STATE OF MAINE
CUMBERLAND, ss.

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

PAMELA W. GLEICHMAN, et al.,

Plaintiffs,

v.

ROSA SCARCELLI, et al.,

Defendants.

COMBINED ORDER ON DEFENDANTS ROSA SCARCELLI AND PRESERVATION HOLDINGS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND STANFORD MANAGEMENT, LLC AND ACADIA MAINTENANCE, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Rosa Scarcelli and Preservation Holdings, LLC (hereafter "Preservation") (collectively, the "Scarcelli Defendants") have moved for partial summary judgment pursuant to M.R. Civ. P. 56(a) on Plaintiff's Second Verified Amended Complaint (the "Complaint"). Defendants Stanford Management, LLC (hereafter "Stanford") and Acadia Maintenance, LLC (hereafter "Acadia") (collectively, the "Entity Defendants") have also moved for partial summary judgment. Plaintiffs timely opposed and the Scarcelli Defendants and the Entity Defendants replied. Oral argument was heard on both motions on September 14, 2017.[1] Attorney John Campbell appeared for Plaintiffs, Attorney G. Toby Dilworth appeared for the Scarcelli Defendants, and Attorney James R. Wagner appeared for the Entity Defendants.

PROCEDURAL HISTORY

Plaintiffs' operative pleading is the 83-page Complaint filed with the Cumberland County Superior Court July 26, 2016. The Superior Court (Cumberland County, *Horton, J.*) entered an

[1]The Court notes that while Attorneys John Campbell and James Wagner appeared and were heard, the Entity Defendants' motion was filed September 8, 2017 and was not yet fully briefed when oral argument was held. To the extent that no second oral argument was held after an opposition was filed to the Entity Defendants' motion, the Court exercises it discretion under M.R. Civ. P. 7(b)(7) and decides that motion without reargument.

order on the Scarcelli Defendants' and Entity Defendants' joint motion for partial summary judgment on the pleadings on January 12, 2017, granting judgment in favor of all those defendants as to Count XI (abuse of process) of the Complaint and dismissing Count XVI (punitive damages) as redundant. *Gleichman v. Scarcelli*, CUMSC-CV-2015-539 at 6 (Me. Super. Ct., Cum. Cty., Jan. 12, 2017).

The Scarcelli Defendants now move this Court for summary judgment in their favor as to Count IV (Breach of Fiduciary Duties- Derivative Action), Count V (Oppression and Breach of Fiduciary Duties- Direct Action), Count VI (Judicial Dissolution of Stanford), Count VII (Avoidance of Transfer of Stanford Membership Interests to Ms. Scarcelli), and Count X (Declaratory Judgment- GN Holdings) of the Complaint. (*See* Complaint ¶¶ 195-212, 216-223).

The Entity Defendants move for summary judgment as to them on Count IV, Count V, Count VI, and Count VII. The Entity Defendants adopted the Scarcelli Defendants' arguments in their own motion as well as the Scarcelli Defendants' statement of material facts. Plaintiffs filed an opposition to the Entity Defendants' motion that offered grounds specifically directed at defeating the Entity Defendants' motion for summary judgment. Plaintiffs also filed separate M.R. Civ. P. 56(h)(2),(3) opposing and reply statements of facts for each motion. The Court's disposition on the Scarcelli Defendant's motion controls much of the result on the Entity Defendants' motion. Where grounds unique to the Entity Defendants have been raised the Court addresses those arguments separately.

FACTUAL BACKGROUND

I. PARTIES

This motion comes before the Court in the context of almost a decade of litigation between Plaintiffs and Defendant Rosa Scarcelli, who are all family members. (Plaintiff's Statement of

Additional Facts ("P.S.A.F.") at ¶ 1).[2] Mr. Norberg is the sole trustee of the Scarcelli Norberg Holdings Trust (hereafter "SNH Trust") (Defendants' Statement of Material Facts ("S.M.F.") at ¶ 7). Ms. Gleichman is the sole lifetime beneficiary of the SNH Trust. (S.M.F. ¶ 8).

Stanford manages subsidized housing properties in the State of Maine. (S.M.F. ¶ 1). Acadia is a real estate maintenance company. (S.M.F. ¶ 10). Ms. Scarcelli has been the President of Acadia and Stanford since 2006. (S.M.F. ¶¶ 9-10). Ms. Scarcelli own 51% of Stanford and is the majority member; the remaining 49% is owned by the SNH Trust. (S.M.F. ¶¶ 3-4). Acadia's ownership is disputed. (S.M.F. ¶¶ 11-13; Plaintiff's Statement of Facts in Dispute ("P.S.F.D.") at ¶¶ 11-13).[3] However, there is no dispute that Ms. Scarcelli is the majority owner of Acadia. (*Id.*).

Preservation is not described in any Statement of Facts filed in support or opposition of either motion, nor is it addressed in any Defendants' or Plaintiffs' briefs on this motion. Preservation was founded by Ms. Scarcelli and she is the company's sole member. (Complaint ¶ 13). Plaintiffs' claims against Preservation under review in the present motion are unclear, other than to the extent that Plaintiffs allege that Ms. Scarcelli has used that entity as a device to facilitate the behavior complained of in the counts against her. (Complaint ¶¶ 13, 202).

Although not a party to this lawsuit, a brief description of GN Holdings, LP, (hereafter "GN") is appropriate here given its importance to the Scarcelli Defendants' motion. GN is a limited partnership which is a majority limited partner in several limited partnerships that own various multifamily properties. (S.M.F. ¶ 14). Although Plaintiffs dispute the ownership of GN in this lawsuit, it is not disputed that on November 13, 2013 the Business and Consumer Court (*Nivison, J.*) entered an Order, in prior litigation between Ms. Gleichman and Mr. Norberg on the one side

[2] As noted above, Plaintiffs filed separate M.R. Civ. P. 56(h)(2),(3) opposing and reply statements of facts for each motion. Except where otherwise indicated, references to Plaintiffs' "statement of facts in dispute" and "statement of additional facts" refer to those filed in opposition to the Scarcelli Defendants' motion for summary judgment.

[3] *See* Note 2 *supra*.

and Ms. Scarcelli on the other, declaring that Ms. Scarcelli is the owner of a 70% equity interest in GN. (S.M.F. ¶ 30). Mr. Norberg was previously the general partner of GN, until as late as November 2013. (S.M.F. ¶ 17, P.S.A.F. ¶ 39). Mr. Norberg is no longer a partner in GN. (S.M.F. ¶ 41; P.S.A.F. ¶ 39).

II. SEQUENCE OF EVENTS GIVING RISE TO THIS LAWSUIT

Despite Plaintiffs' twenty-three-page response to the Scarcelli Defendants' seven-page statement of material facts, the parties agree on the general sequence of events giving rise to this lawsuit. Ms. Scarcelli has served as president of Stanford and Acadia since 2006. (S.M.F. ¶¶ 9-10). Effective January 1, 2007, Ms. Gleichman gifted 41% of her membership units in Stanford to Ms. Scarcelli. (S.M.F. ¶ 2). Ms. Scarcelli already held 10% of the membership units of Stanford, (S.M.F. ¶ 37), so Ms. Gleichman's gift made her the majority member of Stanford with 51% of its membership units. (S.M.F. ¶ 3; P.S.A.F. ¶ 50).

In 2011, after regulators cited deficiencies at some of the properties under the control of GN, Ms. Scarcelli made a written demand upon Mr. Norberg in his capacity as general partner of GN to remove Ms. Gleichman or entities controlled by her as general partners of various projects, based on their alleged failure to fulfill their obligations to GN. (S.M.F. ¶ 17). Mr. Norberg did not respond to the demand, so Ms. Scarcelli then filed a complaint in Cumberland County Superior Court in January 2012. (S.M.F. ¶¶ 18-19). The complaint requested a declaratory judgment and other relief and named GN, Ms. Gleichman, and Mr. Norberg as defendants. (S.M.F. ¶ 19). After a brief sojourn in the United States District Court for the District of Maine, the case was remanded to Superior Court and eventually found its way here to the Business and Consumer Court. (S.M.F. ¶¶ 20-22). It was here that Ms. Gleichman and Mr. Norberg filed their Amended Counterclaim and Third-Party Complaint (hereafter the "Counterclaim"). (S.M.F. ¶¶ 20-23). Ms. Gleichman and Mr.

Norberg named Stanford as a third-party defendant in the Counterclaim. (S.M.F. ¶ 33; *see* Counterclaim).

These two pleadings—Ms. Scarcelli's complaint and the Counterclaim—dealt with several of the same issues now before this Court. Ms. Scarcelli's complaint sought *inter alia* a judicial declaration of her ownership interest in GN. (S.M.F. ¶ 26). The Counterclaim alleged *inter alia* breaches of duty on the part of Ms. Scarcelli in her management of Stanford and sought judicial dissolution of Stanford. (S.M.F. ¶¶ 33-35). The Counterclaim was disposed of in an agreed-to Stipulation of Dismissal filed by both parties on October 30, 2013. (S.M.F. ¶¶ 39-42). Ms. Gleichman's claims were dismissed without prejudice. (S.M.F. ¶ 42). Mr. Norberg's claims—both individually and as trustee of the SNH Trust—were dismissed with prejudice. (S.M.F. ¶¶ 39-40).

Ms. Scarcelli's complaint was also largely disposed of by the Stipulation of Dismissal. (S.M.F. ¶ 39). Prior to the filing of the Stipulation of Dismissal, on October 18, 2013, Ms. Scarcelli filed a motion for partial summary judgment on the count of her complaint that requested a judicial declaration of her ownership interest in GN. (S.M.F. ¶ 26). The parties exempted that issue from the Stipulation of Dismissal and left it to the court to decide on the pending motion for partial summary judgment. (S.M.F. ¶ 39). The court ruled on the unopposed motion on November 13, 2013, granting judgment in favor of Ms. Scarcelli and declaring her the owner of a 70% equity interest in GN. (S.M.F. ¶¶ 29-30).

Although the 2012 litigation concluded with the entry of the court's order on November 13, 2013, the Plaintiffs have alleged in this lawsuit that Ms. Scarcelli has continued to breach her fiduciary duties to them and continued to divert profits due to them. (P.S.A.F. ¶ 27).

STANDARD OF REVIEW

Summary judgment is granted to a moving party where "there is no genuine issue as to any

material fact" and the moving party "is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). A material fact is one capable of affecting the outcome of the litigation. *Savell v. Duddy*, 2016 ME 139, ¶ 19, 147 A.3d 1179. A genuine issue exists where the jury would be required to "choose between competing versions of the truth." *MP Assocs. v. Liberty*, 2001 ME 22, ¶ 12, 771 A.2d 1040. "Summary judgment is no longer an extreme remedy." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18. To survive a defendant's motion for summary judgment, the plaintiff must establish a prima facie case for every element of the plaintiff's cause of action. *See Savell*, 2016 ME 139, ¶ 18, 147 A.3d 1179. *See also Spickler v. Dube*, 644 A.2d 465, 467-68 (Me. 1994) (holding that *res judicata* entitled the moving party to summary judgment).

DISCUSSION

I. MS. SCARCELLI IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON COUNT X OF THE COMPLAINT UNDER THE DOCTRINE OF ISSUE PRECLUSION

In Count X of the Complaint, Plaintiffs seek a declaratory judgment declaring that Ms. Scarcelli is not the 70% owner of GN and that Mr. Norberg retains a 95% interest in that entity. (Complaint ¶ 223). The Scarcelli Defendants argue that *res judicata* precludes Plaintiffs from relitigating this issue in light of the court's November 13, 2013 order on Ms. Scarcelli's motion for summary judgment, naming her the owner of a 70% equity interest in GN.

Res judicata consists of two branches: issue preclusion (formerly referred to as "collateral estoppel") and claim preclusion (formerly referred to as "bar or merger"). *Pearson v. Wendell*, 2015 ME 136, ¶ 23, 125 A.3d 1149. "[C]laim preclusion is focused on the claims set forth in the prior proceeding, collateral estoppel concerns factual issues, and applies even when the two proceedings offer different types of remedies." *Id*. ¶ 9. Issue preclusion "prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment,

and the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding." *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 9, 940 A.2d 1097. Issue preclusion "arises only if the identical issue necessarily was determined by a prior final judgment." *Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 25, 834 A.2d 140 (quotations omitted). This prong of *res judicata* is "focused on factual issues, not claims, and asks whether a party had a fair opportunity and incentive in an earlier proceeding to present the same issue or issues it wishes to litigate in a subsequent proceeding." *Id.* ¶ 22. The relevant factors a court should consider in determining whether a party had a fair opportunity and incentive to litigate in an earlier proceeding include

> the size of the claim, the forum of the prior litigation, whether the issue was a factual or a legal one, the foreseeability of future suits, the extent of the previous litigation, the availability of new evidence, the experience of counsel, . . . [and] procedural opportunities available in the second suit that were unavailable in the first.
>
> *Gray v. TD Bank, N.A.*, 2012 ME 83, ¶ 21, 45 A.3d 735.

In the 2012 litigation, Plaintiffs had a fair opportunity and incentive to litigate the same issue they bring in Count X. *See id.* ¶ 22. Plaintiffs had an economic incentive due to the financial and tax benefits at stake. (S.M.F. ¶ 27.) Plaintiffs were represented by experienced counsel and had all of the tools of discovery at their disposal. (S.M.F. ¶ 25.) The Stipulation of Dismissal explicitly carved out the issue of GN's ownership from the other claims to be dismissed, putting Plaintiffs on notice that the court would be ruling on the issue. (S.M.F. ¶ 39.) Although Plaintiffs did not oppose Ms. Scarcelli's summary judgment motion in the 2012 litigation, there is no genuine dispute that they had a fair opportunity and incentive to do so.

Count X is barred by issue preclusion because the identical issue was determined by the Court's judgment in its November 13, 2013 order on Ms. Scarcelli's motion for summary judgment in the prior litigation between these parties, and Plaintiffs had a fair opportunity and incentive to

litigate. The issue in that latter litigation and this case is identical, and the court entered final judgment deciding that issue in the prior case.

Plaintiffs arguments for why *res judicata* should not apply are unavailing. First, Plaintiffs allege that the Order declaring Ms. Scarcelli owner of a 70% "equity interest" in fact only declared that Ms. Scarcelli owns 70% of the "limited partner interests" of the limited partnership. As such, Plaintiffs argue that they are entitled to seek declaratory relief as to the ownership of the "general partner interests" in GN Holdings and how the partnership's ownership is distributed between general partners and limited partners.

Plaintiffs claim that a review of the pleadings from the prior litigation shows that only the limited partnership interest was in issue. However, regardless of what was litigated, the Court's order in the 2012 Litigation clearly and unambiguously declares Ms. Scarcelli "the owner of a 70% equity[4] interest" in the limited partnership. The Court is not inclined to accept Plaintiff's invitation to look beyond this plain, unambiguous language in a prior final judgment of this Court.

Plaintiffs next point out that this was a judgment on a motion for summary judgment for declaratory relief and as such *res judicata* should not apply. Indeed, claim preclusion generally does not apply where only declaratory relief is sought. *See Sebra v. Wentworth*, 2010 ME 21, ¶ 10, 990 A.2d 538 (holding claim preclusion applied in that case despite the prior judgment being a declaratory judgment because the claim seeking declaratory relief was joined with a claim for an injunction). *See also* Restatement (Second) of Judgments, § 33, cmt. c ("When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant . . . . The effect of such a declaration [therefore] is not to [apply claim

[4] Equity is "that portion of a company's net worth belonging to its owners or shareholders." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 492 (5th ed. 2016). Thus, Ms. Scarcelli was declared the owner of 70% of all of the net worth belonging to GN's owners.

preclusion.]").

But the Scarcelli Defendants prevail on this count as a matter of issue preclusion, not claim preclusion. The exact issue Plaintiffs seek a declaratory judgment on in this case was already decided in the prior litigation. Unlike claim preclusion, issue preclusion applies to declaratory judgments with the same vitality as it applies to coercive judgments. *See* Restatement (Second) of Judgments, § 33, cmt. b ("If a declaratory judgment is valid and final, it is conclusive, with respect to the matters declared . . . even as to a party who makes no appearance in the action.").

That the motion was unopposed does not soften the judgment's preclusive effect. *Id.* Plaintiffs' failure to oppose the motion—or seek relief under Rule 60(b), or on appeal—does not make the judgment more vulnerable to collateral attack. *See Caron v. City of Auburn*, 567 A.2d 66, 68 n. 5 (Me. 1989); *Baliey v. City of Lewiston*, 2017 ME 160, ¶ 10, 168 A.2d 762.

The Plaintiffs have failed to raise any genuine, material factual dispute to demonstrate why issue preclusion does not entitle the Scarcelli Defendants to judgment as a matter of law. *See Spickler*, 644 A.2d at 467-68. The Court thus rules that the Scarcelli Defendants are entitled to judgment as a matter of law on Count X of Plaintiffs' complaint and hereby **grants** the Scarcelli Defendants' motion for summary judgment as to Count X of Plaintiffs' complaint.

II. THE SCARCELLI DEFENDANTS AND THE ENTITY DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW AS TO COUNT VII BECAUSE THERE IS NO GENUINE FACTUAL ISSUE THAT THE TRANSFER OF STANFORD MEMBERSHIP UNITS TO MS. SCARCELLI WAS A GIFT

As explained below, claim preclusion bars Mr. Norberg from litigating the issue of the transfer of membership units in Stanford to Ms. Scarcelli. However, unlike Mr. Norberg's claims, Ms. Gleichman's claims in the 2012 litigation were dismissed without prejudice. (S.M.F. ¶ 42). Therefore, she is not barred from bringing Count VII and seeking to avoid the transfer of 41 membership units in Stanford from Ms. Gleichman to Ms. Scarcelli. In their motion, the Scarcelli

Defendants claim that they are nonetheless entitled to judgment as a matter of law on this Count because the transfer was an irrevocable *inter vivos* gift. Plaintiffs respond that there is a genuine factual issue whether the gift was conditional.

An *inter vivos* gift requires three elements: (1) donative intent; (2) delivery with intent to surrender all present and future dominion over the property; and (3) acceptance by the donee. *Brackett v. Larrivee*, 562 A.2d 138, 139 (Me. 1989). An *inter vivos* gift is irrevocable and "[a] change of mind by the donor . . . cannot undo th[e] completed gift." *Id.* at 140. Unlike a gift *causa mortis*, which is complete only upon the death of the donor, an *inter vivos* gift is made irrevocable on delivery. *Bickford v. Mattocks*, 50 A. 894, 895 (Me. 1901).

There is ample record evidence to support a finding that the transfer of Stanford membership units from Ms. Gleichman to Ms. Scarcelli was a valid and completed *inter vivos* gift. (Complaint ¶ 47; S.M.F. ¶¶ 36- 38). Plaintiffs do not argue that the elements for an effective donative transfer have not been met. Instead, Plaintiffs rely exclusively on Ms. Gleichman's assertion by affidavit nearly ten years later that the gift was conditional. (P.S.F.D ¶ 38.)

There is no contemporaneous evidence to suggest that the gift was conditional. Plaintiffs do not clearly articulate what consideration flowed from Ms. Scarcelli to Ms. Gleichman in exchange for the transfer, and any such articulation is inconsistent with the allegations brought in the Complaint. (Complaint ¶ 47). Therefore, the Court finds that Ms. Gleichman's mere assertion, many years after the fact, that the gift was meant to be conditional is inadequate to generate a genuine factual issue. *Dyer*, 2008 ME 106, ¶ 14, 951 A.2d 821 (plaintiff cannot create a factual dispute for purposes of defeating summary judgment merely by raising "improbable references[] and unsupported speculation"). On Ms. Gleichman's affidavit alone, no juror could reasonably find that at the time of the transfer Ms. Gleichman intended the gift to be conditional.

The Court does not doubt that Ms. Gleichman regrets her decision to give Ms. Scarcelli her 41 membership units in Stanford, but to allow a disappointed donor to claim, many years after the fact, that a gift was conditional would swallow the rule that completed *inter vivos* gifts are irrevocable. *See Brackett*, 562 A.2d at 140. Plaintiffs cite *Bryant v. Cribbie*, No. 09-P-1421, 2010 Mass. App. Unpub. LEXIS 320 (App. Ct. Mar. 25, 2010) for the proposition that conditions on gifts can be implied from circumstances and that where such an inference is reasonable, summary judgment is not appropriate. To the extent that *Bryant* would dictate a different outcome here, this Court declines to follow that case based on Maine case law and the policy reason explained above.

Based on the foregoing the Court thus hereby **grants** the Scarcelli Defendants motion for summary judgment as to Count VII. There is no genuine question of fact that the transfer of 41 membership units in Stanford from Ms. Gleichman to Ms. Scarcelli was a valid and completed *inter vivos* gift, and the Scarcelli Defendants and Entity Defendants are thus entitled to judgment as a matter of law on that issue.

III. *RES JUDICATA* BARS MR. NORBERG FROM RELITIGATING THE CLAIMS IN COUNT IV, COUNT V, COUNT VI, AND COUNT VII OF THE COMPLAINT

A. Mr. Norberg's Claims Are Barred Generally by *Res Judicata*

Count IV is a derivative claim alleging breaches of fiduciary duties on the part of Ms. Scarcelli, Count V is a direct claim grounded in a materially similar allegation, Count VI seeks judicial dissolution of Stanford pursuant to 31 M.R.S.A. § 1595(1), and Count VII seeks an avoidance of the transfer of Stanford membership units to Ms. Scarcelli. (*See* Complaint ¶¶ 195-212). The Scarcelli Defendants argue that *res judicata* entitles them to judgment as a matter of law under a claim preclusion theory because Plaintiffs brought these same claims against Ms. Scarcelli in the Counterclaim filed in the 2012 litigation. Plaintiffs respond that claim preclusion does not

(or should not) apply.

Unlike issue preclusion, claim preclusion is focused not on the factual issues determined by a prior final judgment, but "on the claims set forth in the prior proceeding." *Pearson*, 2015 ME 136, ¶ 9, 125 A.3d 1149. Claim preclusion prevents relitigation if: "(1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *Portland Water Dist.*, 2008 ME 23, ¶ 8, 940 A.2d 1097. In other words, a valid final judgment in a prior action will bar the claim of a party to that prior judgment where "the matters presented for decision were, or might have been, litigated in the prior action." *Beegan v. Smith*, 451 A.2d 642, 644 (Me. 1982). "[A] voluntary dismissal with prejudice constitutes a valid final judgment for purposes of claim preclusion." *Darney v. Dragon Products Co.*, 592 F. Supp 2d 180, 184 n.3 (D. Me 2009) (citing *United States v. Cunan*, 156 F.3d 110, 114 (1st Cir. 1998)).

Under Maine law, a transactional test is used to determine whether the matters presented for decision in the second action were, or might have been, litigated in the first action. To apply this test, the court "examin[es] the aggregate of connected operative facts that can be handled together for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong." *Portland Water Dist.*, 2008 ME 23, ¶ 8, 940 A.2d 1097. A "new" claim cannot avoid the transactional test simply because it "relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, or involves evidence different from the evidence relevant to the first case." *Id.* (quotations omitted). *See also Draus v. Town of Houlton*, 1999 ME 51, ¶ 8, 726 A.2d 1257 (quoting *Beegan,* 451 A.2d at 645) ("When there is a final judgment against a plaintiff, claims the plaintiff has against the same defendant are extinguished with regard to all

or any part of the transaction, or series of connected transactions, out of which the action arose.").

Here, all three components of claim preclusion are satisfied. Generally, the same parties to this action—Ms. Scarcelli, Ms. Gleichman, and Mr. Norberg—were parties to the 2012 litigation. Plaintiffs do not dispute that this element has been satisfied, nor could they reasonably do so. The Stipulation of Dismissal filed jointly by the parties to the 2012 litigation is a final prior judgment for *res judicata* purposes. *Darney*, 592 F. Supp 2d at 184 n.3. Finally, Counts IV, V, VI, and VII of Plaintiffs' Complaint arise out of Ms. Scarcelli's alleged mismanagement of Stanford and Acadia—allegations that are substantially similar to the allegations in the Counterclaim filed by Plaintiffs in the 2012 litigation. The claims for relief are virtually identical, to the point that the language itself is almost verbatim. A side-by-side comparison of the operative pleadings of the two lawsuits illustrates that the claims arise out of the same transaction and seek redress for essentially the same basic wrongs. *See Portland Water Dist.*, 2008 ME 23, ¶ 8, 940 A.2d 1097. Counts IV, V, VI, and VII of Plaintiffs' Complaint are frequently a word-for-word recitation of the allegations raised in the Counterclaim in 2012.[5] It is an unescapable conclusion on this record that the claims arise out of the same transaction and seek redress for essentially the same basic wrongs.

Plaintiffs do not argue that a voluntary dismissal with prejudice lacks preclusive effect generally as a "valid final judgment." *See Darney*, 592 F. Supp 2d at 184 n.3. Nor do they argue that the matters presented for decision in this second action could not have been litigated in the first action. *See Beegan*, 451 A.2d 642, 645-46. Instead, Plaintiffs collaterally attack the Stipulation of Dismissal, questioning the "validity" of the prior judgment. *See Portland Water*

[5] The Counterclaim did not include a derivative action on behalf of Stanford, which Plaintiffs bring in Count IV of the Complaint. Nonetheless, that claim *might* have been litigated in the prior action between these same parties and still arises out of the same nucleus of operative fact. *Portland Water Dist.*, 2008 ME 23, ¶ 8, 940 A.2d 1097.

Dist., 2008 ME 23, ¶ 8, 940 A.2d 1097 (claim preclusion requires "valid" prior judgment). As grounds for their collateral attack, Plaintiffs claim (1) it was a typographical error that the stipulation dismisses Mr. Norberg's claims "with" instead of "without" prejudice, (P.S.A.F. ¶¶ 8-16); (2) Attorney Dana Strout, Plaintiffs' lawyer at the time, lacked authority to sign the document on behalf of Plaintiffs, (P.S.A.F. ¶¶ 17, 20, 22); and (3) the dismissal was ineffective because Ms. Gleichman was under an Illinois court order not to allow any claims of hers to be abandoned. (P.S.A.F. ¶¶ 2-3). As to (3), Plaintiffs argue that as settlor/ beneficiary of the SNH Trust, the Trust was effectively her asset and thus the Illinois court order enjoined the Trust from dismissing any claims with prejudice.

Plaintiffs' collateral attack on the validity of the prior judgment is impermissible at this stage. It is well-established under Maine law that a final judgment is a valid judgment, unless one of three specific exceptions apply: denial of due process, lack of jurisdiction, or adjudication of issues beyond the scope of those submitted for decision. *N.E. Bank N.A. v. Crochere*, 438 A.2d 266, 268 n. 7 and accompanying text (Me. 1981) (citing *Warren v. Waterville Urban Renewal Authority*, 290 A.2d 362, 365-66 (Me. 1972)). *See also Bailey v. City of Lewiston*, 2017 ME 160, ¶ 10, 168 A.3d 762 ("It is well established that a valid judgment entered by a court, if not appealed from, generally becomes *res judicata* and is not subject to later collateral attack.") (quoting *Standish Tel. Co. v. Saco River Tel. & Tel. Co.*, 555 A.2d 478, 481 (Me. 1989)); *Town of Lincolnville v. Perry*, 150 Me. 113, 119, 104 A.2d 884, 888 (1954) ("A judgment of a court having jurisdiction, no fraud or collusion appearing, cannot, at the instance of a party to it, be impeached collaterally by proof of errors.").

Plaintiffs do not challenge the jurisdiction of the court to enter the joint Stipulation of

Dismissal[6] or claim that the court decided an issue outside of what the parties submitted in their stipulation.[7] They do not explicitly allege a violation of due process in the 2012 litigation. The three challenges Plaintiffs now attempt to bring may have been winning arguments on appeal brought pursuant to M.R. App. P. 2, but the twenty-one-day period for bringing an appeal has long since passed. *Id.* As an appeal from a consented-to voluntary stipulation of dismissal may have been procedurally awkward, the Plaintiffs may have instead considered raising these three arguments with the Business and Consumer Court in the original lawsuit in a motion for relief from judgment brought pursuant to M.R. Civ. P. 60(b) under its more forgiving one-year period. *Id*. But the Court need not now consider whether those arguments would have won. The procedural windows for attacking the validity of the entry of the 2013 Stipulation of Judgment have closed.

This analysis does leave one loose end: allegations of post-2013 misconduct on the part of Ms. Scarcelli. Plaintiffs claim that some of the wrongful actions complained of in this case had not yet occurred by the time of the court's entry of the Stipulation of Dismissal on November 13, 2013. (P.S.A.F. ¶ 27). Plaintiffs suggest that these post-2013 wrongful actions state sufficient grounds for relief for the claims now under review.

Despite allusions to "many continuing wrongs," Plaintiffs in fact only draw the Court's attention to one in their opposition and Statement of Additional Facts: namely, Ms. Scarcelli's auction of an entity called General Holdings (formerly Gleichman & Co.) to Preservation in 2014. (Complaint ¶ 152). Preservation had purchased rights to a note and guaranty obligation owed by Plaintiffs and Gleichman & Co., related to their financing of a failed development project in

[6] Plaintiffs challenge the jurisdiction of the court to dismiss the SNH Trust's claims in their opposition to the Entity Defendants' motion. The issue is considered in Part II.B.2. *infra* of this Order.

[7] Plaintiffs possibly level such an allegation against the Court's decision declaring Ms. Scarcelli the holder of a 70% equity interest in GN to the extent that they argue that the only question submitted to the Court on that issue was the extent of Ms. Scarcelli's "limited partner interest" and not her equity interest. *See* Part I of this Order *supra*. That is inapposite to the applicability of claim preclusion to the claims under review in this Part.

Chicago in 2007-2008. (Complaint ¶¶ 13, 126). The purchase took place on November 20, 2012: nearly a year before the entry of Stipulation of Dismissal in the previous lawsuit.

Even assuming that the purported auction took place and was improper, as this Court must, Plaintiffs do not articulate why that action was a breach of fiduciary duty on the part of Ms. Scarcelli to either themselves or Stanford, how it satisfies the elements required for judicial dissolution pursuant to 31 M.R.S.A. § 1595(1), or why it is sufficient grounds to avoid the transfer of Stanford membership units to Ms. Scarcelli. Plaintiffs cannot raise a factual issue for purposes of defeating summary judgment if they cannot articulate its materiality. *Savell*, 2016 ME 139, ¶¶ 18, 19, 147 A.3d 1139. *See also Dyer v. D.O.T.*, 2008 ME 106, ¶ 14, 951 A.2d 821 (explaining that plaintiff cannot create a factual dispute for purposes of defeating summary judgment merely by raising "conclusory allegations").

Based on the foregoing, the Court hereby **grants** the Scarcelli Defendants' motion for summary judgment on Count IV, Count V, and Count VI of the Complaint as brought by Mr. Norberg as an individual and in his capacity as Trustee for the SNH Trust.

B. **Mr. Norberg's Claims Against Stanford Are Barred by *Res Judicata***

Plaintiffs raise two issues unique to Stanford to argue that *res judicata* should not bar their claims against that entity. First, Plaintiffs argue that Stanford was not a party to the 2012 litigation and that *res judicata* therefore cannot bar subsequent claims against it. Second, Plaintiffs claim that the court lacked jurisdiction over SNH Trust in the 2012 litigation and therefore *res judicata* does not bar SNH Trust from now pursuing a claim against Stanford.

1. Stanford Was a Party to the 2012 Litigation

Plaintiffs claim that Stanford was merely joined as a party in interest to the Counterclaim

in the 2012 litigation. (P.S.A.F. ¶¶ 26-27).[8] Plaintiffs argue Stanford was only named as a party in interest because Plaintiffs sought judicial dissolution of Stanford in the Counterclaim, and that the Counterclaim did not seek an award of damages from Stanford (P.S.A.F. ¶ 27). As such, Plaintiffs argue that it would be unfair to bar them from bringing claims against Stanford now, because they could not be expected to have brought those claims against a mere party in interest joined for the limited purpose of recovering against the real interested defendant: Ms. Scarcelli.

Plaintiffs argument is based on a faulty premise: that Stanford was not a real party to the 2012 Litigation. Despite Plaintiffs' attempt to minimize the extent to which the Counterclaim made allegations against Stanford or sought to recover from Stanford, the Counterclaim is replete with allegations against Stanford and names Stanford as a third-party defendant in the caption. (P.S.A.F. ¶ 25; S.M.F. ¶ 33; *see* Counterclaim). The Plaintiffs' theory, in this case as in 2012, is that Ms. Scarcelli used Stanford to her own advantage and to the disadvantage of its minority owner, the SNH Trust. Stanford was as much a defendant in the Counterclaim as it is now in the Complaint.

2. The Court Had Jurisdiction to Enter Final Judgment as to SNH Trust in the 2012 Litigation

Plaintiffs argue that Mr. Norberg's claims as trustee of the SNH Trust were not properly joined to the GN Holdings litigation and therefore the court never had jurisdiction to dismiss SNH Trust's claims. (P.S.A.F. ¶¶ 23-25). Lack of jurisdiction is one of the limited exceptions to the general rule that a final judgment is a valid one, and is therefore one of the few permissible means of collateral attack of a prior judgment to defeat *res judicata*. *N.E. Bank N.A.*, 438 A.2d at 268.

Plaintiffs note that SNH Trust was not named as a defendant in the 2012 Litigation, and that SNH Trust was not joined in the litigation until Plaintiffs filed the Counterclaim. (P.S.A.F. ¶¶

[8] All references to statements of facts in dispute and statements of additional facts in this sub-part and the following sub-part refer to Plaintiff's statement of additional facts filed in opposition to the Entity Defendants' motion for summary judgment. *See* note 2 of this Order, *supra*.

23-25). Ms. Scarcelli challenged this attempt to join SNH Trust to the litigation in a motion to dismiss based on the fact that neither Ms. Gleichman nor Mr. Norberg had standing to pursue claims on behalf of SNH Trust, the minority interest holder of Stanford. (P.S.A.F. ¶ 28). Plaintiffs cite *Bank of N.Y. v. Dyer*, 2016 ME 10, ¶ 11, 130 A.3d 966 for the proposition that if a plaintiff lacks standing, that plaintiff cannot invoke the court's jurisdiction to make any adjudication on the merits. The Entity Defendants respond that *Bank of N.Y.* is inapposite because in that case, the plaintiff itself moved for dismissal without prejudice and did not dispute that it could not establish standing. *Id.* ¶ 11. The Entity Defendants point out that in the 2012 litigation, the motion to dismiss was not granted and Mr. Norberg's claims as trustee in the Counterclaim were allowed. (P.S.A.F. ¶ 28). Thus, unlike in *Bank of N.Y.*, there was a judicial determination that counterclaim plaintiff SNH Trust did have standing to bring its claim.

Regardless of any earlier disputes about standing, at the time the Stipulation of Dismissal was entered, SNH Trust was in the case and the court had jurisdiction over SNH Trust to enter its voluntary dismissal with prejudice. (S.M.F. ¶¶ 39-40). The jurisdictional issue raised now was already litigated in the motion to dismiss filed by Ms. Scarcelli in the prior lawsuit. (P.S.A.F. ¶ 28). Plaintiffs ultimately prevailed in that dispute and succeeded in joining SNH Trust as a plaintiff in their Counterclaim. Plaintiffs cannot now argue that the court reached the wrong decision on their adversaries' motion to dismiss and that it should have dismissed SNH Trust's counterclaims. *Royal Coachman Color Guard v. Marine Trading & Transp., Inc.,* 398 A.2d 382, 384 (Me. 1979) ("Once there has been full opportunity to present an issue for judicial decision in a given proceeding, *including those issues that pertain to a court's jurisdiction*, the determination of the court in that proceeding must be accorded finality as to all issues raised or which fairly could have been raised, else judgments might be attacked piecemeal and without end.") (emphasis added).

Based on the foregoing, the Court hereby **grants** the Entity Defendants' motion for summary judgment on Count IV, Count V, Count VI, and Count VII of the Complaint as brought by Mr. Norberg as an individual and in his capacity as Trustee for the SNH Trust against Stanford.

IV. MS. GLEICHMAN HAS RAISED A GENUINE FACTUAL ISSUE AS TO WHETHER SHE HAS STANDING TO BRING THE CLAIMS IN COUNT IV, COUNT V, AND COUNT VI OF THE COMPLAINT

A. The Scarcelli Defendants

The Scarcelli Defendants have moved for summary judgment as to Counts IV, V, and VI of the Complaint as to Ms. Gleichman on the grounds that Ms. Gleichman lacks standing to bring those claims because she is not a member of Stanford or Acadia. Plaintiffs do not dispute that Ms. Gleichman is not a member of Stanford. Plaintiffs dispute the assertion that Ms. Gleichman is not a member of Acadia and claim that she retains a 49% interest in that company.

Every plaintiff "must establish its standing to sue, no matter the causes of action asserted." *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700. While there is "no set formula for determining standing, a court may limit access to the courts to those best suited to assert a particular claim." *Lindemann v. Comm'n on Gov'tl Ethics and Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538 (quotations omitted). Maine statutory law provides that only "a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests . . . ." 31 M.R.S.A. § 1631(1). Standing to bring derivative actions on behalf of limited liability companies in a derivative action is likewise limited only to members. 31 M.R.S.A. §§ 1632, 1633(1). Only members may apply for judicial dissolution of limited liability companies. 31 M.R.S.A. § 1595(1)(D),(E).

Plaintiffs do not argue in their opposition that Ms. Gleichman has standing to bring a direct or derivative action against Ms. Scarcelli regarding Stanford, but do allege facts suggesting such

a position in their Statement of Additional Facts. (P.S.A.F. ¶¶ 48-51). Statements of additional facts filed pursuant to M.R. Civ. P. 56(h)(2) are not the proper place for legal arguments. *See Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶ 4 n.2, 133 A.3d 1021. As Plaintiffs fail to address the issue in their opposition to the motion, the issue of Ms. Gleichman's standing to bring Counts IV, V, and VI with regards to Stanford is waived.

The Defendants claim that Ms. Gleichman is not a member of Acadia because she and Ms. Scarcelli both assigned all of their interest in that company to Stanford. (S.M.F. ¶ 11). In support of this position, the Scarcelli Defendants rely on a 2008 assignment document, signed by both Ms. Scarcelli and Ms. Gleichman, that purports to assign their respective interests in Acadia to Stanford. (*Id.*) Plaintiffs contest the issue of Acadia's ownership and question the authenticity of the assignment document. (P.S.F.D. ¶ 11). For her part, Ms. Gleichman has sworn that she has no memory of signing such a document and claims that if her signature is genuine the assignment was never meant to go into effect and never has. (*Id.*) Beyond Ms. Gleichman's sworn testimony, Plaintiffs point to other record evidence suggesting that Ms. Gleichman's accountant and Ms. Scarcelli's own lawyers understood Ms. Gleichman to be a minority member of Acadia after the purported 2008 assignment. (*Id.*)

This Court is thus presented with two competing versions of the truth on a factual issue material to the case. *See MP Assocs.*, 2001 ME 22, ¶ 12, 771 A.2d 1040. On the evidence provided, the Court would be required to make a credibility determination as to which version to believe, which is impermissible for summary judgment. *Id.* The Court thus rules that Plaintiffs have raised a genuine factual issue as to the membership of Acadia. Therefore, the Scarcelli Defendants' motion for summary judgment is **denied in part** as to Ms. Gleichman's claims in Counts IV, V, and VI. Ms. Gleichman can proceed on those Counts only as they relate to Acadia.

B. The Entity Defendants

The Entity Defendants do not offer any alternative grounds specific to Acadia as to why Acadia is entitled to summary judgment, instead relying exclusively on the lack of standing argument raised by the Scarcelli Defendants.[9] As that argument failed for the Scarcelli Defendants so too it must fail here for the Entity Defendants. The Court thus hereby **denies** Defendant Acadia's motion for summary judgment.

CONCLUSION

Based on the foregoing IT IS ORDERED:

(1) The Scarcelli Defendants' motion for summary judgment is **GRANTED** as to Count X.

(2) The Scarcelli Defendants' and the Entity Defendants' motions for summary judgment are **GRANTED** as to Count VII.

(3) The Scarcelli Defendants' motion for summary judgment is **GRANTED IN PART AND DENIED IN PART** as to Count IV, Count V, and Count VI.

   a. As to Plaintiff Karl Norberg's claims in Counts IV, V, and VI, the Scarcelli Defendants' motion is **GRANTED**.
   b. As to Plaintiff Pamela Gleichman's claims in Counts IV, V, and VI, the Scarcelli Defendants' motion is **GRANTED IN PART AND DENIED IN PART**. The Scarcelli Defendant's motion is **GRANTED** to the extent that Ms. Gleichman cannot proceed on those counts as they relate to Stanford. The motion is **DENIED** to the extent that Ms. Gleichman may proceed on those counts as they relate to Acadia.

(4) The Entity Defendants' motion for summary judgment is **GRANTED** as to Defendant Stanford on Counts IV, V, and VI.

(5) The Entity Defendants' motion for summary judgment is **DENIED** as to Defendant Acadia on Counts IV, V, and VI. Those counts remain pending as against Defendant

[9] In three sentences at the end of their reply brief, the Entity Defendants point out that Plaintiffs cite no authority to show that a LLC owes fiduciary obligations to its members. But nor do the Entity Defendants offer any authority to show that a LLC does not owe fiduciary obligations to its members. *See Wescott v. Allstate Ins*., 397 A.2d 156, 163 (Me. 1979) ("[T]he burden of showing entitlement to summary judgment rests on the [moving party.]").

Acadia.

Accordingly, Counts IV, V, and VI of Plaintiffs' Complaint remain pending. Plaintiff Pamela Gleichman's claims against Ms. Scarcelli arising out of Ms. Scarcelli's management of Acadia, as well as her direct and derivative claims against and on behalf of Acadia, have survived Defendants' motions for summary judgment.

The Clerk is instructed to enter this Order on the docket for this case incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

November 2, 2017 **/s**
DATE **SUPERIOR COURT JUSTICE**
BUSINESS AND CONSUMER COURT