffen hostage from earning a living by failing to invoke their rights to a buy-out for over four years. While it is true that Steffen had the option of obtaining an offer from a third-party (which Movants could then match), the reality of that occurring is fairly *de minimis* given the lack of marketability of a minority interest in a closely

Count IV: Abuse of Process

Movants assert that the allegations in Steffen's Third Party Complaint are "patently false and frivolous as Steffen already received $667,909 in full satisfaction of his claims with respect to his partnership interest in BHI on April 13, 2016."

To prevail, Movants "must establish that [Steffen] (1) employed regularly issued legal process to compel performance (or forbearance) of some act; (2) with intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of process" (*Golden v City of New York,* 418 F Supp 2d 226 [ED NY 2006] [applying New York law]). "In order for the conduct to be considered tortious there must be something done outside the use of the process a perversion of the process" (*Bd. of Educ. of Farmingdale Union Free Sch. Dist. v. Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO,* 38 NY2d 397, 403 [1975] [internal quotations omitted]). "No action for abuse of process will lie premised merely upon the commencement of a civil action, even if such action is commenced with malicious intent" (*I.G. Second Generation Partners, L.P. v Duane Reade,* 17 AD3d 206, 207 [1st Dept 2005]), or has "occasioned a party trouble, inconvenience and the expense of defending" (*Curiano v Suozzi,* 102 AD2d 759, 759 [1st Dept 1984], *affd,* 63 NY2d 113 [1984]). Indeed, "[p]ublic policy requires that parties be permitted to avail themselves of the courts to settle their grievances and that they may do so without unnecessary exposure to a suit for damages in the event of an unsuccessful prosecution" (*Miller v Stern*, 262 AD 5, 7 [1st Dept 1941]).

Movants cannot establish (nor have they even alleged) that Steffen's Third Party Complaint seeks to obtain some "collateral objective that is outside legitimate ends of process." Instead, the record is clear that a real dispute exists among the parties and that Steffen has legitimate grievances. Contrary to Movants' contention that Steffen is using the legal process in an "improper manner" by filing a lawsuit he knows to be "baseless," the record establishes that Steffen is using the legal process appropriately. Steffen has brought third party claims and counterclaims in this action as a minority shareholder and to remedy

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held corporation.

alleged breaches of fiduciary duty (*see Gidumal v Cagney,* 144 AD3d 550, 552 [1st Dept 2016] ["[i]f process has a legitimate purpose, the allegation that it was misused does not suffice to state a claim for abuse of process"]). Steffen's allegations are not "patently false and frivolous."

There is evidence in the record that reflects that Dalton and Schum issued shares to themselves without notice to Steffen and without obtaining an independent valuation for those shares (Steffen's SOMF ¶¶ 31-35). Further, there is evidence in the record that for many years, Dalton has taken substantial compensation without any effort to determine whether he is paying himself market rate (Steffen's SOMF ¶ 30). The evidence Steffen has presented in opposition to Movants' motion for summary judgment for breach of fiduciary duty and unjust enrichment is sufficient to create a triable issue of fact. For all the foregoing reasons, the branch of Steffen's motion for summary judgment seeking dismissal of Count IV shall be granted.

Count V: Specific Performance as to Article 9 Valuation Provisions

"Since specific performance is a remedy for breach of contract, this remedy requires proof that the contract was breached" (*see Ruby v Chase Manhattan Bank*, 2002 WL 725493, at *3 [Conn Super Ct 2002] ["Specific performance is an equitable remedy and it, of necessity, includes the findings concerning the breach of contract to support its claims"]). Because BHCM's breach of contract claim is dismissed as a matter of law, its cause of action for the remedy of specific performance similarly fails and the Court shall grant the branch of Steffen's motion seeking dismissal of Count V.

Movants' Motion for Summary Judgment

In their motion for summary judgment, Movants allege that the primary issue in the case is contractual; *i.e.*, that Steffen does not want to be bound by the valuation procedures in the BHCM Shareholders' Agreement. Movants allege that they are entitled to summary judgment dismissing all of Steffen's claims, granting partial summary judgment on their breach of contract claim, and granting summary judgment on their claim for specific performance.

Count I (Counterclaim Against BHCM: Right to Inspect Books and Records)

Steffen alleges that he has made multiple inspection demands as a shareholder of BHCM to inspect various books and records from BHCM including financial statements and documents relating to BHCM's valuation of his shares. Apparently recognizing that this counterclaim has been rendered moot by the discovery provided in this action, Steffen failed to submit opposition to this argument and, accordingly, the Court shall grant this branch of Movant's motion (*see Agoglia v Benepe*, 84 AD3d 1072, 1075 [2d Dept 2011]; *see also Allan v DHL Express (USA), Inc.*, 952 NYS 2d 275, 279 [2d Dept 2012]; *Sanchez v Village of Ossining*, 707 NYS 2d 866 [2d Dept 2000]).[5]

Counts II, III: Breach of Fiduciary Duty/Unjust Enrichment (2016 Share Issuance)

Movants argue that they are entitled to summary judgment with respect to Steffen's derivative claims for breach of fiduciary duty and unjust enrichment relating to the 2016 stock issuances to Dalton and Schum because: (1) Steffen approved the issuance of two shares of common stock to Schum and is thus estopped from arguing that the share issuance was improper; and (2) the consideration for the shares issued to Dalton and Schum was in good faith, reasonably informed, fair, and objectively reasonable because the consideration was explicitly authorized by the Articles of Incorporation and Connecticut Statute and the consideration was derived using the same methodology used to determine the price of Steffen's shares (Movants' Mem. at 11-21).[6]

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[5] In any event, at this point, written discovery has been closed for months and the deadline for fact discovery has expired. There have been extensive document productions, multiple days of depositions, and BHCM purports to have produced the specific documents demanded by Steffen. Particularly given that Steffen does not appear to request additional discovery or contend that this claim should not be dismissed, even if Steffen had addressed this count in his opposition, it would be rendered moot (*see Bank of New Haven v Hilton Mech. Contractors, Inc.*, 1995 WL 625901, at *1 [Conn Super Ct 1995] ["A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists... [i]t is not the province of ... courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow"]).

[6] Steffen alleges that Dalton and Schum deliberately undervalued BHCM to enable themselves to purchase BHCM stock for artificially low prices, thereby enriching themselves at the expense of BHCM and its minority shareholder Steffen.

With respect to the issuance of the two shares of stock to Schum, Movants argue that because Steffen signed the resolution authorizing the issuance of two shares of common stock to Schum in 2007, which Movants allege was "memorialized" in 2016, he should be "deemed to have either ratified the issuance or is estopped from disclaiming his signature" (*id.* at 13).

Movants claim that Steffen is estopped from contesting the issuance of shares to both Dalton and Schum because "he endorsed the valuation method used to issue the shares in this case when he acquired his own shares derived from the same methodology" (*id.* at 15). They claim that Connecticut law and the governing documents in this case expressly permit the Directors to issue stock at their discretion and that there is no requirement in the BHCM Shareholders's Agreement requiring BHCM stock to be issued for Fair Market Value as determined by Article 9 of the Shareholders' Agreement, which only applies to the purchase of other shareholders' shares under sections 7 and 8 of the Shareholders' Agreement. Movants argue that the stock issuances were made in accordance with past practices and in accordance with Connecticut law finding transactions made in the ordinary course of business and in keeping with past practices to be fair (*id.* at 17). Movants argue that "there can be no dispute as to whether the stock issuances to Mr. Dalton and Mr. Schum were the product of valid business judgment, objectively informed by past practices, and fair to the corporation" (*id.* at 21).

The elements for a breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship; (2) giving rise to a duty within the scope of that relationship; (3) that the defendant advanced its own interests to the detriment of plaintiff within the scope of that relationship; and (4) that the plaintiff suffered damages as a result of the defendant's conduct (*Censor v ASC Tech. of CT, LLC*, 900 F Supp 2d 181, 213 [D Conn 2012]; *Ives Bros., Inc. v Keeney*, 2000 WL 35775696 at *5 [Conn Super Ct 2009]). As officers and directors of BHCM, Dalton and Schum owed fiduciary duties to BHCM and to Steffen as a minority shareholder (*Ostrowski v Avery,* 243 Conn 355, 357 [1997]). Whether a breach of fiduciary duty has occurred is almost always a question of fact for a jury to resolve in light of all the relevant circumstances (*see Schumann v Sylvester,* 1991 WL 88492, at *1 [Conn

Super Ct 1991] ["whether there has been a breach of such a fiduciary duty or duties as alleged are questions of fact"]; *Jacobs, Grudberg, Belt & Dow, PC v Sullivan*, 2004 WL 1888938, at *2 [Conn Super Ct 2004] ["breach of a fiduciary duty. . . claim necessarily involves an issue of fact]; *Peebles v Ayres*, 2013 WL 4419337, at *8, n.6 [Conn Super Ct 2013] ["the trier of fact must determine whether [defendant] breached his fiduciary duty"]; *Biller Assocs. v Peterken,* 269 Conn. 716, 722 [2004] [same]; *Chioffi v. Martin,* 181 Conn App. 111, 136 [Conn App Ct 2018].

When "a breach of fiduciary duty is alleged and the allegations concern fraud, self-dealing or a conflict of interest, the burden shifts to the fiduciary to prove fair dealing by clear and convincing evidence" (*Cadle Co. v D'Addario*, 268 Conn 441, 457 [2004]). Where a plaintiff has established self-dealing, a fiduciary "has the burden of showing that any personal dealing with the corporation is fair, in good faith and for adequate consideration" (*Osborne v. Locke Steel Chain Co.,* 153 Conn 527, 531 [1966]; *Klopot v. Northrup*, 131 Conn 14, 20 [1944]).

In support of their *prima facie* case, Movants seem to be relying on the business judgment rule. However, because Steffen has provided evidence of self-dealing, Defendants must show that any personal dealing with the corporation was fair, in good faith and for adequate compensation (*Lynn v Bosco,* 2015 WL 1867112, at *11 [Conn Super Ct 2015] [*citing Osborne v. Locke Steel Chain Co.,* 135 Conn 27, 531 [1966]]). Further, the shield of the business judgment rule is insufficient to overcome the evidence of self-dealing and insufficient to show by clear and convincing evidence that Movants acted in good faith and fair dealing as a matter of law (*see Rosenfield v Metals Selling Corp.,* 229 Conn 771, 795 [1994]; *Lynn, supra* 2015 WL 1867112 at *11).

The dispute over the two shares issued to Schum is a red herring for a number of reasons. First, it does not resolve Dalton's issuance of 17 shares to himself in 2016 for what Steffen contends was inadequate consideration. Second, the Court cannot rule as a matter of law whether the March 2007 letter from Steffen and Dalton constitutes an authorization by Steffen to issue two shares of BHCM stock to Schum given that it states a grant of two common shares of stock of "Belle Investments, L.P." (BHCM's predecessor in interest) and

the issuance was to have taken place within two years of the date of the letter and the first document reflecting an ownership of the two shares by Schum is in 2016 (Palmeri Aff. Ex. J). Even if Steffen authorized the issuance of two shares to Schum based on this 2007 letter, in 2016 he did not authorize them to be sold at a price Steffen claims did not constitute fair consideration and which had the impact of diluting the value of Steffen's shares.

Therefore, even if there were no issue of fact as to the authorization of the Schum shares, there are nevertheless questions of fact as to whether Dalton and Schum breached their fiduciary duty by failing to set a fair price for the shares. Such questions of fact include whether Dalton and Schum paid fair prices for the shares and whether they acted in good faith (*see Yanow v Teal Indus., Inc.*, 178 Conn 262, 267, 283-85 [1979]). These determinations are for the trier of fact and are inappropriate for resolution on a summary judgment motion (*see Barkyoumb v Barkyoumb*, 2004 WL 113522, at *3 [Conn Super Ct 2004] ["Valuation is a factual determination"]; *State v Goggin*, 208 Conn 606, 612 [1988] [finding "genuine issue of material fact concerning the fair market value of the life estate"]; *Turgeon v. Turgeon*, 190 Conn. 269, 274 [1983] ["In assessing the value of property the trier arrives at his own conclusions by weighing the opinions of the appraisers, the claims of the parties, and his own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation"]).

Similarly, whether Dalton and Schum were unjustly enriched by deliberately undervaluing BHCM, purchasing shares at artificially low prices, and retaining the benefit of the unfairly low share purchase prices at the expense of BHCM and its minority shareholder, as alleged by Steffen, is also a classic question of fact (*see Medura v. Town & Country Veterinary Assocs., P.C.*, 2012 WL 3871953, at *7 [Conn Super Ct 2012] [whether "defendants wrongfully retained a benefit... is a question of fact as to whether defendants' enrichment was unjust"]; *Duncan v. Junior Achievement, Inc.*, 2000 WL 157701, at *4 [Conn. Super. Ct. Jan. 27, 2000] ["whether the failure to pay the plaintiff for the benefit was unjust is a question of fact"].[7]

[7] The elements for a cause of action for unjust enrichment are "(1) that the defendants were benefitted, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3)

Particularly given the high burden of proof imposed on fiduciaries in transactions involving self-dealing, the branches of Movants' motion for summary judgment seeking dismissal of Steffen's derivative claims for breach of fiduciary duty and unjust enrichment regarding the 2016 share issuance shall be denied.

Count IV: Breach of Fiduciary Duty (Excessive Compensation to Dalton)

Movants argue that the Court should grant summary judgment dismissing Steffen's derivative claim alleging that Dalton breached his fiduciary duties by compensating himself excessively rather than distributing BHI's net profits to the limited partners, including BHCM, as required under the Partnership Agreement. Movants contend that Steffen is estopped from arguing that Dalton's compensation is excessive because the amount was determined in accordance with past practices. Movants also argue that compensation has always been decided at the partners' discretion, as it was in this case, and is fair (Movants' Mem. at 3, 28-30).

Connecticut's standard for breach of fiduciary duty governing transactions involving conflicts of interest or self-dealing discussed above also applies to Steffen's claim for breach of fiduciary duty based on allegations that Dalton's compensation was excessive. The burden is on Dalton to demonstrate that his compensation was fair and reasonable (*see, e.g. Sarner v Fox Hill, Inc.*, 151 Conn 437, 445 [Conn 1964] ["defendant, as a stockholder, was the only stockholder who voted at that meeting; he, as previously indicated, had the burden of proving the fairness and reasonableness of the compensation he received, and his vote as the sole stockholder ratifying the transaction did not serve to absolve him of that burden"]).

Here, Movants have not provided evidence establishing a *prima facie* case demonstrating that Dalton's compensation was fair. Movants argue that Dalton's compensation was fair as a matter of law because it was made in the ordinary course of business and in keeping with past practices of the corporation - *i.e.* based on the controlling partners' instructions (Movants' Mem. at 28-29). Movants also point to the fact that BHI's assets under management "have grown exponentially from zero at the time of its formation

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that the failure of payment was to the plaintiff's detriment" (*Vertex, Inc. v City of Waterbury*, 278 Conn 557, 573 [2006]).

to billions as of September 2018" purportedly due to Dalton's contributions. However, as Movants admit, in the past the controlling partners determining the distribution of profits included "Mr. Bell, Mr. Dalton, and Steffen when Mr. Cavanagh was CFO; and Mr. Dalton and Steffen when Mr. Schum was CFO" (Movants' Mem. at 29), not just Dalton himself.

In opposition, Steffen has introduced evidence, including Dalton's own deposition testimony, that Dalton sets his own compensation, and that Dalton does so by taking all of the "left over" profit (Steffen Opp. at 24; Noonan Aff. Ex. 2 at 33:13-23). Steffen alleges that BHCM has no third party compensation committee to review Dalton's compensation and that Dalton has never engaged a third party compensation firm or commissioned a salary survey to determine the reasonableness of his compensation (*id.*; *see also* Noonan Aff. Ex. 4 156:23-157:16).[8]

Steffen contends that, since he was terminated in 2013, Dalton has paid himself more than $26 million rather than distributing BHI's net profits to the limited partners. Steffen states that in 2012, the last full year of Steffen's employment, Dalton's compensation was $1.19 million and Steffen's compensation was $393,750, while in 2018 Dalton's compensation was $8 million (Steffen Opp. at 25). Steffen claims that executives at other companies performing similar functions to Dalton are compensated at a fraction Dalton's compensation (*id.*). Regarding the parties' past practices, Steffen argues that Dalton's unilateral determination of the amount of his own compensation is not in keeping with past practices and contends that "it is one thing for both owners of a business to reach a mutual agreement as to how to set their compensation" but "[i]t is quite another thing for an unchecked majority shareholder to shovel every penny of a business's profits into his own pockets even when doing so would result in plainly excessive compensation" (*id.*).

Here, because Movants have failed to demonstrate by clear and convincing evidence that Dalton's compensation was fair and reasonable (particularly in light of the evidence

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[8] As Steffen notes, in *Rosenfield* (*supra* 229 Conn at 798) the court found the alleged self-dealing transactions to be not unreasonable given that the accountant's determinations were supported by an auditor's report (Steffen Opp. at 26). Here, Dalton does not provide any such evidence.

submitted by Steffen reflecting triable issues of fact as to the reasonableness of Dalton's compensation), the Court shall deny this branch of Movants' motion.

Counts V, VI: Breach of Fiduciary Duty/Unjust Enrichment (Steffen's Direct Claims)

Steffen also brings direct claims for breach of fiduciary duty and unjust enrichment alleging that Dalton and Schum breached their fiduciary duties when they enriched themselves by: (1) undervaluing BHCM and purchasing shares at improperly low prices, at Steffen's expense; and (2) refusing to pay Steffen for his ownership in "the Belle Haven business" (Steffen Second Amended Answer, Counterclaim, and Third Party Complaint at ¶ 28).

The breach of fiduciary duty and unjust enrichment claims based on allegations that Dalton and Schum undervalued BHCM and purchased shares at improperly low prices, thus harming Steffen through diluting his interest, raise genuine issues of material fact for the same reasons that there are genuine issues of material fact as to his derivative claims in Counts II and III. Therefore, the branches of Movants' motion for summary judgment seeking dismissal of Steffen's direct claims for breach of fiduciary duty and unjust enrichment in Counts V and VI, to the extent they are predicated on Dalton and Schums's purchase of BHCM's shares, shall be denied.

With respect to Steffen's direct breach of fiduciary duty and unjust enrichment claims related to his "ownership interest in the Belle Haven business" (*id.* at 21), Movants argue that: (1) Steffen's claims to his BHI partnership interest were extinguished by accepting payment in "full and final satisfaction" of a lawsuit against BHI and BHCM in 2015; (2) there is no valid claim arising from the failure to set a factor[9] under the BHI partnership agreement; and (3) Steffen has no valid claim for BHCM failing to pay him for his shares

[9] Steffen argues that he owned a 1/3 equity interest in BHCM at the time of his termination, which included goodwill and intangibles for which he was never adequately compensated including by virtue of the fact that his limited partnership capital investment was purportedly returned at book value so as not to include these intangibles. He also argues that BHCM failed to set a proper multiple for the capital that was returned pursuant to section 10.01 of the BHI Partnership Agreement. Steffen asserts that his "primary position in this litigation is that his equity interest in Belle Haven is reflected in his BHCM shares" (Steffen Opp. at 14).

since he is bound by the valuation mechanism of the Shareholders' Agreement (*id.* at 21-30). Movants assert that Steffen does not have any damages because "he can tender his shares to BHCM at any time he chooses by invoking the valuation procedures in Article 9 of the BHCM Shareholders' Agreement" (Movants' Mem. at 22).

The Court does not agree that Steffen released his right to pursue his claims herein based on his cashing of the check tendered to him in connection with the Connecticut action. A review of the Complaint in that action reveals that the claims related to BHI and BHCM's failure to return his capital account in BHI - nothing more (Palmeri Aff., Ex. R). The claim for breach of fiduciary duty against BHCM related solely to its failure to tender Steffen's capital account in BHI within 30 days of his termination for cause. The email from Steffen's counsel made clear that Steffen was cashing the check and was settling his claim for the return of his capital account (Palmeri Aff., Ex. T). Accordingly, there is no basis to dismiss these claims based on a theory of accord and satisfaction.

Essentially, Steffen is alleging that Movants had an obligation to buy him out of his shareholder interest and wrongfully failed to do so. The parties do not dispute that the Shareholders' Agreement is a valid contract and that it governs their interests as shareholders in BHCM.

The elements for a cause of action for unjust enrichment are "(1) that the defendants were benefitted, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiff's detriment" (*Vertex, supra* 278 Conn at 573). It is well established that unjust enrichment is unavailable when an express contract exists between the parties (*Meaney v Connecticut Hosp. Assn., Inc.*, 250 Conn 500, 517 [1999]; *United Coastal Indus., Inc. v Clearheart Constr. Co.*, 71 Conn App 506, 512-13 [Conn App Ct 2002]). Dalton and Steffen had no obligation to buy Steffen's shares outside of the procedures set forth in the Shareholders' Agreement. He did not invoke these procedures. Therefore, to the extent that Steffen's direct claims for breach of fiduciary duty and unjust enrichment relate to his alleged "ownership interest" in BHCM, that aspect of Counts V and VI shall be dismissed.

CONCLUSION

This Court has considered the following papers in connection with this motion:

1) Parties' Rule 19-A Statements of Material Facts and Responses

2) Movants' Notice of Motion, Affirmation of Brian Palmeri, Esq., Exhibits and Memorandum of Law, dated April 12, 2019 (Motion Sequence #3)

3) Steffen's Opposition, Affirmation of Allegra A. Noonan, Esq., Affidavit of Mark Steffen and Exhibits, dated May 23, 2019

4) Movants' Reply Memorandum of Law, Affirmation of Brian J. Palmeri, Esq. and Exhibit, dated June 7, 2019

5) Steffen's Notice of Motion for Summary Judgment, Affirmation of Justin J. Gunnell, Esq., Exhibits and Memorandum of Law, dated April 12, 2019 (Motion Sequence #4)

6) Movants' Opposition to Motion and in Further Support of Movants' Motion, Affidavit of Stephen Schum, and Exhibits, dated May 23, 2019

7) Steffen's Reply Memorandum of Law, Affirmation of Theresa Trzaskoma and Exhibits, dated June 7, 2019

Based upon the foregoing and for the reasons set forth above it is hereby

ORDERED that the motion by Plaintiff/Counterclaim Defendant Belle Haven Capital Management Inc. and Third Party Defendants J. Matthew Dalton and Stephen Schum seeking an order granting it summary judgment with respect to all Counts in Defendant and Third Party Plaintiff Mark W. Steffen's Second Amended Answer, Counterclaim and Third Party Complaint dated February 5, 2019 and seeking summary judgment with respect to Counts III and V of its Third Amended Complaint dated September 7, 2018 is granted in part and denied in part; and it is further

ORDERED that the branch of the motion seeking to dismiss Count I for inspection of books and records is granted and the cause of action is dismissed with prejudice, and it is further

ORDERED that the branches of the motion seeking to dismiss Counts V for breach of fiduciary duty and VI for unjust enrichment is granted only to the extent that they relate to

Steffen's ownership interest in BHCM, but in all other respects these branches of the motion are denied; and it is further

ORDERED that the motion by Defendant and Third Party Plaintiff Mark W. Steffen seeking an order granting him summary judgment with respect to all Counts in Plaintiff/Counterclaim Defendant Belle Haven Capital Management Inc.'s Third Amended Complaint dated September 7, 2019 is granted and Counts I, II, III and IV are hereby dismissed; and it is further

ORDERED that counsel shall appear for a conference at 9:30 am on October 11, 2019 for the purpose of setting a trial date in this action.

Dated: October 4, 2019
White Plains, New York

ENTER:

HON. GRETCHEN WALSH, J.S.C.

TO: WINGET, SPADAFORA & SCHWARTZBERG LLP
By: Luigi Spadafora, Esq.
Brian Joseph Palmeri, Esq.
One Canterberry green
201 Broad Street
Suite 1000
Stamford, CT 06901

Attorneys for
Belle Haven Capital Management, Inc., J. Matthew Dalton and Stephen Schum

SHER TREMONTE LLP
By: Theresa Trzaskoma, Esq.
Justin J. Gunnell, Esq.
Allegra Noonan
90 Broad Street, 23rd Fl.
New York, New York 10004

Attorneys for Defendant, Counterclaimant, and
Third Party Plaintiff Mark Steffen