UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GREENELL CORPORATION,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-31-P-C***
	)	
PENOBSCOT AIR SERVICE, LTD.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant, Penobscot Air Service, Ltd., moves for summary judgment[1] on all counts of the plaintiff's complaint arising out of the plaintiff's ownership and the defendant's management of a Piper Cheyenne II airplane. I recommend that the court grant the motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the

[1] The plaintiff has requested oral argument on the motion. Docket No. 19. I am satisfied that the written submissions of the parties adequately address the issues raised. Accordingly, the request for oral argument is denied.

potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The parties have presented the following appropriately supported material facts that are not in dispute.[2] Penobscot Air Service, Ltd. is a Maine corporation with a principal place of business

[2] The plaintiff's Statement of Disputed Material Facts in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law ("Plaintiff's SMF") (Docket No. 13) fails to comply with this court's Local Rule 56(c). To the extent that entries in that document refer to specific paragraphs in the defendant's Statement of Undisputed Material (continued...)

in Maine, of which Clinton and Hannah Demmons are the majority stockholders. Complaint (Docket No. 1) ¶ 3; Answer and Counterclaim (Docket No. 3) ¶ 3; Deposition of Hannah Demmons, sealed copy filed with Plaintiff's SMF ("H. Demmons Dep.") at 10. At all relevant times the defendant was engaged in the air charter business pursuant to 14 C.F.R. Part 135 and as authorized by the Federal Aviation Administration. Counterclaim ¶ 5; Reply to Defendant's Counterclaim (Docket No. 6) ¶ 5. The plaintiff, Greenell Corporation, a family owned company, is a Pennsylvania corporation with a principal place of business in New Jersey. Deposition of Reine Fleck ("R. Fleck Dep."), copy filed with Defendant's SMF, at 24, 34. Reine Fleck served as its president from 1979 to June 1998. *Id*. at 30. She and her husband, Jost Fleck, ran the company. *Id*. at 22-23.

After twice chartering flights from the defendant, Jost Fleck informed Clinton Demmons that the plaintiff was interested in purchasing an airplane. Deposition of Jost J. Fleck ("J. Fleck Dep."), copy filed with Defendant's SMF, at 43-46. Sometime later, Clinton Demmons provided the Flecks with prospectuses on three or four Cheyenne airplanes that were available. R. Fleck Dep. at 51. Clinton Demmons told the Flecks that he got the information about the planes from Bob Sheehan. *Id*. at 52. Clinton Demmons recommended the plane identified as 884 Charlie Alpha to the Flecks, *id*. at 53; after a test flight in the plane on March 5, 1998, the Flecks made a $10,000 deposit on it, J. Fleck Dep. at 57, 62. Greenell Corporation purchased the plane on or about April 9, 1998. R. Fleck Dep. at 107-08.

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[2](...continued)
Facts in Support of Motion for Summary Judgment ("Defendant's SMF") (Docket No. 10), I have nonetheless considered those statements by the defendant to be properly contested, if and to the extent the plaintiff's citations to the record support the opposing statements. All other statements in the defendant's SMF, to the extent properly supported by record citations, are deemed admitted. Local Rule 56(e).

The parties entered into a written aircraft lease agreement as of April 15, 1998 concerning the plane. Exh. 18 to J. Fleck Dep., copy attached to Defendant's SMF. After receiving notice from the Maine Revenue Service that sales tax might be due on Greenell Corporation's purchase of the plane, R. Fleck Dep. at 140-43, Greenell Corporation asked the defendant to execute a management agreement that had been prepared by its attorney to replace the lease agreement, *id*. at 152, 155, 158 & Exhs. 27-29 to R. Fleck Dep. (attached to Defendant's SMF). The management agreement, effective by its terms as of April 15, 1998, was executed on September 21, 1998. Management Agreement, Exh. 29 to R. Fleck Dep., at 1, 7. The management agreement did not alter the way that the parties did business on a day-to-day basis. R. Fleck Dep. at 168.

By a letter dated November 9, 1998 from its attorney, the plaintiff directed the defendant to stop using the plane in any way. Exh. 32 to R. Fleck Dep., copy attached to Defendant's SMF. The letter also states that the attorney had been informed by the plaintiff that the defendant had "breached and violated the oral and management agreement dated April 15, 1998." *Id.*

The plaintiff filed its complaint in this action in the Maine Superior Court on or about January 20, 1999. Complaint at 11. The defendant removed the action to this court on February 9, 1999. Docket.

III. Discussion

The complaint alleges breach of "an express and/or implied contract," Complaint ¶¶ 24-25; fraud, *id*. ¶¶ 35-39; and negligent misrepresentation, *id*. ¶¶ 41-45; and seeks an accounting and punitive damages, in addition to consequential damages, *id*. ¶¶ 30-33, 48. In a counterclaim the defendant asserts claims based on breach of contract, *quantum meruit*, unjust enrichment, negligent

misrepresentation and fraudulent misrepresentation and also alleges violation of the Uniform Trade Secrets Act, 10 M.R.S.A. § 1541 *et seq*. Counterclaim at 7-17. The motion for summary judgment addresses only the claims asserted in the complaint.

A. Breach of Contract (Count I)

The defendant argues that none of the promises alleged in the complaint to have been breached are included in the management agreement[3] and that the parol evidence rule bars recovery on any promises not included in that written agreement. The plaintiff responds that the allegations in the complaint set forth breaches of the written agreement, that the agreement's integration clause is ambiguous, and that the agreement is not integrated as to the oral promises upon which it bases its claim. When jurisdiction of the court is based on diversity of citizenship of the parties, as is the case here, state law concerning the parol evidence rule applies because the matter is one of substance rather than of procedure. *Baker v. Rapport*, 453 F.2d 1141, 1142 (1st Cir. 1972).

Under Maine law,

> [t]he parol evidence rule operates to exclude from judicial consideration extrinsic evidence offered to alter, augment, or contradict the unambiguous language of an integrated written agreement. Application of the rule requires an initial finding that the parties intended the writing to integrate their understandings concerning the subject matter of the agreement. To determine whether integration was intended and whether the

[3] The defendant devotes most of its discussion of the contract claim to the lease agreement, referring only cryptically to the management agreement. Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law ("Defendant's Memorandum") (Docket No. 9) at 10. The summary judgment record includes a written agreement signed by both parties that specifically provides that the lease agreement is null and void "retroactive to April 15, 1998," the lease's stated effective date, and that the lease agreement is replaced by the management agreement "effective as of April 15, 1998." Agreement, R. Fleck Dep. Exh. 28, copy attached to Defendant's SMF. The defendant offers no evidence or argument to support a conclusion that this document was ineffective or that the management agreement is for any other reason unenforceable. Accordingly, my analysis deals only with the management agreement.

> scope of integration was complete or partial, the court may consider extrinsic evidence. Such consideration, however, is only appropriate where the agreement is ambiguous on the issue of integration. Where the language of the agreement is unambiguous with respect to the existence and scope of integration, no extrinsic evidence concerning integration may be presented by the parties or considered by the court.

Handy Boat Serv., Inc. v. Professional Servs., Inc., 711 A.2d 1306, 1308-09 (Me. 1998) (citations omitted). The management agreement at issue here contains the following language:

> This Agreement constitutes the entire understanding between the parties, and as of its effective date supersedes all prior or independent agreements between the parties covering the Aircraft. Any change or modification hereof must be in writing signed by both parties.

Management Agreement, Article Seventeen(B).

The complaint alleges breach of contract by the defendant as follows:

> Defendant breached said contract by failing to accept unscheduled flights ("pop-ups"), by failing to sell fuel to Plaintiff at a special retail price, and by failing to provide the benefits to the pilots for which Plaintiff paid Defendant.

Complaint ¶ 25. It is clear from other paragraphs of the complaint that the defendant's alleged promises to undertake these specific activities were made before the lease agreement or the management agreement were signed. *Id*. ¶¶ 6-13.

1. Express Contract Terms.

Neither the lease agreement nor the management agreement contains any reference to unscheduled flights, fuel prices or pilot benefits. The plaintiff first contends that the failures alleged in paragraph 25 of the complaint constitute breaches of two express terms of the management agreement, which, although the plaintiff fails to identify them, it describes as providing that the defendant "has exclusive control over the operation of the Airplane to provide 24-hour charter

service and has 'sole control' in dispatching and scheduling the Airplane." Plaintiff's Response to Defendant's Motion for Summary Judgment, etc. ("Plaintiff's Memorandum") (Docket No. 12) at 3.

I assume that the reference to "sole control" is to the last sentence of Article Four of the management agreement, which provides that the defendant "shall be given sole control over dispatching and scheduling the Aircraft." Management Agreement Article Four, at 2. However, there is no provision in the management agreement that can be reasonably construed to require the defendant to "provide 24-hour charter service." While there are repeated references to the intended use of the plane in a charter service, *e.g.*, Management Agreement preamble & Articles One, Five, Seven(A) & Ten, the only one of these references that can possibly be construed to relate to the defendant's "exclusive control over the operation of the Airplane to provide . . . charter services" is found in Article Seven(A), which states that "[d]uring those times when the Aircraft has been chartered, [the defendant] shall have the authority as required in accordance with . . . 14 C.F.R. Section 135.77." The incorporated federal regulation provides, in its entirety:

> Each certificate holder is responsible for operational control and shall list, in the manual required by § 135.21, the name and title of each person authorized by it to exercise operational control.

14 C.F.R. § 135.77.

Neither of these terms of the management agreement can possibly be stretched far enough to provide a basis for the specific claims of breach presented by the plaintiff. If anything, they provide support for the opposite conclusion: that the defendant had exclusive control, allowing it to refuse "pop-ups," charge any price for fuel, and pay or not pay any benefits to pilots. To the extent that the plaintiff means to rely on the proposition that the promises alleged to have been breached

are implied in any written contract terms,

> [t]he implication of a contract term is only justified when the implied term is not inconsistent with some express term of the contract and when there arises from the language of the contract itself, and circumstances in which it was entered into, an inference that it is absolutely necessary to introduce the term to effectuate the intention of the parties.

Top of the Track Assoc. v. Lewiston Raceways, Inc., 654 A.2d 1293, 1295 (Me. 1995) (quoting 11 *Williston on Contracts*, §1295 (1968); internal quotation marks omitted). The evidence in the summary judgment record does not begin to meet this standard.[4]

2. Parol Evidence Rule.

The plaintiff next contends that the management agreement is ambiguous on the issue of integration. Specifically, it argues that the phrase "covering the Aircraft" in Article Seventeen(B) could be construed to refer only to "such things as maintenance which is physically performed on the airplane itself" or to cover "the services to be provided by the parties." Plaintiff's Memorandum at 4. This ambiguity, the plaintiff asserts, allows it to present extrinsic evidence to show that the agreement is only partially integrated because the parties intended the promises alleged to have been breached by the defendant to be binding agreements independent of the written contracts. *See Astor*

[4] The plaintiff also argues that the defendant breached Article Five(B) and (D) of the management agreement, which require the plaintiff to pay "[a]ll costs and expenses incurred by [the defendant] in purchasing fuel and oil for the Aircraft" and "[a]ll costs and expenses incurred by [the defendant] in providing pilots to operate the Aircraft." Plaintiff's Memorandum at 7-8. Even if the court were to ignore the fact that this article by its terms imposes an obligation only on the plaintiff, the plaintiff's argument that the defendant breached the article by charging the plaintiff for costs in excess of those it actually incurred for fuel and pilots is unsupported by any factual evidence. The plaintiff's assertions that the defendant charged it the same rate for fuel that it charged other customers and that it never audited its payments to pilots during the seven months that the agreements were in force simply do not support the conclusion that the defendant charged the plaintiff for costs that it did not in fact incur, which is the basis of the plaintiff's argument. Indeed, the plaintiff has offered no evidence that it paid the defendant for any fuel costs.

v. Boulos Co., 451 A.2d 903, 905 (Me. 1982) (court may refer to agreements and negotiations preceding contract to determine whether agreement is completely or just partially integrated).

"The issue of whether an agreement is integrated is an issue of law for the Court." *Vigilant Ins. Co. v. Burnell*, 844 F. Supp. 9, 12 (D. Me. 1994). The plaintiff's reading of the integration clause included in the management agreement can best be described as tortured. "[A]ll prior or independent agreements between the parties covering the Aircraft" could not reasonably be interpreted to be limited to maintenance of the plane. While the use of the word "covering" might not be as precise as the terms "referring to" or "concerning," such precision is not necessary in order to find the integration clause unambiguous. *See Blackie v. State of Maine*, 75 F.3d 716, 721 (1st Cir. 1996) ("[A] contract is not ambiguous merely because a party to it, often with a rearward glance colored by self-interest, disputes an interpretation that is logically compelled."). It is not the court's role to enlarge or diminish the terms of a contract. *See Tinker v. Continental Ins. Co.*, 410 A.2d 550, 554 (Me. 1980).

The plaintiff also argues that parol evidence is admissible on the question of the degree of integration intended by the parties because the clause at issue here does not include the following sentence that was included in the integration clause under scrutiny in *Handy Boat*: "[The defendant] agrees that it is not relying on any representations or agreements other than those contained in this Lease." 711 A.2d at 1309; Plaintiff's Memorandum at 4. However, Maine law does not require such language in order to find that an integration clause is unambiguous and intended to provide total integration. *See, e.g., Farley Inv. Co. v. Webb*, 617 A.2d 1008, 1010 (Me. 1992) ("This instrument . . . sets forth the entire agreement between the parties" sufficient, along with detailed and comprehensive nature of agreement, to establish complete integration.).

It is also significant that the plaintiff does not provide any evidence that it would not have entered into the lease or management agreements if the defendant had not made the alleged oral promises. *Astor*, 451 A.2d at 905. The only statement in the plaintiff's statement of material facts that addresses this aspect of its argument is the assertion that "[t]he parties intended that the verbal agreements were a part of the agreement reached between the parties," Plaintiff's SMF ¶ 10, a statement that is not supported by the record citations provided by the plaintiff and is belied by the terms of the written agreements.

I conclude that the failures of the defendant alleged by the plaintiff do not constitute breaches of the parties' written agreement and that the written agreement is fully integrated, thus barring any consideration of oral promises extrinsic to the written agreements allegedly made before the effective date of the agreements as the basis for a claim of breach of contract.

B. Accounting (Count II)

The complaint alleges that the plaintiff and defendant were engaged in a joint venture and seeks an accounting "for all income and expenses generated . . . concerning the Management Agreement." Complaint ¶¶ 30, 32. The defendant contends that the equitable remedy of an accounting is only available under Maine law for joint venturers and that the written agreements between the parties in this case establish as a matter of law that they were not joint venturers. Without citation to authority, the plaintiff argues in response that the existence of an owner-manager relationship is not inconsistent with a joint venture. The plaintiff also contends that an accounting is an available remedy even when the parties were not engaged in a joint venture.

Under Maine law, "[a] joint venture is an association between two or more individuals or entities who agree to pool their efforts and resources to jointly seek profits." *Nancy W. Bayley, Inc.*

v. Maine Employment Sec. Comm'n, 472 A.2d 1374, 1377 (Me. 1984).

> It is similar to a partnership, although it is generally more limited in scope and duration. Like a partnership, a joint venture is *ex contractu*, and its existence may be established by proving the elements of a contract. Such a contract may be express or implied, and the finder of fact must consider the conduct of the parties and the surrounding circumstances before reaching a conclusion as to their intent.

Id. (citations omitted). *See also Honeycomb Sys., Inc. v. Admiral Ins. Co.*, 567 F. Supp. 1400,1409 (D. Me. 1983).

Here, the plaintiff contends that the "profits" jointly sought by the parties were the hourly payments to be made when the plane was chartered. Plaintiff's Memorandum at 9 & Plaintiff's SMF ¶ 28. Of course, the plaintiff was paying all expenses of the aircraft under the management agreement and the defendant was incurring some costs in connection with the scheduling and operation of charter flights, so it is unduly simplistic to call the gross charter income "profit." In addition, the defendant points out that the plaintiff apparently never intended to make a profit from its ownership of the plane. J. Fleck Dep. at 105-06. Strictly speaking, the joint venture, if it existed, was not the ownership of the plane but only its use for charter service, but the costs of ownership and the costs of the charter venture were essentially identical for the plaintiff. Sharing of profits, standing alone, is not sufficient in any event to establish the existence of a joint venture. *Simpson v. Richmond Worsted Spinning Co.*, 128 Me. 22, 30 (1929).[5] The business relationship of the parties in this case also fails to meet several other criteria of a joint venture. The plaintiff contends that the parties shared losses when the plane was not being flown, Plaintiff's Memorandum at 9, but the

[5] *Cf. Guerrero v. Bluebeard's Castle Hotel, Inc.*, 982 F. Supp. 343, 349 (D.V.I. 1997) ("a joint venture is distinguishable from other business associations by the fact that it is always undertaken for profit").

defendant incurred no losses at such times. The defendant only "lost" the potential difference between its share of the hourly charter rate and its costs incurred in arranging the flight, which is not a "loss" from the venture itself. While the parties had a community of interest in the chartering of the plane and each contributed something to that business, *Simpson*, 128 Me. at 30-31, the management agreement gives exclusive control of the charter business to the defendant, a situation that is inconsistent with the existence of a joint venture, *id*. at 31. The plaintiff's contention that the requirement of the agreement that the defendant make its records concerning the plane available to the plaintiff is evidence of joint control over the chartering, Plaintiff's Memorandum at 9, borders on the frivolous.[6]

The plaintiff has not submitted sufficient evidence to allow the court to find that there is a disputed issue of material fact concerning the existence of a joint venture between the parties. However, that conclusion is not dispositive concerning the demand for an accounting in Count II. While an accounting is "the proper remedy of a party to a joint adventure to recover his share of the profits or fix the liability for losses," *Waldo Lumber Co. v. Metcalf*, 132 Me. 374, 378 (1934), the existence of a joint venture does not appear to be a prerequisite to entitlement to an accounting under Maine law, *e.g.*, *Graffam v. Wray*, 437 A.2d 627, 635 & n. 12 (Me. 1981) (accounting appropriate remedy in dispute over church funds between two groups of members of a church); *City of Waterville v. Kennebec Water Dist.*, 138 Me. 307, 334 (Me. 1942) (accounting appropriate remedy in action by town seeking return of payments made to water district due to accounts "being of great

[6] The plaintiff also contends that its "primary responsibility of preparing advertising for the Airplane" is further evidence of its control and management of the charter business. Plaintiff's Memorandum at 9. The plaintiff has not offered any evidence of the existence of such a responsibility in the summary judgment record, and the court therefore may not consider the contention.

complexity and unduly difficult to determine and adjust in an action at law"). The necessary element of such a claim is that the plaintiff seeking an accounting have no adequate remedy at law. *Graffam,* 437 A.2d at 635 n.12; *Paris Utility Dist. v. A. C. Lawrence Leather Co.*, 665 F. Supp. 944, 961 (D. Me. 1987). Here, the plaintiff failed to plead that it has no adequate remedy at law. Complaint ¶¶ 1-33. That defect alone is fatal to Count II, *People's Heritage Sav. Bank v. Recoll Management, Inc.*, 814 F. Supp. 159, 171 (D. Me. 1993), and, even if that were not the case, it is clear from the discussion of Counts III and IV of the complaint that follows that the plaintiff does have an adequate remedy at law for its claims.[7]

Accordingly, the defendant is entitled to summary judgment on Count II.

C. Fraudulent Misrepresentation (Count III)

Count III of the complaint is entitled "Fraud," but it is clear from the allegations of the complaint that the plaintiffs claim that they were fraudulently induced to enter into the lease and management agreements by the same alleged promises that formed the basis of their contractual claim.[8] Complaint ¶ 35. The plaintiff's memorandum of law discusses this claim in terms of

[7] The plaintiff asserts, in conclusory fashion, that it has no adequate remedy at law "because damages at law cannot be accurately measured without an accounting." Plaintiff's Memorandum at 10. Under this circular theory, every demand for damages that could be measured would require an accounting, consigning the vast majority of claims asserted in law to an equitable remedy. Suffice it to say, for purposes of this action, that the plaintiff has failed to demonstrate that the damages it seeks are in any way difficult to determine in an action at law. Juries have been determining damages for breach of contract, fraudulent misrepresentation and negligent misrepresentation for years and presumably continue to be able to do so.

[8] "Parol evidence of fraudulent inducement may be introduced to show that a signed document does not reflect the intent of the parties." *Ferrell v. Cox*, 617 A.2d 1003, 1006 (Me. 1992). *See also Nelson v. Leo's Auto Sales, Inc.*, 158 Me. 368, 370 (Me. 1962) (action for false representation allows plaintiff to introduce testimony concerning conversations that took place before written contracts were signed "to evidence the fact . . . a false and fraudulent representation (continued...)

fraudulent misrepresentation.[9] Plaintiff's Memorandum at 11. The defendant contends that the promises at issue are not actionable under Maine law because they are promises to do something in the future and that, even if the promises were actionable, there is no evidence that Clinton Demmons at the time he allegedly made the promises intended not to honor them, a necessary element of the claim. Defendant's Memorandum at 14-18. Addressing only the claim about the availability of pilots for unscheduled flights, the plaintiff responds that the alleged promise is actionable under Maine law and that the defendant "had to have known at the time the representations were made that it did not have the proper flight coverage to ensure 24-hour pop-up service." Plaintiff's Memorandum at 12.

Under Maine law, a plaintiff alleging fraudulent misrepresentation must show that the defendant

> (1) [made] a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relie[d] upon the representation as true and act[ed] upon it to the damage of the plaintiff.

McCarthy v. U.S.I. Corp., 678 A.2d 48, 53 (Me. 1996) (quoting *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995)). The fact that intent is one of the elements of this claim does not mean that summary judgment is necessarily unavailable. *See, e.g., Bilodeau v. Mega Indus.*, ___ F.Supp.2d ___, 9 A.D. Cases 850, 1999 WL 427659 (D. Me. Jun. 7, 1999), at *14.

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[8](...continued)
made [sic] for the purpose of inducing her to execute them").

[9] The defendant makes no argument concerning the sufficiency of the complaint with respect to any allegations of fraudulent misrepresentation. *Cf. Philippe v. Shape, Inc.*, 688 F. Supp. 783, 786 (D. Me. 1988) (allegations of fraudulent misrepresentation must specify time, place and content of alleged misrepresentation).

The defendant bases its argument on the nature of the alleged misrepresentation regarding the availability of pilots for the plane, contending that the promise[10] concerned only future conduct and therefore could not be actionable, citing *Shine v. Dodge*, 130 Me. 440 (1931). In that case, the Law Court held that "it is well settled in this state that the breach of a promise to do something in the future will not support an action of deceit, even though there may have been a preconceived intention not to perform." 130 Me. at 443. While "an action for deceit must be based on misrepresentations of past or existing fact and not merely on broken promises for future performance," *Wildes v. Pens Unlimited Co.*, 389 A.2d 837, 840 (Me. 1978), it is also the case under Maine law that

> [t]he relationship of the parties or the opportunity afforded for investigation and the reliance, which one is thereby justified in placing on the statement of the other, may transform into an averment of fact that which under ordinary circumstances would be merely an expression of opinion.

Shine, 130 Me. at 444. The *Shine* opinion seems to differentiate between promises of future action and expressions of opinion, *id.*, but the *Wildes* opinion makes no such distinction for purposes of a claim of fraudulent misrepresentation. In *Wildes*, the Law Court held that the factual circumstances, in which the plaintiff job applicant "was clearly at the mercy of the defendant insofar as any representations were made regarding . . . employment opportunities and remuneration," meant that the defendant's misrepresentations "could well have been justifiably understood as being of fact and

[10] For purposes of the motion for summary judgment, the defendant does not dispute the plaintiff's assertions that it "represented to Greenell that it would provide two sets of pilots to cover the Airplane," and that "two sets of pilots would mean that Penobscot Air would not have to turn down flights in the Airplane on the basis that the pilots had used their allowed duty time and flight time and therefore would be required by the FAA to have a rest period before flying another flight." Defendant's Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 17) ¶¶ 15, 16.

not mere opinion," and therefore actionable. 389 A.2d at 840. The Law Court reiterated the *Shine* holding and suggested that a promise of future action and a statement of opinion may be equated for purposes of a claim of fraudulent misrepresentation in *Boivin v. Jones & Vining, Inc.*, 578 A.2d 187, 189 (Me. 1990), in which it adopted Section 525 of the Restatement (Second) of Torts (1977), which provides:

> One who fraudulently makes a representation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

In *Boivin*, the Law Court upheld a jury verdict for the plaintiff on a claim of fraudulent misrepresentation arising out of promises made in an offer of employment. 578 A.2d at 188-89.

In *Schott Motorcycle Supply, Inc. v. American Honda Motor Co.*, 976 F.2d 58 (1st Cir. 1992), the First Circuit, applying Maine law, held that statements that the defendant "would continue to be just as committed to the motorcycle market as it had been in the past in terms of support for dealerships and advertising," and that the defendant's products to be introduced in the future "would definitely cause an increase in sales over previous years," were only expressions of opinion as to future events, "nothing more than 'puffing' or 'trade talk,' upon which no reasonable person would rely." *Id*. at 65. In the case at hand, the alleged promise that the defendant would always have a second set of pilots available to fly the plaintiff's plane when a customer requested a charter and the pilots who would otherwise fly the plaintiff's plane were unavailable is considerably more specific than the promises at issue in *Schott* and cannot be construed as mere puffing. In addition, the factual circumstances are quite different.

Here, the plaintiff contends, and the defendant does not dispute, that "Greenell trusted

Clinton Demmons and Penobscot Air's expertise in the aviation industry and relied heavily on [them] as Greenell knew nothing about aviation." Defendant's Reply SMF ¶ 1. The defendant urges the court to discount this fact because the plaintiff could not have been "at the mercy of" the defendant in the negotiations before the lease was signed, because the plaintiff is a much larger corporation than the defendant, involved its accountant and attorney in the negotiations, and had a two-month period in which to investigate the alleged misrepresentations before it executed the lease.[11] Defendant's Memorandum at 15-16. None of these facts compels a conclusion that the plaintiff's claim cannot fit within the contours of the *Wildes* and *Boivin* definition of fraudulent misrepresentation. In *Veilleux v. National Broad. Co.*, 8 F.Supp.2d 23 (Me. 1998), this court addressed the argument made by the defendant here in the context of a claim that the plaintiffs were induced to appear on a television program by means of fraudulent misrepresentation, holding that *Wildes* and *Boivin* "do make clear . . . that a breach of a promise of future performance is now actionable, at least in certain circumstances, under a theory of fraudulent misrepresentation." *Id.* at 33. This court construed *Schott* to "recognize[] that statements of opinions are to future events could be actionable . . . where they could justifiably be understood as assurances as to specific facts." *Id.* Contrary to the defendant's interpretation of the Maine case law to require that a plaintiff be entirely

[11] The defendant also relies in this regard on an allegation that Jost Fleck consulted his brother, "who has experience as a commercial airline pilot," about the plaintiff's arrangement with the defendant. Defendant's Memorandum at 16. To support this contention, the defendant cites the deposition testimony of Reine Fleck, in which she says that her husband's brother was a pilot in the past and "I'm sure my husband talked to him many times about [the arrangement with Penobscot Air]." R. Fleck Dep. at 197. There is no indication in the record when these conversations took place, whether they had anything to do with the defendant's alleged representations concerning the availability of a second set of pilots, or that the fact that the brother had been a pilot gave him any expertise or background in the area of private airplane chartering services. This fact, as presented, adds nothing to the defendant's argument in support of summary judgment.

at the mercy of the defendant in order to invoke *Boivin* and *Wildes*, that case law only requires that the plaintiff be "at the mercy of" the defendant with respect to the specific representation at issue. That could have been the case here, and nothing more is required at this stage of the proceedings.

A closer question is presented by the defendant's alternative contention that there is no evidence in the summary judgment record to show that the defendant knew that its representation concerning the availability of pilots was false when it was made, or that the defendant made the statement with reckless disregard of its truth or falsity. The plaintiff directs the court's attention to paragraphs 1-2, 15-16, and 19-23 of its statement of material facts as evidence of this element of its claim. Plaintiff's Memorandum at 11-14. Paragraphs 1, 2, 15, 16 and 19 of that document provide no evidentiary support for this element of the claim. The record citations offered by the plaintiff in support of paragraphs 20 and 22 of its statement of material facts are correctly challenged by the defendant as inadmissible hearsay and cannot be considered by the court. Paragraph 23, when the cited record source is consulted, clearly refers to a time after the written agreement between the parties had taken effect, Transcript of Deposition of Kevin Waters ("Waters Dep."), copy submitted with Defendant's SMF, at 154, and therefore offers evidence that is irrelevant to the defendant's knowledge or intent before the first written agreement was executed. The defendant contends that paragraph 21 of the plaintiff's SMF is not supported by the record citation given, but the cited testimony of Kevin Waters, one of the defendant's pilots, does support the plaintiff's statement that "Penobscot Air . . . did not have a flight crew such that it would be available for charter services as represented by Penobscot Air." Waters' cited deposition testimony on this point provides:

> Q: Do you think that Penobscot Air did not manage or operation the plane properly with respect to its agreement with Greenell Corporation?
> A: Yes.

> Q: How so?
> A: That the understanding which I have is that . . . the airplane would be crewed available for charter.
> Q: Have you finished your answer?
> A: The reality is that that was not the case.

Waters Dep. at 91. While minimal, this evidence, viewed in the light most favorable to the plaintiff, is sufficient to avoid the entry of judgment for the defendant as a matter of law based on the only element of the claim for fraudulent misrepresentation challenged by the defendant in its motion. Waters' testimony can be construed to support a finding that the defendant knew at the time the alleged representation was made that it did not and would not have sufficient pilot crews to make the plaintiff's plane available whenever a customer asked to charter it.

Accordingly, the defendant is not entitled to summary judgment on Count III.

D. Negligent Misrepresentation (Count IV)

Maine has adopted Section 552 of the Restatement (Second) of Torts as its definition of the tort of negligent misrepresentation. *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990).

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977).

The alleged statements at issue with respect to the plaintiff's claim for fraudulent misrepresentation also apparently provide the basis for its claim of negligent misrepresentation. Complaint ¶¶ 40-45. The defendant, citing case law from other states or interpreting the law of other states, argues that the claims are not actionable under this theory because the alleged statements did

not involve misrepresentations of existing or past fact.[12] Defendant's Memorandum at 18-19. The plaintiff does not respond to this argument. The Law Court has apparently not addressed this issue, but, to the extent that this is the same argument made in support of the defendant's motion for summary judgment on the fraudulent misrepresentation claim, it would seem that the same result should obtain. If the Law Court would find the *Shine* limitation[13] applicable to claims of negligent misrepresentation as well as to claims of fraudulent misrepresentation, then the *Wildes* and *Boivin* modification of *Shine* would also apply. If the Law Court were to find otherwise, the defendant has offered no other argument in support of its motion for summary judgment on this claim.

Under the circumstances, the defendant is not entitled to summary judgment on Count IV.

E. Punitive Damages (Count V)

The defendant argues that there is no evidence to support the plaintiff's claim for punitive damages. The plaintiff responds, without citation to authority, that a claim of punitive damages involves a question of fact — the presence of malice or ill will — that "cannot be decided as a matter of law," Plaintiff's Memorandum at 15-16, presumably therefore making summary judgment impossible on any claim for punitive damages. To state the argument is to demonstrate its absurdity. Maine courts, and this court, have for years been able to determine whether the record contains sufficient evidence to allow a plaintiff to proceed to trial on a claim for punitive damages. *E.g.*, *Veilleux*, 8 F.Supp.2d at 42; *Gayer v. Bath Iron Works Corp*., 687 A.2d 617, 622 (Me. 1996).

Under Maine law, "punitive damages are available based upon tortious conduct only if the

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[12] *But see Killian v. McCulloch*, 850 F. Supp. 1239, 1254-55 (E.D.Pa. 1994) (claim of negligent misrepresentation may be based on future promises under Pennsylvania law).

[13] The *Shine* opinion refers to the claim at issue as one for "deceit," 130 Me. at 443, which is defined as a fraudulent misrepresentation. *Black's Law Dictionary* (6th Ed. 1990) at 405.

defendant acted with malice." *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). Malice can be demonstrated by evidence of actual ill will toward the plaintiff on the part of the defendant or of conduct by the defendant so outrageous that malice can be implied. *Id*. Here, the plaintiff offers no evidence that the defendant bore ill will toward the plaintiff. As evidence of outrageous conduct, it offers its interpretation of the alleged misrepresentations as the "hiding" of information and "lead[ing] Greenell along," Plaintiff's Memorandum at 16, neither of which approaches the necessary level of outrageous conduct. *See, e.g., C. N. Brown Co. v. Gillen*, 569 A.2d 1206, 1214 (Me. 1990) (breach of series of promises relating to parties' contractual relationship, along with exchange of harsh words and accusations, insufficient to show malice or give rise to inference of malice); *Boivin*, 578 A.2d at 189 (fraudulent misrepresentations made in connection with offer of employment cannot be considered outrageous). The plaintiff also offers evidence of the defendant's treatment of the defendant's employee, Waters, after he approached the plaintiff to provide it with information that led it to terminate its contract with the defendant, as evidence to support its claim for punitive damages. Plaintiff's Memorandum at 16-17. Any such evidence is irrelevant to the question of the defendant's malice toward the plaintiff.

The defendant is entitled to summary judgment on Count V.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to Counts I, II, and V of the complaint and otherwise **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of August, 1999.

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David M. Cohen
United States Magistrate Judge