COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

2184CV01129-BLS2

PAUL CROWLEY

v.

WILLIAM B. CROWLEY, INDIVIDUALLY;
TIMOTHY D. STEIN, ESQ., INDIVIDUALLY;
WILLIAM B. CROWLEY AND TIMOTHY D. STEIN AS TRUSTEES
OF THE COOLIDGE ASSOCIATES NOMINEE TRUST,
ABACUS NOMINEE TRUST, AND THE BROOKSIDE REALTY TRUST;
MOUNT AUBURN TENNIS ASSOCIATES LIMITED PARTNERSHIP; AND
MOUNT AUBURN ATHLETIC CLUB, INC.

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Paul Crowley helped his brother Bill Crowley run the Mount Auburn Athletic Club in Watertown, Massachusetts, for almost fifty years. Paul alleges that Bill convinced him to move to the Boston area to help launch the business, treated and relied upon Paul as a co-owner, paid him far less than his services were worth, and in exchange repeatedly promised to "take care of" Paul financially. Bill closed the Club in 2020 due to the COVID-19 pandemic. He quickly sold the property for more than $32 million. Paul says that Bill then agreed to fulfill his promises to take care of Paul by paying Paul an additional $1.4 million, plus enough to cover any resulting tax liability, but has not done so.

Paul claims that Bill is liable to him for breach of contract and under other legal theories, and that Bill's attorney Timothy Stein is liable for tortious interference and for aiding Bill's alleged breach of fiduciary duty. He also asserts equitable claims against the corporation that constituted the Club business, the limited partnership that previously owned part of the land where the Club was located, and the trusts that owned the real estate where the Club was located when it closed. Defendants have filed separate motions to dismiss all claims under Mass. R. Civ. P. 12(b)(6).

The Court will **deny in part** Bill's motion to dismiss with respect to the core claims against him for breach of express contractual promises, as well as the alternative claims for quantum meruit and unjust enrichment, because the facts alleged by Paul plausibly suggest that Bill may be liable under these theories. It will also **deny** the motions to dismiss the equitable claims against Mount

Auburn Athletic Club, Inc. ("MAAC") and the Abacus Nominee Trust. But it will **allow in part** Bill's motion with respect to the claims against him for violating the implied covenant of good faith and fair dealing, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, and violating G.L. c. 93A, as well as the claims against the Mount Auburn Tennis Associates Limited Partnership (the "Partnership"), the Coolidge Associates Nominee Trust, and the Brookside Realty Trust. And it will **allow** Attorney Stein's motion to dismiss all five claims against him.

1. **Legal Standard**. To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that, if true, would "plausibly suggest[] … an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007).

The Court must assume the allegations in the complaint are true and draw "every reasonable inference in favor of the plaintiff" from those allegations. *Rafferty* v. *Merck & Co., Inc.*, 479 Mass. 141, 147 (2018). In so doing, however, it must "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." *Maling* v. *Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336, 339 (2015), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011). In other words, the Court must accept as true only the facts alleged in the complaint, not any "legal conclusions cast in the form of factual allegations." *Sandman* v. *Quincy Mut. Fire Ins. Co.*, 81 Mass. App. Ct. 188, 189 (2012).

2. **Claims against William Crowley individually, MAAC, the Trustees, and the Partnership.**

2.1. **Breach of Contract and Promissory Estoppel**. Paul claims that Bill has breached three interrelated promises.

- **The 1974 Promise**. First, Paul alleges that in 1974 Bill asked Paul to quit his job, move to the Boston area, and help Bill to launch and run a new tennis club. Paul alleges that Bill said he could not afford to pay Paul much, but that Bill would make sure that Paul was "taken care of" financially if Paul would join the new venture. Paul alleges that he did as Bill asked, and accepted below-market compensation for his work at the Club, in reliance on this promise.

- **The Early 1980s Promise**. Second, Paul alleges that he was a limited partner in Mount Auburn Tennis Associates Limited Partnership, the entity that bought the land where the Club was originally located, and that after a time Bill asked Paul to relinquish his interest in the Partnership. Paul alleges that in the early 1980s Bill again promised that he would "take care of" Paul if he ceded his Partnership interest to Bill. Paul alleges that he did as Bill asked in reliance on this promise, and that Bill then transferred ownership of the property to the Abacus Nominee Trust, of which Bill was the sole beneficiary.
- **The February 2021 Promise**. Third, Paul alleges that, after Bill sold the land where the Club had been located for over $32 million, they spoke about how Bill was going to fulfill his promise to take care of Paul. Paul alleges that in December 2020 Bill paid Paul and his wife a total of $232,503.78 as partial satisfaction of his promise to take care of Paul financially.[1] He further alleges that in February 2021 Bill offered to pay Paul an additional $1.4 million on a "tax free" basis, meaning that Bill would pay any associated taxes so that Paul would not bear any of the tax burden, and that Paul accepted that offer.

Paul asserts that Bill has not lived up to these promises and is therefore liable for breach of contract (Count I of the amended complaint) or under a theory of promissory estoppel (Count III).

There is no need to analyze these two claims separately, as they are both claims for breach of contract. The only difference is that Count I alleges that contracts were formed based on consideration, and Count II alleges they were formed based on reasonable and detrimental reliance.

"When a promise is enforceable in whole or in part by virtue of reliance, it is a 'contract,' and it is enforceable pursuant to a 'traditional contract theory' antedating the modern doctrine of consideration." *Rhode Island Hosp. Trust Nat. Bank* v. *Varadian*, 419 Mass. 841, 849 (1995), quoting *Loranger Constr. Corp.* v. *E.F. Hauserman Co.*, 376 Mass. 757, 760–761 (1978). "Detrimental reliance on an offer or a promise (also known as promissory estoppel) is a substitute for consideration. Therefore, an offer that reasonably induces the other party to act

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[1] Paul says that Bill paid him a $150,000 bonus in December 2020; soon thereafter gave Paul an additional $30,000 and also gave Paul's wife $30,000; and then paid $22,503.78 into Paul's 401(k) account to pay off a loan that Paul had taken from that account.

is enforceable as a contract in the same manner as any other contract to the extent necessary to avoid injustice." *Johnny's Oil Co.* v. *Eldayha*, 82 Mass. App. Ct. 705, 714 (2012); accord *Varadian*, 419 Mass. at 850 ("an action based on reliance is equivalent to a contract action, and the party bringing such an action must prove all the necessary elements of a contract other than consideration").

The Supreme Judicial Court has cautioned "that the term 'promissory estoppel' should not be used in deciding cases under this principle because that term 'tends to confusion' and overlooks the point that" a promise enforceable on the basis of detrimental reliance is enforced through a claim for breach of contract. *Cataldo Ambulance Serv., Inc.* v. *City of Chelsea*, 426 Mass. 383, 386 n.6 (1998), quoting *Varadian*, 419 Mass. at 849, and *Loranger Constr.*, 376 Mass. at 761.

Although Paul could not recover against Bill twice for the same alleged breach, he may assert claims for breach of contract based on consideration and based on detrimental reliance in the alternative. See Mass. R. Civ. P. 8(e)(2); *Linkage Corp*. v. *Trustees of Boston Univ*., 425 Mass. 1, 20 (1997).

2.1.1. **Sufficiently Definite Promises**. Bill contends that his alleged promises to "take care of" Paul in exchange for Paul moving to Boston, helping to start and then run the business, and giving up his interest in the limited partnership are too vague to create an enforceable contract. He also asserts that Bill's alleged promise to pay Paul an additional $1.4 million "tax free" in order to satisfy this obligation is unenforceable vague because Bill did not agree to make that payment by any particular date. These arguments are without merit.

The alleged promises to "take care of" Paul are sufficiently definite to be enforceable as contracts to pay Paul fair and reasonable compensation for his contributions to the success of the Club. See *Fenton* v. *Federal St. Bldg. Trust*, 310 Mass. 609, 613–614 (1942) (promise that plaintiff would be "taken care of" for initial work to secure tenants was "not too vague, uncertain or indefinite to render it incapable of being enforced"); see also *Eno* v. *Prime Mfg Co.*, 314 Mass. 686, 690 (1943) (promise that defendant would "justly and properly compensate" inventor for using shoe manufacturing process was enforceable as a promise to pay fair and reasonable compensation); *Silver* v. *Graves*, 210 Mass. 26, 28–29 (1911) (promise to "make it right" and pay unspecified "sum of money that would be satisfactory" if plaintiffs withdrew appeal from decree allowing a will enforceable); *Noble* v. *Joseph Burnett Co.*, 208 Mass. 75, 82 (1911) (promise to pay inventor "a fair and equitable share of the net profits" for using certain chemical formulas).

The alleged promise to pay Paul an additional $1.4 million is also sufficiently definite to be enforceable, even though Bill did not specify the date by which he would pay the full amount. A contract that requires payment to be made without specifying when that will happen should be understood to require the payment to be made within a reasonable time. See, e.g., *A.B.C. Auto Parts, Inc.* v. *Moran*, 359 Mass. 327, 329 (1971); *Tzitzon Realty Co.* v. *Mustonen*, 352 Mass. 648, 654 (1967); *Barber* v. *Fox*, 36 Mass. App. Ct. 525, 531 (1994). If a promise to pay reasonable but unspecified compensation with no reference to timing is enforceable, as in *Fenton* and the other cases cited above, then a promise to pay a specific amount with no reference to timing must also be enforceable.

It will be up to a jury to determine what amount of total compensation would be fair and reasonable under the circumstances, and when it was due. See *Fenton*, *supra*. Or the jury might decide that Paul and Bill have agreed upon the amount of an additional payment that would satisfy Bill's obligation to take care of Paul, in which case they will have to decide whether the reasonable time within which that payment was to be made has now passed.

2.1.2. **Statute of Frauds**. Bill further contends that his alleged oral agreements to take care of Paul financially may not be enforced because doing so would violate the statute of frauds. This argument is also without merit.

The statute of frauds provides that no action may be brought to enforce an oral "agreement that is not to be performed within one year from the making thereof" and that is not memorialized in writing. See G.L. c. 259, § 1, cl. Fifth.

This clause does not apply to a contract that could be fully performed within a one-year period, even though performance may have been expected to extend for longer. See *Boothby* v. *Texon, Inc.*, 414 Mass. 468, 479 (1993). For example, an oral contract for indefinite employment is enforceable under the statute of frauds because the employment relationship could end in less than a year if the employee died, the employer went out of business, or the employer terminated the arrangement because the employee failed to perform satisfactorily. *Id.*; accord *Meng* v. *Trustees of Boston Univ*. 44 Mass. App. Ct. 650, 652 (1998).

Much the same is true here. Since Bill's alleged contractual obligation to take care of Paul could have come to an end in less than a year, for example if Paul had unexpectedly died during that time, the claimed contract is not barred by the statute of frauds.

In addition, the complaint alleges that Bill partially performed his promise to take care of Paul by making substantial payments to Paul and his wife in late 2020. Such partial performance of an oral contract may bar reliance on the statute of frauds. See generally *Matter of Estate of Widdiss*, 98 Mass. App. Ct. 808, 814 (2020); *Mulvanity* v. *Pelletier*, 40 Mass. App. Ct. 106, 109 (1996).

2.1.3. **Consideration for 2021 Promise**. The facts alleged in the complaint plausibly suggest that Bill offered in February 2021 to pay an additional $1.4 million "tax free" to satisfy his promises to "take care of" Paul, and Paul by his acceptance implicitly agreed to release any claim that Bill was obligated to pay more than that. If proven, such a modification of the alleged prior contracts between Bill and Paul would be supported by adequate consideration in the form of a partial waiver of claims, and is therefore enforceable.

Parties to a contract may modify their agreement by mutual assent and either consideration or detrimental reliance. See *Okerman* v. *VA Software Corp*., 69 Mass. App. Ct. 771, 781 (2007) ("A valid contract modification requires mutual assent and consideration."); *Johnny's Oil Co.* v. *Eldayha*, 82 Mass. App. Ct. 705, 714 (2012) ("Detrimental reliance on an offer or promise … is a substitute for consideration."). Under Massachusetts law a contract modification "may be express or implied." *Cochran* v. *Quest Software, Inc.*, 328 F.3d 1, 9 (1st Cir. 2003); accord, e.g., *Parker* v. *EnerNOC, Inc.*, 484 Mass. 128, 132 (2020) (modification of fully integrated written contract may be inferred from parties' conduct and surrounding circumstances).

The essence of the alleged modification in February 2021 is that Bill agreed not to contest his obligation to take care of Paul financially, the parties agreed to fix the amount of Bill's additional financial obligation to Paul, and in exchange Bill "avoided the possibility of having to pay more" if Paul were to sue for breach of contract; such an agreement is valid and enforceable. Cf. *Richardson* v. *Dept. of Revenue*, 423 Mass. 378, 380 (1996) (enforcing agreement not to contest paternity and to pay specified amount for child support).

By agreeing to accept an additional "tax free" payment of $1.4 million to resolve Bill's contract obligation, Paul implicitly released any claim for a larger final payment. This is a fair and reasonable inference from the facts alleged in the complaint, and the Court must draw "every reasonable inference" in Paul's favor at this stage of the case. See *Rafferty*, 479 Mass. at 147. An agreement of this kind, to make certain payments in exchange for a release of other claims

against the payor, is "a valid and binding contract supported by good and sufficient consideration." *Strand* v. *Herrick & Smith*, 396 Mass. 783, 786 (1986).

Though Paul is now asserting the very claims that he says he waived as consideration for the February 2021 contract amendment, he is entitled to assert these contract claims in the alternative: i.e., claim that Bill must either pay him $1.4 million plus a sum sufficient to cover all taxes that Paul will incur as a result or, if that promise is found not to be enforceable, pay a fair and reasonable sum sufficient to take care of Paul financially.

2.2. **Implied Covenant of Good Faith and Fair Dealing**. The claim for breach of the implied covenant of good faith and fair dealing adds nothing of substance to Paul's claims for breach of express terms of his alleged contracts with Bill.

This implied covenant "does not create rights or duties beyond those the parties agreed to when they entered into the contract." *Boston Med. Ctr. Corp.* v. *Secretary of Executive Office of Health & Human Servs.*, 463 Mass. 447, 460 (2012) (affirming dismissal of claim), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 680 (2011). "The implied covenant 'concerns the manner of performance' and 'exists so that the objectives of the contract may be realized.' " *Beauchesne* v. *New England Neurological Assocs., P.C.*, 98 Mass. App. Ct. 716, 722 (2020), rev. denied, 486 Mass. 1111 (2021), quoting *Ayash* v. *Dana-Farber Cancer Inst*., 443 Mass. 367, 385, cert. denied sub nom. *Globe Newspaper Co*. v. *Ayash*, 546 U.S. 927 (2005). In other words, it only governs "the manner in which existing contractual duties are performed." *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 289 (2007).

The facts alleged in the complaint do not plausibly suggest that Bill violated the implied covenant; they only suggest that he breached the express terms of the alleged contracts. The Court will therefore dismiss Count II.

2.3. **Quantum Meruit**. In Count X, Paul asserts a claim against Bill and MAAC under the equitable doctrine of quantum meruit, alleging that he is entitled to but has not yet been paid the fair value of the services he provided to the Club over many years.

Bill contends that Paul cannot assert a claim for quantum meruit because the services he rendered to Club were governed by an employment agreement. That argument is unavailing, at lease at the motion to dismiss stage. Though Paul contends that he is entitled to additional compensation for his work for

the Club because Bill orally agreed to pay him more than his salary and "take care of" Paul financially, Bill contends there is no enforceable oral contract.

Paul is therefore entitled to assert his quasi-contract claim for quantum meruit "in the alternative." See Mass. R. Civ. P. 8(a). "A party may … state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds." Mass. R. Civ. P. 8(e)(2).

It would be inappropriate to dismiss Paul's quantum meruit claim as duplicative because that would "presuppose" that he can prevail on his contract claims. *Zelby Holdings, Inc.* v. *Videogenix, Inc.*, 92 Mass. App. Ct. 86, 93 (2017) (reversing dismissal of unjust enrichment claim); see also *Greene* v. *Boston Safe Deposit Trust Co.*, 255 Mass. 519, 522–523 (1926) (if contract is unenforceable due to the statute of frauds, then "the recovery is on quantum meruit").

Although a plaintiff cannot recover damages for the same alleged injury under a legal theory and also under an equitable claim for quantum meruit or unjust enrichment, "it is accepted practice to pursue both theories at the pleading stage." *Zelby Holdings*, *supra*, quoting *Lass* v. *Bank of America, N.A.*, 695 F.3d 129, 140 (1st Cir. 2012).

2.4. **Unjust Enrichment**. In Count V, Paul alleges that Bill benefitted unjustly at Paul's expense, by convincing Paul to give up his interest in the Partnership without fair compensation, as a result of which Bill (through the Abacus Trust) was able to sell the property years later and keep all of the profit for himself. Paul also asserts this unjust enrichment claim against the Partnership and the three defendant trusts.

As noted above, the land where the Club was originally built was first owned by the Partnership and later transferred to the Abacus Trust. In the early 1980s, Bill formed the Coolidge Associates Nominee Trust and the Brookside Realty Trust to acquire two different parcels of land adjacent to the Club, so that the Club could expand its facilities and operations.

To state a claim for unjust enrichment, Paul must allege facts plausibly suggesting that these defendants obtained a valuable benefit from Paul that was not covered by a contractual agreement, and that they accepted or retained the benefit under circumstances where it would be unfair for them to do so without paying its value to Paul. See *National Shawmut Bank of Boston* v. *Fidelity Mut. Life Ins. Co.*, 318 Mass. 142, 145-146 (1945); *Santagate* v. *Tower*, 64 Mass. App. Ct. 324, 329 (2005).

The complaint alleges that Paul succumbed to Bill's request to give up his interest in the Partnership, this allowed Bill to transfer ownership of the Club's original property from the Partnership to the Abacus Trust, Bill was the sole beneficiary of that trust, when Bill recently the property he was the effective recipient of the proceeds, and Bill has never fairly compensated Paul for his prior interest in the Partnership.

These allegations state a viable claim for unjust enrichment against Paul and the Abacus Trust. The fact that Bill transferred title to the property from the Partnership to a trust cannot insulate Bill from liability under an unjust enrichment theory.

But the facts alleged do not plausibly suggest that the Partnership or the Coolidge or Brookside trusts have been unjustly enriched.

The complaint alleges that the Paul ceded his interest in the Partnership to Bill, in exchange for a promise (to take care of Paul) that Paul considered to be more than four. And it makes clear that the Partnership ultimately received no benefit as a result, because Bill transferred ownership of the original Club property from the Partnership to the Abacus trust. These allegations do not plausibly suggest that the Partnership itself was unjustly enriched at Paul's expense.

As for the Coolidge and Brookside trusts, the complaint alleges that they were created to purchase parcels of land adjoining the Club's original property. There is no allegation that either of these trusts obtained anything of value from Paul. As a result, the complaint does not plausibly suggest that these two trusts may be liable under an unjust enrichment theory.

2.5. **False Promise**. In Count IV, Paul alleges that Bill engaged in fraud by making false promises to him. Though this count is labelled as a claim for negligent misrepresentation, the Court will treat it as a claim for intentional fraud based on a false promise, because "promises to perform an act cannot sustain a claim for negligent misrepresentation." *Cumis Ins. Society* v. *BJ's Wholesale Club, Inc.*, 455 Mass. 458, 474 (2009). It does not matter than the count is mislabeled. See generally *Gallant* v. *City of Worcester*, 383 Mass. 707, 709 (1981) (complaint may allege facts plausibly suggesting that plaintiff has legally viable claim even if complaint does not name correct legal theory).

To state a claim of misrepresentation upon a false promise, a plaintiff must allege facts plausibly suggesting that "the promisor had no intention to

perform the promise at the time it was made." See *Cumis*, *supra*, *Yerid* v. *Mason*, 341 Mass. 527, 530 (1960). It is not enough to allege that Bill promised to take care of Paul, also promised to pay him an additional $1.4 million, and then did not do so, because an "intention not to perform a promise" cannot be inferred merely from later "nonperformance of the promise." *Galotti* v. *United States Trust Co.*, 335 Mass. 496, 501 (1957); accord *McCartin* v. *Westlake*, 36 Mass. App. Ct. 221, 230 n.11 (1994).

Paul does **not** allege that, when Bill made his alleged promises, he had no intention of ever following through. To the contrary, the complaint alleges that Bill repeatedly made partial payments to Paul, consistent with an intent to perform the alleged promises. Without factual allegations plausibly suggesting that this was all fake, and that Bill never intended to do what he had promised, the complaint does not state a viable claim of fraud based on an allegedly false promise. The Court will therefore dismiss Count IV.

2.6. **Breach of Fiduciary Duty**. The Court will dismiss the claim against Bill for breach of fiduciary duty in Count VI for several reasons.

Though Bill owed Paul a fiduciary duty with respect to his limited partnership interest in the Partnership, none of the allegations against Bill arise from that relationship. Instead, they concern Bill's alleged failure, years after Paul was no longer a limited partner, to pay Paul what Bill had promised for Paul's service to the Club.

The facts alleged in the complaint do not plausibly suggest that Bill owed Paul any fiduciary duties outside of the Partnership. Paul's allegations that he placed trust and confidence in Bill do not, standing alone, suggest that theirs was a fiduciary relationship. Instead, it was a business relationship, as the two brothers worked together to run the Club. "A business relationship is not transformed into a fiduciary relationship merely because trust was reposed by one party in the other party." *Davidson* v. *General Motors Corp.*, 57 Mass. App. Ct. 637, 643 (2003).

In any case, the essence of Paul's complaint is that Bill made and then breached a series of contractual promises. That would not support a claim for breach of fiduciary duty even if Bill and Paul had a fiduciary relationship after the Partnership was dissolved.

When a contested action by an alleged fiduciary "falls entirely within the scope of a contract," any obligations derive from the contract and defendant's

conduct “is not subject to question under fiduciary duty principles.” *Selmark Assocs., Inc.* v. *Ehrlich*, 467 Mass. 525, 537–538 (2014), quoting *Chokel* v. *Genzyme Corp.*, 449 Mass. 272, 278 (2007); accord *Merriam* v. *Demoulas Super Markets, Inc.*, 464 Mass. 721, 727 (2013). In other words, a breach of contract by someone who owes a fiduciary duty may give rise to liability for breach of contract, but does not support an independent claim for breach of fiduciary duty. Paul’s claim is for breach of contract, not breach of fiduciary duty.

2.7. **Civil Conspiracy**. The claim for civil conspiracy is entirely derivative of the claim against Bill for breach of fiduciary duty, as Paul alleges that Bill and Stein “conspired in the breach of Bill’s fiduciary duties to Paul.”[2] Since the claim for breach of fiduciary duty fails as a matter of law, it follows that Bill and Stein cannot be liable for conspiring with each other to carry out Bill’s alleged breach of fiduciary duty. There can be no civil conspiracy without “an underlying tortious act.” *Bartle* v. *Berry*, 80 Mass. App. Ct. 372, 383–384 (2011). The Court will therefore dismiss Count XI.

2.8. **Violation of G.L. c. 93A**. The alleged misconduct by Bill did not take place in trade or commerce and thus did not implicate G.L. c. 93A. Cf. *Office One, Inc.* v. *Lopez*, 437 Mass. 113, 125 (2002) (“Violations of G.L. c. 93A require unfair or deceptive acts or practices ‘in the conduct of any trade or commerce.’”) (quoting G.L. c. 93A, § 2). The Court will therefore dismiss the c. 93A claim against Bill in Count XII.

“[D]isputes between parties in the same venture do not fall within the scope of G.L. c. 93A, § 11.” *Selmark Assocs., Inc*. v. *Ehrlich*, 467 Mass. 525, 549 (2014), quoting *Szalla* v. *Locke*, 421 Mass. 448, 451 (1995). “ ‘Intra-enterprise’ disputes, including those … between or among fellow shareholders” or LLC members “are essentially private in nature, and thus not considered ‘commercial transactions’ within the meaning of c. 93A.” *Id*. at 550, quoting *Milliken & Co.* v. *Duro Textiles, LLC*, 451 Mass. 547, 563 (2008).

Paul’s complaint that he was improperly frozen out of the Club’s profits and the increase in value of the property where the Club was located constitutes the kind of “private grievance” or intra-enterprise dispute that does not implicate c. 93A. *Kurker* v. *Hill*, 44 Mass. App. Ct. 184, 190-191 (1998) (c. 93A inapplicable

[2] Paul does not assert a claim under the alternative theory of civil conspiracy, as he does not contend that Bill and Stein exercised some power of coercion over him that they would not have had if they had acted independently. Cf. *Kurker* v. *Hill*, 44 Mass. App. Ct. 184, 188-189 (1998).

to alleged freeze-out of shareholder in closely-held corporation and alleged improper sale of corporate assets), quoting *Zimmerman* v. *Bogoff*, 402 Mass. 650, 663 (1988) (c. 93A inapplicable to disputes among shareholders in close corporation).

3. **Claims against Timothy Stein, Individually**. The Court will dismiss all claims against Attorney Stein, because the facts alleged in the complaint do not plausibly suggest that he may be liable for tortious interference, aiding and abetting a breach of fiduciary duty by Bill, conspiring to help Bill breach a fiduciary duty, or violating G.L. c. 93A by committing an unfair or deceptive act or practice in trade or commerce.

Paul does not claim that Stein breached any fiduciary duty, committed legal malpractice, or otherwise violated any duty of care owed to Paul. That makes good sense. The complaint alleges that at all relevant times Stein was representing his client Bill, whose interests were adverse or potentially adverse to Paul. As a result, Stein could not have owed any duty of care to Paul.

Massachusetts law generally does not impose on a lawyer any duty of care to a third-party with interests adverse to the lawyer's client, because doing so "would potentially conflict with the duty the attorney owes to his or her client." See *Lamare* v. *Basbanes*, 418 Mass. 274, 276 (1994) (lawyer representing husband in divorce action and care and protection proceeding owed no duty of care to client's wife or children). "It is the potential for conflict that is determinative" in narrowly construing any duty owed by an attorney to a non-client, "not the existence of an actual conflict." *Miller* v. *Mooney*, 431 Mass. 57, 63 (2000) (lawyer representing client in preparation of will owed no duty of care to client's children); accord *Spinner* v. *Nutt*, 417 Mass. 549, 553-554 (1994) (lawyer representing trustee owed no duty of care to trust's beneficiaries).

3.1. **Tortious Interference.** Paul contends that Attorney Stein interfered with Paul's contractual relationship with Bill, and that he did so in the process of acting as Bill's attorney in connection with Paul's contract claims. If this were an actionable claim, then any lawyer who advises a client and helps them try to settle a contract claim could be sued and held liable for intentionally interfering with a contract. The Court concludes that this claim is not viable.

Though Paul asserts that Stein tortiously interfered with both contractual and advantageous relations, the facts alleged state a claim only for interference with contractual relations. Paul contends that Stein interfered with Bill's alleged

contractual obligation to take care of Paul financially, and to do so by paying Paul an additional $1.4 million "tax free." Paul does not allege that Stein interfered with any other advantageous relationship. As result any claim for intentional interference must be for tortiously inducing a breach of contract, not for interfering with a non-contractual advantageous business relationship. See *Cachopa* v. *Town of Stoughton*, 72 Mass. App. Ct. 657, 658 n.3 (2008).

To state a claim for intentional interference with contractual relations, a party must allege facts plausibly suggesting that: "(1) [it] had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *Weiler* v. *PortfolioScope, Inc.*, 469 Mass. 75, 84 (2014), quoting *G.S. Enters., Inc.* v. *Falmouth Marine, Inc.*, 410 Mass. 262, 272 (1991).

Paul has failed to state a viable claim for tortious interference because the facts he alleges do not plausibly suggest that Stein's alleged interference was improper in motive or means. Paul contends that Stein encouraged and substantially assisted Bill's breach of his alleged contractual obligation to Paul. But the complaint makes clear that, in doing so, Stein was acting solely in his capacity as Bill's lawyer. It is not tortious interference with the contract between a lawyer's client and another if the lawyer advises their client that they are not bound by the alleged contract or if the lawyer takes steps to protect their client against a potential claim for breach of contract. See Restatement (Second) of Torts § 770 and comment b, & § 772 (1979). As a result, Paul does not have a viable claim for tortious interference against Stein.

3.2. **Claims for Aiding and Abetting or Conspiracy**. The claims against Stein for allegedly aiding and abetting a breach of fiduciary duty by Bill, or conspiring with Bill in his alleged breach of fiduciary duties, both fail for the same reasons. Since the facts alleged do not plausibly suggest that Bill breached any fiduciary duty, as discussed above, Stein cannot be held liable for helping Bill to commit such a breach. There can be no liability for aiding and abetting a breach of fiduciary duty in the absence of a breach of fiduciary duty. *Arcidi* v. *National Ass'n of Govt. Employees, Inc.*, 447 Mass. 616, 623 (2006). Similarly, as noted above, there can be no civil conspiracy without "an underlying tortious act." *Bartle*, 80 Mass. App. Ct. at 383–384.

3.3. **Violation of G.L. c. 93A**. Finally, the Court will dismiss the claim against Attorney Stein under G.L. c. 93A because the facts alleged in the complaint do

not plausibly suggest that Stein was acting in trade or commerce in his dealings with Paul. See generally *Manning* v. *Zuckerman*, 388 Mass. 8 (1983) (affirming Rule 12(b)(6) dismissal of c. 93A claim because complaint established that plaintiff was not engaged in trade or commerce with defendant); *Cavicchi* v. *Koski*, 67 Mass. App. Ct. 654, 662–663 (2006) (same).

The complaint makes clear that Paul never had any commercial relationship with Stein, and their dealings did not otherwise take place in a business context. With rare exceptions not applicable here, the conduct of a lawyer in representing a client in connection with litigation or some other dispute does not implicate c. 93A. See *First Enterprises, Ltd*. v. *Cooper*, 425 Mass. 344, 347–348 (1997) (vacating denial of motion to dismiss). For a lawyer to be liable under c. 93A to a non-client to whom the lawyer does not owe any duty of care, the lawyer must have been "acting in a business context" and "engaged in trade or commerce with the plaintiffs." *Miller* v. *Mooney*, 431 Mass. 57, 65 (2000) (affirming summary judgment because lawyer representing client in preparation of will was not in trade or commerce with client's children); accord *Tetrault* v. *Mahoney, Hawkes & Goldings*, 425 Mass. 456, 463 (1997). But the facts alleged in the complaint suggest only that Stein was representing Bill and defending his interests, not that Stein was engaged in trade or commerce with Paul.

Paul's reliance on *Baker* v. *Wilmer Cutler Pickering Hale and Dorr LLP*, 91 Mass. App. Ct. 835 (2017), is misplaced. *Baker* held that if a closely-held limited liability company is governed by an operating agreement that provides significant protections to minority members, then lawyers representing the LLC may have a fiduciary duty not to undermine the minority members' contractual rights in secret. *Id.* at 837, 839, & 845-847. And it further held that where such a fiduciary duty arose from the lawyers' engagement as corporate counsel, and the lawyers allegedly "engaged in unfair or deceptive acts or practices in connection with professional services they sold in the marketplace," the complaint stated a claim under c. 93A. *Id*. at 850–851.

The facts alleged in the complaint are nothing like what was alleged in *Baker*, as Paul did not hold an ownership interest in a closely-held business and had no rights under an LLC operating agreement, shareholder agreement, or similar contract that Stein was arguably obligated to respect. Instead, the facts alleged here are very similar to the claim that was dismissed in *Cooper*.

The plaintiff in *Cooper*, a business that owned a Dunkin' Donuts franchise, got into a dispute with one of its shareholders. After the shareholder's lawsuit against the business was dismiss, the business sued the attorney who had represented the shareholder, claiming that the attorney submitted a false legal claim against the business and thereby violated c. 93A. See 425 Mass. at 344–347. The SJC held that the claim should have been dismissed, because a lawyer's attempt to secure a favorable result for their client in a legal dispute does not constitute "trade or commerce" and therefore cannot give rise to a claim under c. 93A. *Id*. at 348.

The same is true here. Though Paul contends that Stein improperly denied that Bill had any obligation to Paul, tried to transform Bill's alleged contractual obligations into an unenforceable promise of a gift, pressured Paul to release all possible claims, and misrepresented the adequacy of the settlement offer he made on Bill's behalf, there is nothing to suggest that when Stein did so he owed any duty to Paul. Since Stein was acting solely as Bill's lawyer and adversely to Paul, none of Stein's alleged conduct took place in trade or commerce within the meaning of c. 93A, just as in *Cooper*.

ORDER

The motion by all Defendants other than Timothy Stein to dismiss counts 1–6 and 10–12 (doc. no. 24) is **allowed in part** with respect to (a) the claims against William Crowley for breach of the implied covenant of good faith and fair dealing in Count II of the First Amended Complaint, for misrepresentation in Count IV, for breach of fiduciary duty in Count VI, for civil conspiracy in Count XI, and for violating G.L. c. 93A in Count XII; and (b) the claims against the Mount Auburn Tennis Associates Limited Partnership), the Coolidge Associates Nominee Trust, and the Brookside Realty Trust for unjust enrichment in Count V of the First Amended Complaint. This motion is **otherwise denied**.

The motion by Timothy Stein to dismiss all claims against him in Counts VII, VIII, IX, XI, and XII is **allowed**.

Kenneth W. Salinger
Justice of the Superior Court

23 May 2022