

Plaintiff Eastern Maine Electric Cooperative, Inc. (“EMEC”) is a non-profit, member-owned electric cooperative. (Pl. Add’l S.M.F. ¶ 1; Defs. Reply S.M.F. ¶ 1.) During the relevant time period, from 2011 to 2014, Defendant First Wind Holdings, LLC (“First Wind”) owned and operated various wind projects through a family of wholly-owned holding companies, i.e., the Subsidiary Entities. (*Id.* ¶ 4.) One of First Wind’s projects was a 38-mile long transmission line known as the Evergreen Gen Lead Line or Stetson Line (hereafter, the “Stetson Line”), which connected three operating wind farms to the regional electric grid. (Defs. Supp’g S.M.F. ¶ 1; Pl. Opp. S.M.F. ¶ 1; Pl. Add’l S.M.F. ¶ 6; Defs. Reply S.M.F. ¶ 6.) The Stetson Line is owned by Defendant Evergreen Gen Lead, LLC. (Pl. Add’l S.M.F. ¶ 5; Defs. Reply S.M.F. ¶ 5.) Evergreen Gen Lead, LLC is majority-owned by Defendants Evergreen Wind Power III, LLC, Stetson Holdings, LLC, and Stetson Wind II, LLC, which own the three operating wind farms. (Defs. Supp’g S.M.F. ¶ 3; Pl. Opp. S.M.F. ¶ 3.) Evergreen Wind Power III, LLC, Stetson Holdings, LLC, Stetson Wind II, LLC, and Evergreen Gen Lead, LLC are all direct or indirect subsidiaries of First Wind. (*Id.* ¶ 4.)

Sometime in 2011, EMEC, Bangor Hydro Electric, Inc. (“Bangor Hydro”) and its parent Emera, Inc., and First Wind sought to enter into a sale-and-leaseback agreement involving the Stetson Line (hereafter, the “Stetson Line Transaction” or the “Transaction”). (Defs. Supp’g S.M.F. ¶ 5; Pl. Opp. S.M.F. ¶ 5; Pl. Add’l S.M.F. ¶ 11; Defs. Reply S.M.F. ¶ 11.) To effectuate the agreement, the parties executed a “Term Sheet,” which set forth the terms of the Stetson Line Transaction. (Pl. Add’l S.M.F. ¶ 18; Defs. Reply S.M.F. ¶ 18; Compl. Ex A.) The Term Sheet itself was not a binding contract. (Defs. Mot. Summ. J. 2; Compl. Ex A at 3, 10.) The Term Sheet contemplated that EMEC would purchase 33% (12.54 miles) of the Stetson Line for \$9.9

million and charge the wind farms connected to the line a fee to use the line. (Pl. Add'l S.M.F. ¶ 12; Defs. Reply S.M.F. ¶ 12; Compl. Ex A at 2.) Bangor Hydro would purchase the remaining 66% (25.46 miles) of the Stetson Line and charge the wind farms connected to the line a fee to use the transmission line. (*Id.* ¶ 13; Compl. Ex. A at 2.)

Certain aspects of the Term Sheet needed to be effectuated immediately before a final, definitive agreement for the Stetson Line Transaction could be negotiated between the parties. (*Id.* ¶ 20.) Specifically, at the same time the parties were negotiating the Stetson Line Transaction, EMEC and First Wind were also involved in a regulatory proceeding before the Maine Public Utilities Commission (“PUC”). (*Id.*) First Wind and Bangor Hydro insisted that EMEC withdraw from the PUC proceeding before negotiations of the Stetson Line Transaction could be completed. (*Id.*) EMEC insisted that First Wind agree to be contractually bound to complete the Stetson Line Transaction in good faith before EMEC would withdraw from the PUC proceeding. (*Id.* ¶ 21.) Thus, on December 23, 2011, the parties entered into a binding “Precedent Transmission Line Agreement” (hereafter, the “Precedent Agreement”), which incorporated by reference the terms contained in the Term Sheet. (*Id.* ¶ 18; Compl. Ex B at 1.) The Precedent Agreement obligated the parties to “proceed in good faith to negotiate, draft, execute and deliver” a definitive agreement implementing the provisions of the Term Sheet. (*Id.* ¶ 22; Compl. Ex. B at 2.) The parties were ultimately unable to reach a definitive agreement regarding the Stetson Line Transaction.

EMEC filed a complaint with the Superior Court on October 24, 2014, against First Wind and eleven of its Subsidiary Entities. EMEC’s complaint asserts contract claims for breach of contract (Count I), promissory estoppel (Count II), and unjust enrichment (Count III) and tort

claims for fraud (Count IV) and negligent misrepresentation (Count V) against First Wind and its Subsidiary Entities. This action was then transferred to the Business and Consumer Docket. On July 8, 2016, Defendants moved for partial summary judgment on all claims against the Subsidiary Entities, which would leave First Wind Holdings, LLC as the only defendant in this action.¹ Following an extension of time, EMEC filed its opposition to summary judgment on July 29, 2016. Defendant filed their reply on August 12, 2016.

II. STANDARD OF REVIEW

Summary judgment is appropriate if, based on the parties' statements of material fact and the cited record, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821. A fact is material if it can affect the outcome of the case. *Dyer*, 2008 ME 106, ¶ 14, 951 A.2d 821 (internal citation and quotation marks omitted). A genuine issue of material fact exists if the fact finder must choose between competing versions of the truth. *Id.* When deciding a motion for summary judgment, the court reviews the evidence in the light most favorable to the non-moving party. *Id.*

If the moving party's motion for summary judgment is properly supported, the burden shifts to the non-moving party to respond with specific facts establishing a prima facie case for each element of the claim challenged by the moving party. M.R. Civ. P. 56(e); *Chartier v. Farm*

¹ Technically speaking, Defendants have moved for summary judgment on all claims against only the Subsidiary Entities that own the Stetson Line and the connected wind farms. Defendants have named only Evergreen Wind Power III, LLC, Stetson Holdings, LLC, Stetson Wind II, LLC, and Evergreen Gen Lead, LLC in their motion for summary judgment. (Defs. Mot. Summ. J. 1.) However, in a footnote, Defendants assert their arguments for summary judgment equally apply to all of the other Subsidiary Entities named as defendants in the complaint, i.e., that none of the Subsidiary Entities were parties to the Precedent Agreement and First Wind was not acting as their agent. (*Id.* at 1 n.1.) Therefore, although only four of the eleven Subsidiary Entities are expressly named in the motion, the court shall treat the Defendants' motion as one for summary judgment on all claims against all of the Subsidiary Entities.

Family Life Ins. Co., 2015 ME 29, ¶ 6, 113 A.3d 234. If the non-moving party fails to present sufficient evidence of the challenged elements, then the moving party is entitled to a summary judgment. *Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 21, 969 A.2d 897. Even if one party's version of the facts appears more credible and persuasive, any genuine issue of material fact must be resolved by the fact finder, regardless of the likelihood of success. *Estate of Lewis v. Concord Gen. Mut. Ins. Co.*, 2014 ME 34, ¶ 10, 87 A.3d 732.

III. ANALYSIS

In their motion for summary judgment, Defendants argue all of EMEC's claims arise from the acts or conduct of First Wind and the Subsidiary Entities are not liable for First Wind's actions. (Defs. Mot. Summ. J. 5.) With regard to EMEC's contract claims, Defendants assert the Subsidiary Entities are not parties to the Precedent Agreement and there was no separate agreement between EMEC and the Subsidiary Entities to negotiate in good faith. (*Id.* at 9.) Defendants assert that EMEC is attempting to hold the Subsidiary Entities liable for promises made by First Wind under a theory of agency. (*Id.* at 5.) Defendants argue the Subsidiary Entities cannot be held liable for the actions of First Wind under a theory of agency because there is no evidence that the Subsidiary Entities exerted control over the parent in order to for First Wind to be deemed their agent. (*Id.* at 6-7.)

With regard to EMEC's claims for fraud and negligent misrepresentation, Defendants similarly argue the Subsidiary Entities had no direct involvement in the negotiations of the Stetson Line Transaction and that First Wind was not acting as their agent. (*Id.* at 10-11.) Thus, according to Defendants, there is no evidence the Subsidiary Entities or their agent made false

statements of material fact or supplied false information in order to hold the Subsidiary Entities liable for fraud or negligent misrepresentation. (*Id.*)

In response to Defendants' motion, EMEC argues the Subsidiary Entities were parties to Precedent Agreement and are directly bound by its terms. (Pl. Opp'n to Defs. Mot. Summ. J. 9.) Alternatively, EMEC argues that there are genuine issues of material fact regarding whether the Subsidiary Entities exerted control over First Wind, making it the Subsidiary Entities' agent, or whether the Subsidiary Entities are liable for the actions of First Wind under the doctrines of apparent authority, estoppel, or ratification. (*Id.* at 11-18.) EMEC also argues that there are questions of material fact whether the corporate veil between First Wind and the Subsidiary Entities should be pierced and the Subsidiary Entities should be held liable as the alter egos of First Wind. (*Id.* at 19-20.)

A. Contract Claims

The Precedent Agreement is ambiguous as to whether the Subsidiary Entities are parties to the agreement, and there are genuine issues of material fact regarding whether the parties intended the Subsidiary Entities to be bound by the terms of the Precedent Agreement. The interpretation of an unambiguous contract is a question of law for the court. *Town of Lisbon v. Thayer Corp.*, 675 A.2d 514, 516 (Me. 1996). However, if a contract is ambiguous, then its interpretation is a question of fact that must be determined by the fact finder. *Id.* The determination of whether a contract is ambiguous is a question of law for the court. *Id.* Contract language is ambiguous when it is reasonably susceptible to different interpretations. *Id.* If a contract is found to be ambiguous, the court may consider extrinsic evidence to determine the parties' intent. *Villas by the Sea Owners Ass'n v. Garrity*, 2000 ME 48, ¶ 10, 748 A.2d 457.

When a contract is ambiguous and there are genuine issues of material fact regarding the intent of the parties, summary judgment is inappropriate. *Thayer Corp.*, 675 A.2d at 516.

First, the Precedent Agreement is ambiguous as to whether the Subsidiary Entities are parties to the agreement. The Precedent Agreement was signed by Paul Gaynor on behalf of First Wind. (Defs. Supp'g S.M.F. ¶ 6; Compl. Ex. B at 5.) None of the Subsidiary Entities were signatories to the Precedent Agreement. (*Id.*; Compl. Ex. B at 4-5.) The final paragraph of the agreement states, "each Party hereto has caused this Precedent Transmission Line Agreement to be signed *on its behalf* as of the Execution Date first written above." (Pl. Add'l S.M.F. ¶ 28; Defs. Reply S.M.F. ¶ 28; Compl. Ex. B at 4) (emphasis supplied).

However, the Precedent Agreement also states that it was made and entered into by First Wind "on behalf of itself *and any of its subsidiaries* involved in the transactions related to the Term Sheet." (Pl. Opp. S.M.F. ¶ 6; Compl. Ex. B at 1) (emphasis supplied). There is no language in the Precedent Agreement expressly stating that the agreement was only made and entered into by First Wind and that the Subsidiary Entities are not bound its terms. (Pl. Add'l S.M.F. ¶ 26; Defs. Reply S.M.F. ¶ 26; Compl. Ex. B.)

The Precedent Agreement further states that the "Parties" agreed to negotiate a definitive agreement in good faith to implement the provisions of the Term Sheet. (Defs. Supp'g S.M.F. ¶ 7; Compl. Ex. B at 2.) Specifically, the Precedent Agreement states, "the Parties shall agree... to transfer ownership interests in the Gen-Lead Assets, as defined in the Term Sheet," to Bangor Hydro and EMEC. (Compl. Ex. B at 2.) The Term Sheet defines the "Gen-Lead Assets" as certain assets owned by Evergreen Gen Lead, LLC, a subsidiary of the owners of the "Gen-Lead Projects." (Compl Ex. A at 1.) According to the Term Sheet, the owners of the "Gen-Lead

Projects” were “subsidiaries of First Wind Holdings, LLC.” (*Id.*) Because certain Subsidiary Entities were the owners of the Gen-Lead Assets and the Term Sheet contemplates that those subsidiaries would transfer ownership interest, this language seems to suggest that certain Subsidiary Entities were parties to the agreement.

The Precedent Agreement also states, “as provided in the Term Sheet, the Parties will negotiate the following documents concurrently with the negotiation of the definitive agreement: transmission service agreements,…” (Defs. Supp’g S.M.F. ¶ 9; Compl. Ex. B at 2.) Pursuant to the Term Sheet, “each of the owners of the Gen-Lead Projects” would enter into separate transmission service agreements with EMEC and Bangor Hydro regarding transmission services over the Stetson Line. (Defs. Supp’g S.M.F. ¶ 9; Compl. Ex. B at 2; Ex. A at 2.) Based on this language, it appears that the parties to the Precedent Agreement and the Term Sheet understood that certain Subsidiary Entities could act alone and do not always act through First Wind. However, it also suggests, again, that certain Subsidiary Entities were necessary parties to the agreement. Therefore, based on the foregoing, the court finds the Precedent Agreement to be ambiguous as to whether the Subsidiary Entities are parties to the agreement.

Second, there are genuine issues of material fact regarding whether the parties intended the Subsidiary Entities to be bound by the terms of the Precedent Agreement. The Subsidiary Entities were “special purpose entities” that did not have their own employees. (Pl. Add’l S.M.F. ¶ 43; Defs. Reply S.M.F. ¶ 43.) First Wind’s employees generally provided services to the Subsidiary Entities. (*Id.* ¶ 44.) First Wind and the Subsidiary Entities also shared the same executives. (*Id.* ¶ 45.) First Wind’s top executives, Paul Gaynor and Michael Alvarez, were the President, Chief Executive Officer, or Vice President of all the Subsidiary Entities. (*Id.*) First

Wind and the Subsidiary Entities also shared other executives and the same corporate address. (*Id.* ¶¶ 53-69, 89.)

Defendants admit that First Wind, at times, acted on behalf of the Subsidiary Entities. (Defs. Reply S.M.F. ¶ 79.) Defendants further conceded at oral argument that First Wind could bind the Subsidiary Entities to a contract. In fact, First Wind had previously entered into agreements regarding the Stetson Line Transaction on behalf of its Subsidiary Entities. In 2011, prior to the Precedent Agreement, “First Wind Holdings, LLC, its affiliates and subsidiaries (collectively ‘First Wind’)” entered into a confidentiality agreement with EMEC. (Pl. Add’l S.M.F. ¶ 36; Defs. Reply S.M.F. ¶ 36.) That confidentiality agreement purportedly contained representations of authority and was executed by Kurt Adams as Executive Vice President and Chief Operating Officer of First Wind. (*Id.* ¶ 37.)

Scott Hallowell, EMEC’s Chief Operating Officer, has testified that First Wind executives used the term “First Wind” broadly throughout the Stetson Line negotiations to refer, without distinction, to both the parent company and the Subsidiary Entities that owned the relevant assets. (Pl. Add’l S.M.F. ¶¶ 77-78.) Hallowell further testified that First Wind executives were working on behalf of the Subsidiary Entities involved in the Transaction and that the executives made no attempt to differentiate their actions on behalf of one company from those on behalf of another. (*Id.* ¶¶ 79-80). Hallowell asserts that First Wind executives never suggested the Subsidiary Entities were not parties to the Precedent Agreement or that they were not authorized to act on behalf of the Subsidiary Entities regarding the Stetson Line Transaction. (*Id.* ¶ 96.)

Defendants assert that, while the term “First Wind” was generally used by First Wind employees throughout the Stetson Line Transaction, it was understood by all parties that First Wind employees were acting only on behalf of the parent. (Defs. Reply S.M.F. ¶¶ 77, 96.) Defendants assert that there were attempts to differentiate the First Wind from the Subsidiary Entities during the negotiations. (*Id.* ¶ 79.) Defendants cite the Term Sheet, which differentiated between the First Wind and the Subsidiary Entities, an earlier draft of the Term Sheet, which corrected which entities would be entering into subsequent agreements, and a draft of the definitive agreement, which defined “First Wind” solely as “First Wind Holdings, LLC.” (*Id.* ¶ 79; Compl. Ex A.; Horowitz Dep. Ex. 83; Chasse Dep. Ex. 45.)

Based on the foregoing, there are genuine issues of material fact regarding whether the parties intended the Subsidiary Entities to be bound by the terms of the Precedent Agreement. Therefore, Defendants’ motion for summary judgment on EMEC’s contract claims against the Subsidiary Entities must be denied. Because the Precedent Agreement is ambiguous as to whether the Subsidiary Entities are parties to the agreement and there are genuine issues of material fact regarding the parties’ intentions, the court does not reach and does not decide the parties’ arguments regarding agency, actual authority, apparent authority, estoppel, ratification, or alter ego theory.

B. Fraud and Negligent Misrepresentation

To prevail on a claim for fraud, a plaintiff must prove by clear and convincing evidence that (1) the defendant made a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of its truth or falsity; (4) for the purpose of inducing the

plaintiff to act in reliance upon it; and (5) the plaintiff justifiably relied upon the fact as true to their detriment. *Me. Eye Care Assocs., P.A. v. Gorman*, 2008 ME 36, ¶ 12, 942 A.2d 707.

Similarly, to prevail on a claim for negligent misrepresentation, a plaintiff must prove that (1) in the course of a business, profession, employment or any other transaction in which the defendant has a pecuniary interest; (2) the defendant supplied false information; (3) for the guidance of others in the business transactions; (4) and the defendant failed to exercise reasonable care or competence in obtaining or communicating the information; (5) causing the plaintiff to justifiably rely upon the information as true to the plaintiff's detriment. *St. Louis v. Wilkinson Law Offices, P.C.*, 2012 ME 116, ¶ 18, 55 A.3d 443.

As discussed above, Defendants' only argument is that the Subsidiary Entities are not liable for fraud or negligent misrepresentation because the Subsidiary Entities had no direct involvement in the negotiations of the Stetson Line Transaction and First Wind was not acting as their agent. (Defs. Mot. Summ. J. 10-11.) Thus, according to Defendants, there is no evidence the Subsidiary Entities made false statements of material fact or supplied false information. (*Id.*)

There are genuine issues of material fact regarding whether First Wind employees involved in the negotiations were acting on behalf of the Subsidiary Entities. As previously discussed, the Subsidiary Entities were "special purpose entities" that did not have their own employees. (Pl. Add'l S.M.F. ¶ 43; Defs. Reply S.M.F. ¶ 43.) First Wind and the Subsidiary Entities shared the same executives, employees, and the same corporate address. (*Id.* ¶¶ 45-69, 89.) First Wind's employees generally provided services to the Subsidiary Entities. (*Id.* ¶ 44.) Defendants admit that First Wind could, and at times did, act on behalf of the Subsidiary Entities. (Defs. Reply S.M.F. ¶ 79.)

EMEC's Chief Operating Officer, Hallowell, testified that First Wind executives used the term "First Wind" throughout the negotiations to refer to both the parent company and the Subsidiary Entities. (Pl. Add'l S.M.F. ¶¶ 77-78.) Hallowell testified that First Wind executives working on behalf of the Subsidiary Entities involved in the Transaction made no attempt to differentiate their actions on behalf of one company from those on behalf of another. (*Id.* ¶¶ 79-80). Hallowell asserts that the First Wind executives never suggested that they were not authorized to act on behalf of the Subsidiary Entities regarding the Stetson Line Transaction. (*Id.* ¶ 96.)

Defendants assert that, while the term "First Wind" was generally used by First Wind employees throughout the Stetson Line Transaction, it was understood by all parties that First Wind employees were acting only on behalf of the parent. (Defs. Reply S.M.F. ¶¶ 77, 96.) Defendants assert that there were attempts to differentiate the First Wind from the Subsidiary Entities during the negotiations. (*Id.* ¶ 79; Compl. Ex. A.; Horowitz Dep. Ex. 83; Chasse Dep. Ex. 45.)

Based on the foregoing, there are genuine issues of material fact regarding whether First Wind employees involved in the Stetson Line Transaction were acting on behalf of the Subsidiary Entities. Thus, there are genuine issues of material fact regarding whether the Subsidiary Entities made false statements of material fact or supplied false information. Therefore, Defendants' motion for summary judgment on EMEC's claims against the Subsidiary Entities for fraud and negligent misrepresentation must be denied.

IV. CONCLUSION

Defendants' motion for partial summary judgment on all counts against Defendants Evergreen Wind Power III, LLC, Stetson Holdings, LLC, Stetson Wind II, LLC, and Evergreen Gen Lead, LLC and the other subsidiaries of First Wind Holdings, LLC is **DENIED**.

Pursuant to Maine Rule of Civil Procedure 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: October 3, 2016

_____/s_____
Michaela Murphy
Justice, Business and Consumer Court