STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

DAVID MATTHEIS

Plaintiff,

v.

Case No. 2018CV1639

RICHARD IHNEN

Defendants.

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

¶1. In an 1841 essay entitled, *Self-Reliance*, Ralph Waldo Emerson wrote that "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." The point of the essay was to suggest that anyone could achieve happiness by changing one's mindset, and that only small-minded men refuse to reassess prior beliefs.

¶2. There is much to be said for Emerson's thesis. What constitutes foolish versus wise consistency is not explained, however, and presumably something that can only be distinguished with intelligence and intuition purchased from experience.

¶3. With that said, consistency is some respects and in some settings is vitally important, for reasons that will become clear in this decision.

¶4. This case involves various claims filed by David Mattheis ("Mattheis") predicated on his alleged ownership interest in various entities, including MI Family Builders, Inc. ("MI Family Builders") and Over the Top Roofing & Construction, Inc.

¶5. The Defendant, Richard Ihnen ("Ihnen"), contends that Mattheis has no ownership interest in the companies. Ihnen's principal witness in establishing this proposition is Mattheis himself. Ihnen contends that in various lawsuits and tax filings, Mattheis disavowed any ownership in the companies he now claims ownership. Ihnen moved for summary judgment, seeking to have the claims dismissed on the ground of judicial estoppel and on his affirmative defense that the claims are barred by the unclean hands doctrine. Ihnen also contends that the Court should strike Mattheis's affidavit opposing summary judgment under the sham affidavit rule.

¶6. The Court heard oral argument on the motion on April 24, 2020, and requested supplemental briefing on a number of issues. The Court now grants the motion.

EVIDENTIARY OBJECTIONS

¶7. Before discussing the summary judgment record and the facts submitted in support of and in opposition to the motion, the Court must rule on several objections Mattheis lodged to the evidence filed by Ihnen.

¶8. Ihnen filed his Motion for Summary Judgment on January 9, 2020. At a status conference on January 15, 2020, counsel for Mattheis informed the Court that he had objections to what Ihnen had filed, and that he anticipated filing a motion to strike certain submissions. The Court entered a briefing schedule on both the Motion for Summary Judgment and the anticipated motion to strike.

¶9. On March 3, 2020, Mattheis filed his Opposition to the Motion for Summary Judgment, as well as a Motion to Strike and Expunge. Ihnen filed his Opposition to the Motion to Strike and Expunge on March 31, 2020.

¶10. The Motion to Strike and Expunge principally targets the affidavits of Attorneys Gary Krawczyk and Neal Krokosky relating to two lawsuits involving Mattheis.

¶11. First, Mattheis objected to materials filed by Ihnen relating to Mattheis's divorce proceedings in Milwaukee County Case No. 2011FA7962 ("Divorce Proceedings"). The materials, including Mattheis's financial disclosure statements, marital settlement agreement, and tax returns filed in that case, were obtained from the files of Attorney Gary Krawczyk, the attorney for Mattheis's ex-wife in the Divorce Proceedings.

¶12. Mr. Krawczyk's affidavit states that he was served with a subpoena duces tecum on October 14, 2019. In response to the subpoena duces tecum, he prepared the affidavit, attaching copies of all documents in the possession, control, or custody of his firm requested by the subpoena.

¶13. Mattheis objects to this evidence because he contends that the information from the Divorce Proceedings is confidential under Wis. Stat. ¶ 767.127. That section provides, in pertinent part,

> (1) Required disclosure. In an action affecting the family, except an action to affirm marriage under s. 767.001 (1) (a), the court shall require each party to furnish, on standard forms required by the court, full disclosure of all assets owned in full or in part by either party separately or by the parties jointly. Disclosure may be made by each party individually or by the parties jointly. Assets required to be disclosed include, but are not limited to, real estate, savings accounts, stocks and bonds, mortgages and notes, life insurance, retirement interests, interest in a partnership, limited liability company, or corporation, tangible personal property, future interests whether vested or nonvested, and any other financial interest or source. The court shall also require each party to furnish, on the same standard form, information pertaining to all debts and liabilities of the parties. The form used shall contain a statement in conspicuous print that complete disclosure of assets and debts is required by law and deliberate failure to provide complete disclosure constitutes perjury. The court shall require each party to attach to the disclosure form a statement reflecting income earned to date for the current year and the most recent statement under s. 71.65 (1) (a) that the party has received. The court may on its own initiative and shall at the request of either party require the parties to furnish copies of all state and federal income tax returns filed by them for the past 2 years, and may require copies of those returns for prior years.
>
> ...
>
> (3) Confidentiality of disclosed information.

> (a) Except as provided in par. (b), information disclosed under this section and under s. 767.54 is confidential and may not be made available to any person for any purpose other than the adjudication, appeal, modification, or enforcement of judgment of an action affecting the family of the disclosing parties.
>
> (b) The clerk of circuit court shall provide information from court records to the department under s. 59.40 (2) (p).

¶14. Mattheis contends that this statute codifies a strong public policy against the disclosure of financial information required to be filed in divorce proceedings, unless it relates to a dispute between the parties in the divorce.

¶15. The Court denies the motion to strike and overrules the objection to this evidence. As an initial matter, the confidentiality identified in § 767.127(3) relates only to the financial disclosure statements required to be filed in that statute. So Mattheis's objection to other information from the Divorce Proceedings contained in Attorney Krawczyk's affidavit or otherwise does not apply.

¶16. In addition, as discussed in Ihnen's brief opposing the Motion to Strike and Expunge, there is a difference between confidential and privileged. Privileged matters are generally immune from discovery and disclosure. Matters that are confidential, however, are generally still subject to discovery and presentation as evidence. *See Sands v. Whitnall Sch. Dist.*, 2008 WI App 89, ¶¶ 32-33, 312 Wis. 2d 1, 754 N.W.2d 439.

¶17. Here, the information Mattheis claims is confidential was sought in discovery. The statutes provide him with a remedy—to seek a protective order under Wis. Stat. § 804.01(3) or 805.07(3). In response to the subpoena duces tecum served on Attorney Krawczyk specifically requesting, among other things, Mattheis's financial disclosure statements from the case, Mattheis could have moved for a protective order to prevent the disclosure. He did not. In response to specific questions at his deposition relating to the financial disclosure statements, he could have stopped the deposition to seek a protective order. He did not. Instead,

he permitted the questions and deposition to proceed. As a result, Mattheis waived any claimed confidentiality relating to the financial disclosure statements.

¶18. In any event, given the matters at issue, the Court would not have prevented discovery of the financial disclosure statements. In the Court's view, the public policy favoring broad discovery in the search for truth clearly outweighs Mattheis's interest in keeping confidential financial disclosure statements from approximately seven years ago.

¶19. Mattheis also objects to the affidavit from Attorney Krokosky. Attorney Krokosky concurrently represented Ihnen, Mattheis, and Over the Top Roofing & Construction, Inc. in a lawsuit pending in the United States District Court for the Eastern District of Wisconsin captioned *Salgado v. Over the Top Roofing & Construction, Inc., et al.*, E.D. Wis. Case No. 13-CV-1117 ("Federal Case").

¶20. Mattheis's first objection relates to Attorney Krokosky's recitation of communications he had with Ihnen during the representation in the Federal Case. Mattheis objects that this is hearsay. He is correct. It may not be hearsay under § 908.01(4)(a)(2), but that would only be the case if Ihnen testified at trial, is subject to cross-examination, and then, and only then, would Attorney Krokosky be permitted to testify about statements consistent with Ihnen's testimony. But we are not there yet. For purposes of summary judgment, it is hearsay and will not be considered by the Court.

¶21. Mattheis next objects to Attorney Krokosky's recitation of communications he had with Mattheis. He contends that these statements are hearsay and also that they are privileged and meant to be kept confidential. The objections are overruled and the motion to strike is denied.

¶22. As to the hearsay objection, Attorney Krokosky's repeating of what Mattheis said is not hearsay because it is an admission by party opponent under § 908.01(4)(b).

¶23. The privilege objection is also overruled. The attorney-client privilege in Wisconsin is codified in Wis. Stat. § 905.03. The general rule is that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . ." Wis. Stat. § 905.03(2).

¶24. There are five exceptions to that general rule. *See* Wis. Stat. § 905.03(4)(a)-(e). One of the exceptions addresses situations involving joint clients, like Attorney Krokosky had with Mattheis, Ihnen, and Over the Top Roofing & Construction, Inc. That exception provides as follows:

> There is no privilege under this rule . . . [a]s to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common when offered in an action between any of the clients.

Wis. Stat. § 905.03(4)(e). *See also Fouts v. Breezy Point Condo. Ass'n*, 2014 WI App 77, ¶ 20, 355 Wis. 2d 487, 851 N.W.2d 845.

¶25. Mattheis did not cite § 905.03, but instead SCR 20: 1.9 and 1.6, which do not deal with the attorney-client privilege, but a lawyer's duty of confidentiality to former clients under the Rules of Professional Conduct for Attorneys. Even Wisconsin's Rules of Professional Conduct for Attorneys, however, make clear that matters are not privileged or confidential as between joint clients. *See* SCR: 1.7 cmts. 30 & 31.

¶26. Finally, it is also clear from Ihnen's opposition to the Motion to Strike and Expunge that Mattheis waived any objection to the production of documents attached to

Attorney Krokosky's affidavit as a result of the various communications between Attorney Krokosky's former firm, Weiss Berzowski LLP, and attorneys for Ihnen and Mattheis.

¶27. With the evidentiary objections addressed, the Court now turns to the proffered evidence relating to the Motion for Summary Judgment.

SUMMARY JUDGMENT RECORD

¶28. The Court finds the following undisputed facts based on the parties' submissions.

¶29. Prior to January 3, 2010, Mattheis and Ihnen jointly owned MI Family Builders and Over the Top Roofing & Construction, Inc. At that time both parties each owned 50 percent of those companies.

¶30. MI Family Builders was incorporated on December 11, 2007. Its business focuses on providing siding and other general construction services.

¶31. On April 14, 2009, Mattheis and Ihnen also established a company called Over the Top Roofing & Construction, Inc.

¶32. Ihnen alleges that "Over the Top Roofing & Construction" operates as a division of MI Family Builders, and the company formally incorporated as Over the Top Roofing & Construction, Inc. operated exclusively in the State of Missouri. This fact is disputed based on the evidence presented by Mattheis, as well the information provided by Ihnen relating to the Federal Case.

¶33. Over the Top Roofing & Construction, Inc. ceased operations in 2017, and is currently defunct.

¶34. On January 3, 2010, Mattheis sold his ownership interest in MI Family Builders to Thomas Manley ("Manley").

¶35. The Share Purchase Agreement entered into by Mattheis and Manley on January 3, 2010 ("Share Purchase Agreement"), stated:

> The Seller is the owner of record of an aggregate of 1,000 Common shares (the "Shares") of MI Family Builders, Inc. (the "Corporation").
>
> The Seller desires to sell the shares to the Purchaser and the Purchaser desires to Purchase the Shares from the Seller.
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> ...
>
> The Seller agrees to sell and the Purchaser agrees to purchase all the rights, title, interest, and property of the Seller in the Shares for an aggregate purchase price of five thousand Dollars ($5,000.00 USD) (the "Purchase Price").
>
> ...
>
> Except as provided in the incorporating documents of the Corporation or as indicated on the face of the certificates for the Shares, the Purchaser would not be prevented or restricted in any way from re-selling the Shares in the future.

¶36. On January 1, 2011, Manley transferred his ownership interest in MI Family Builders to Ihnen. This resulted in Ihnen owning 100 percent of MI Family Builders.

¶37. Mattheis was aware of the transfer at the time it occurred and did not object.

¶38. On Mattheis's federal and state income tax returns for 2010, Mattheis stated that he sold his ownership in MI Family Builders on January 1st, 2010, and paid taxes on the capital gains from the transaction.

¶39. Mattheis filed the tax returns under penalties of perjury declaring the statements within to be true, correct, and complete to the best of his knowledge and belief.

¶40. On December 1, 2011, Mattheis's wife, Michelle Mattheis, filed for divorce from Mattheis in the Divorce Proceedings.

¶41. In the Divorce Proceedings, Mattheis filed a preliminary financial disclosure statement on May 4, 2012.

¶42. Under the section "Business Interests" on the preliminary financial disclosure statement, Mattheis selected "None." Mattheis made this representation under penalties of perjury.

¶43. On June 11, 2012, Michelle Mattheis served Mattheis with written interrogatories and a request for production of documents. In the First set of Written Interrogatories, Michelle Mattheis asked "Have you transferred any interest in a business to any third party or have you terminated any interest in such a business as defined in Interrogatory #3?"

¶44. On July 19, 2012, Mattheis answered under oath, "Yes." In response to the next interrogatory seeking specific information about any transfer, Mattheis replied, in pertinent part, "Over the Top Roofing/MI Family Builders transferred to Tom Manley [on January 1, 2011]."

¶45. In response to his wife's Request for Production of Documents, Mattheis produced a copy of the Share Purchase Agreement. Mattheis also produced a copy of the agreement entered into between Manly and Ihnen whereby Manley transferred his ownership in MI Family Builders to Ihnen effective January 1, 2011.

¶46. On May 23, 2013, the date of the final hearing in the Divorce Proceedings, Mattheis filed a final financial disclosure statement. Like the prior disclosure, under penalties of perjury, Mattheis did not disclose any ownership interest.

¶47. Attorney Krawczyk contended that Mattheis's ownership in MI Family Builders was worth more than what he sold it for, and the parties negotiated a compromise as part of the parties' property division.

¶48. At the final hearing in the Divorce Proceedings, Mattheis testified under oath that the financial disclosure statements were true and correct. As part of the compromise over the disputed sale of the business, Mattheis confirmed, in response to questions from his attorney, that he was "being awarded a hundred percent of this company even though you say you don't own it."

¶49. On September 30, 2013, Over the Top Roofing & Construction, Inc., Mattheis, and Ihnen were all sued in the United States District Court for the Eastern District of Wisconsin in the Federal Case.

¶50. The Federal Case was filed by four employees of Over the Top Roofing & Construction, Inc., alleging violations of the federal wage laws.

¶51. Mattheis and Ihnen were named as owners of Over the Top Roofing & Construction, Inc. in the lawsuit and they retained Attorney Neal S. Krokosky from Weiss Berzowski Brady LLP to represent them and the company concurrently in the lawsuit.

¶52. During the Federal Case, Mattheis informed Attorney Krokosky that he was no longer an owner of Over the Top Roofing & Construction, Inc. and that he sold his ownership interest in the company in 2010.

¶53. Attorney Krokosky filed an answer in the Federal Case stating that Ihnen was the sole owner of Over the Top Roofing & Construction, Inc.

¶54. Attorney Krokosky's affidavit confirms that he represented to the court and to the plaintiffs' attorneys that Mattheis was not an owner of the company. It also states that the favorable settlement of the Federal Case was based, in part, on the fact that Mattheis was not an owner during the time periods alleged in the plaintiffs' complaint. Mattheis does not dispute this statement in his submissions opposing the Motion for Summary Judgment.

¶55. On September 13, 2018, Mattheis filed the present lawsuit alleging that he never sold his 50 percent interest in MI Family Builders and Over the Top Roofing & Construction and is currently an owner.

¶56. On August 19, 2019, Mattheis filed an Amended Complaint. In the Amended Complaint, Mattheis claimed that he "facially transferred" his ownership interest in MI Family Builders to Manley in 2010, and that his ownership interest was simply being "held in trust by Manley, for the benefit of Mattheis."

¶57. The Amended Complaint alleges four causes of action: (1) Unjust Enrichment; (2) Breach of Fiduciary Duties; (3) Promissory Estoppel; and (4) Judicial Dissolution.

DISCUSSION

¶58. Summary judgment must be granted "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." Wis. Stat § 802.08(2). In making this determination, this Court must apply a two-step test. *Green Spring Farms v. Kersten,* 136 Wis. 2d 314 – 15, 401 N.W.2d 816 (1987). Under the first step, this Court asks if the plaintiff stated a claim for relief. *Id.* at 315. Under the second step, this Court applies the summary judgment statute and asks if any factual issues exist that preclude summary judgement. *Id.*

¶59. "Any doubts as to the existence of a genuine issue of material fact are resolved against the moving party." *L.L.N. v Clauder,* 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997). "A 'material fact' is a fact that is significant or essential to the issue or matter at hand."

State v. Allen, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Black Law Dictionary* 611 (7th ed. 1999)).

¶60. It is often said that summary judgment is the "put up or shut up" moment in a case. *See Lawrence v. Kenosha Cty.*, 391 F.3d 837, 842 (7th Cir. 2004); *see also Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). The mere existence of an alleged factual dispute will not defeat a summary judgment motion. Instead, to survive summary judgment, a nonmovant must present definite and competent evidence from which the finder of fact could decide for the nonmovant on every element on which the nonmovant bears the ultimate burden of proof. *See Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993).

I. THE PLAINTIFF'S CLAIMS AND EVIDENCE.

¶61. The Court starts by looking at Mattheis's Amended Complaint. As noted above, it alleges four causes of action. To say that the allegations are vague and convoluted is an understatement.

¶62. In sum, the allegations contend that Mattheis and Ihnen formed a partnership and formed various companies falling under the umbrella of the partnership.[1] The Amended Complaint alleges

> 5. In 2007, Mattheis and Ihnen intended to form, and did form, a partnership at will to do business together, as a joint business enterprise using the tradename "Over The Top Roofing and Construction," whereupon the "Over The Top Roofing" business enterprise and its various incarnations, changed from Mattheis' sole proprietorship to a newly formed partnership (hereinafter, "Over The Top Partnership").
>
> 6. Mattheis and Ihnen agreed to operate Over The Top Partnership (hereinafter "OTT Partnership"), and did operate OTT Partnership as a 50/50 joint business partnership, equally sharing in all profits and losses. In

[1] The alleged partnership is not identified as the owner of any of the various companies, and Mattheis did not file any documents reflecting the existence of the partnership, including any Schedule K-1s for the partners' share of income.

addition, Mattheis and Ihnen had equal rights and responsibilities in the conduct of the OTT Partnership and engaged in joint decisionmaking until August of 2017.

7. At all times relevant hereto, the joint business venture referenced herein as OTT Partnership constituted a partnership as defined in Wis. Stat. §178.0102(11).

8. As more particularly described herein, OTT Partnership formed and utilized various business entities to conduct the business of construction, roofing, and real estate development for profit.

9. On December 11, 2007, in particular, Mattheis and Ihnen formed MI Family Builders, Inc. as a statutory close corporation, with the chosen name an acronym representing the last names of its founders (i.e. Mattheis and Ihnen).

...

15. On April 14, 2009, Mattheis and Ihnen formed a statutory close corporation known as Over The Top Roofing and Construction, Inc., using the tradename that Mattheis had contributed to the OTT Partnership.

...

35. After 2011, Mattheis and Ihnen continued to create new business entities to be operated under the umbrella of the OTT Partnership, including business entities created for the purpose of buying, developing, holding and selling real estate, for profit.

36. In furtherance of that objective, on March 7, 2013, Mattheis and Ihnen formed Hampton 1, LLC, for the purpose of buying, developing, holding and selling real estate. . .

...

38. On October 15, 2015, Mattheis and Ihnen formed Wisconsin Commercial Roofing, LLC, (hereinafter "WCR") with equal ownership rights between them, and brought in James Brown, a valued employee of OTT Partnership and MI Family Builders, Inc., with all three individuals as equal 33.3% stakeholders.

...

51. Following the August 2017 lock-out, Mattheis learned that Ihnen had taken other actions to consolidate his extralegal and unilateral control of OTT Partnership assets including changing of the registered agent for various of the partnership's corporate business entities and secretly obtaining a deed for the OTT Partnership business premises located at N59 W14464 Bobolink Avenue, in Menomonee Falls, Wisconsin in the name of "Ihnen Properties, LLC", instead of "MI Family Builders, Inc.", the entity which had made all payments under the land contract to purchase said property.

¶63. Therefore, according to Mattheis, the companies that allegedly fall within the umbrella of the alleged "OTT Partnership" are: MI Family Builders, which was formed on

December 11, 2007; Over The Top Roofing and Construction, Inc., which was formed on April 14, 2009; Hampton 1, LLC, which was formed on March 7, 2013; Wisconsin Commercial Roofing, LLC, which was formed on October 15, 2015; and Ihnen Properties, LLC which was formed after August 2017, which held property paid for by MI Family Builders.

¶64. Mattheis acknowledged in his Complaint that Wisconsin Commercial Roofing, LLC, was liquidated by the parties in negotiations occurring the week preceding the filing of this lawsuit.

¶65. In a Stipulation and Order signed on December 20, 2019, Mattheis stipulated that the only remedy he is pursuing on his four claims is "judicial dissolution of the alleged joint venture operations of the plaintiff and the defendant consisting of, but not limited to, MI Family Builders, Inc., Over the Top Roofing & Construction, Inc., Hampton 1, LLC, and Ihnen Properties, LLC, with the resulting proceeds obtained from the judicial dissolution being distributed equally in kind and/or cash to the plaintiff and the defendant."[2]

¶66. All of the claims in the Amended Complaint are predicated upon Mattheis's contention that Mattheis is an equal partner in some entity he refers to as the OTT Partnership and a 50% shareholder of MI Family Builders, and Over the Top Roofing and Construction, Inc. *See* Am. Compl. ¶ 56 (unjust enrichment), ¶60 (breach of fiduciary duties), ¶68 (promissory estoppel), ¶¶72-73 (judicial dissolution).

¶67. Mattheis submitted an affidavit in opposition to the Motion for Summary Judgment. That affidavit states that a fundamental material fact exists because the Share Purchase Agreement was never consummated because he never received payment of the $5,000

[2] The Court notes that plaintiff did not name as parties to this action any of the various companies he seeks to dissolve.

purchase price.[3] Mattheis contends that Ihnen informed him that in late 2009, no bank would extend a line of credit to MI Family Builders and/or Over the Top Roofing and Construction if Mattheis continued to be shown as a shareholder due to his prior business bankruptcy. As a result, the Share Purchase Agreement was put in place to remove him as a shareholder from MI Family Builders, but that it was the intent of the parties that Manley hold Mattheis's shares in trust subject to a future conditional right to reacquire them. Mattheis contends that there was an oral agreement with Manley and Ihnen, which Manley failed to document, giving Mattheis "an inchoate right to repurchase my stock. . . ."

¶68. Mattheis's affidavit makes no mention of an OTT Partnership, no mention of an interest in Hampton 1, LLC; no mention of an interest in Wisconsin Commercial Roofing, LLC (which was liquidated by agreement of the parties just prior to the lawsuit), and no mention of an interest in Ihnen Properties, LLC.

¶69. Mattheis does not dispute telling Attorney Krokosky that he is not an owner of Over the Top Roofing, Inc. Instead, Mattheis in his affidavit disputes "the accuracy and the ability of Attorney Krokosky to opine as to the intent of any statement or notices of any statement attributed to me by him," and asks that Attorney Krokosky's affidavit be stricken and expunged from the record.

II. THE DOCTRINE OF JUDICIAL ESTOPPEL APPLIES AND WARRANTS DISMISSAL OF MATTHEIS'S CLAIMS.

¶70. Ihnen contends that the doctrine of judicial estoppel should bar Mattheis's claims and entitles Ihnen to summary judgment dismissing them.

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[3] Presumably, this allegation speaks to a potential breach of contract claim against Manley. How this allegation supports his claims against Ihnen, and how it overcomes the six-year statute of limitations for breach of contract claims, *see* Wis. Stat. § 893.43, is not explained in Mattheis's opposition to Ihnen's Motion for Summary Judgment.

¶71. The equitable doctrine of judicial estoppel is intended "to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions." *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817, 820, (Wis. 1996) (quotation omitted). The doctrine precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position. *Id.* "[J]judicial estoppel is not directed to the relationship between the parties, but is intended to protect the judiciary as an institution from the perversion of judicial machinery. . . ." *Id.* at 346.

¶72. It is well established that

> [f]or judicial estoppel to be available, three elements must be satisfied: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position.

State v. Ryan, 2012 WI 16, 338 Wis. 2d 695, 809 N.W.2d 37.

¶73. As to the first element, Ihnen claims that Mattheis's position in the current case is inconsistent with his representations in previous cases. Mattheis claims in this case that he is a 50% owner of MI Family Builders and other companies or partnerships. Mattheis stated numerous times, under oath and under penalties of perjury in the Divorce Proceedings, as late as May 23, 2013, that he held no business or ownership interests in any company. In discussions with his lawyer and in filings in the Federal Case, Mattheis took the position that he was not an owner of Over the Top Roofing & Construction, Inc.

¶74. Mattheis argues that there is no inconsistency. In fact, his May 8, 2020, supplemental brief attempts to distinguish between his prior belief that he did not possess a free and unencumbered ownership interest in various entities and what he does have, which is alleged to be a "chose in action," defined by Black's Law Dictionary, as quoted by Mattheis in his brief, as "a personal right not reduced into possession, but recoverable by a suit at law." Mattheis

claims that there was an oral agreement between himself and Manley that modified the written agreement. This modification, according to Mattheis, granted Mattheis the right to reacquire his shares in the future, meaning he has a claim to be an owner in the companies. Therefore, from Mattheis's view, there is no inconsistency.

¶75. The Court disagrees. As discussed above, the purpose of judicial estoppel is to prevent parties from "playing fast and loose with the courts by asserting different positions." *State v. Fleming*, 181 Wis. 2d 546, 510 N.W.2d 837 (Ct. App. 1993). The supplemental brief itself is, in this Court's view, an attempt to play "fast and loose" with what Mattheis is claiming, then and now.

¶76. Unlike the positions distinguished in *State v. Ryan*, 2012 WI 16, 338 Wis. 2d 695, 809 N.W.2d 37, where the prior position was ambiguous and did not clearly identify the ownership of a barge disclaimed by defendant in a subsequent proceeding, here there is simply no room to distinguish the clearly inconsistent positions.

¶77. In fact, what Mattheis now claims is a "chose in action" is an archaic way of describing some contingent interest or option to repurchase his shares. Even such an interest or option, however, has value, particularly one that, as Mattheis alleged, provided him income and benefits while the shares were held by others for his benefit, even during the time of his divorce.[4] If it had value, the business interest should have been properly disclosed in the Divorce Proceedings so that it could be valued and accounted for in the property equalization.

¶78. The positions Mattheis took in the Divorce Proceedings and Federal Case are clearly and completely inconsistent with the position he is taking in this case.

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[4] *See* Am. Compl. ¶ 23 ("From 2011 to 2017, Mattheis and Ihnen nevertheless continued to jointly operate the OTT Partnership through its consortium of business entities, including MI Family Builders, Inc., equally sharing in all profits and losses, and exercising equal rights and responsibilities in joint management and conduct of operations.").

¶79. Ihnen next claims that the facts of this case and Mattheis's prior lawsuits are the same. At issue in both is whether Mattheis is an owner of any business interest with Ihnen, including MI Family Builders and Over the Top Roofing and Construction, Inc. The second prong of judicial estoppel, "the facts at issue should be the same in both cases." is met.

¶80. That leaves the third element—that is, the party to be estopped must have convinced the first court to adopt its position. At the summary judgment hearing, the Court inquired as to the meaning and application of this element. Specifically, the Court noted that in the Divorce Proceedings, the final judgment entered by the court was based on a marital settlement agreement that awarded the business interest to Mattheis based on the compromise over the disputed value of the transferred shares. As such, the divorce court did not technically adopt Mattheis's position that he owned no business interests, but awarded him 100% of MI Family Builders/Over the Top Roofing & Construction, as reflected in the marital settlement agreement and the transcript of the final hearing.

¶81. Likewise, the Federal Case was dismissed pursuant to a settlement agreement. The court there did not adopt Mattheis's position that he was not an owner of Over the Top Roofing & Construction, Inc. because it did not have to.

¶82. The Court asked the parties to file supplemental briefs addressing this and other issues.

¶83. Mattheis did not provide any authority on the issue in his supplemental brief. Ihnen, on the other hand, cited two cases-– *Kale v. Obuchowski*, 985 F. 2d 360 (7th Cir.1993), and *Bidani v. Lewis*, 675 N. E. 2d 647 (Ill. App. Ct. 1996)—the Court found particularly persuasive.

¶84. In *Kale*, husband John Kale testified under oath in a deposition, affidavit, and court hearing in his divorce action that he did not own any interest in any real property other than the marital home. Kale and his ex-wife ultimately entered into a marital property agreement, and their marriage was dissolved. Thereafter, Kale sued the owners of an industrial park in a bankruptcy proceeding, alleging that he was a one-sixth partner with them. The partners moved for summary judgment based on the doctrine of judicial estoppel. The bankruptcy court granted the motion and dismissed Kale's lawsuit. The district court affirmed and sanctioned Kale and his attorneys $2,000 each under Fed. R. Civ. P. 11.

¶85. On appeal, the Seventh Circuit affirmed. In its decision, the Seventh Circuit initially summarized the lower courts' decisions as follows:

> Kale now asserts that he did, and does, own one-sixth of the industrial park. This implies that Kale committed perjury three times: in the deposition, in the affidavit, and in the statement before the judge. [The bankruptcy judge] was not amused. He invoked judicial estoppel to dismiss Kale's claim. Having asserted in state court that he did not own an interest in the industrial park, and having prevailed on that assertion, Kale could not take an inconsistent position in other litigation, [the bankruptcy judge] concluded. The district judge affirmed and penalized Kale and his two lawyers $2,000 under Fed. R. Civ. P. 11.

Id. at 361.

¶86. On appeal, Kale and his attorneys argued that judicial estoppel is not applicable because Kale did not convince the divorce court to adopt his position. The Seventh Circuit rejected that argument and sanctioned Kale and his two attorneys an additional $2,000 each for making a frivolous argument:

> Kale . . . contends that... because his perjury had its desired effect, the state court did not *decide* any issue adverse to him but instead approved the property settlement. Yet the rule, as we have stated it, speaks of *prevailing* in the first case, not of obtaining a judicial decision. Hoodwinking a state court so completely that decision becomes unnecessary is not a satisfactory

> reason to authorize a contrary claim in another court. No case appellants have cited to us, and none we could find, makes application of judicial estoppel depend on the existence of a judicial opinion adopting the litigant's position. it is enough that the litigant win. Sometimes a settlement sidesteps the issue in the first case, so that neither side prevails on a particular contested issue. Frequently, however, a settlement represents capitulation. Persons who triumph by inducing their opponents to surrender have "prevailed" as surely as persons who induce the judge to grant summary judgment. Having won a favorable allocation of property in the divorce case by insisting that he had no interest in real property other than the marital home, Kale is stuck with that proposition in subsequent litigation. . ..
>
> Appellants have other arguments, but displaying them would do little more than illustrate why some members of the public believe that "shyster" and "lawyer" are synonymous. This is a frivolous, doomed, and sanctionable appeal. We direct appellants to pay an additional $2, 000 to Andersen as a penalty under Rule 38.

Id. at 361-62, 363, 364 (italicized language in original).

¶87. Ihnen's second case is also instructive. In that case, Bidani, a nephrologist, testified in a prior divorce proceeding with his ex-wife that he had no ownership interest in a dialysis services business. He swore to that effect in interrogatory answers, his deposition, and a court hearing. Bidani and his ex-wife subsequently entered into a property settlement agreement, and their marriage was dissolved. Thereafter, Bidani filed a lawsuit against the dialysis services entity, alleging that he was, in fact, an owner of the entity. The defendants filed a motion for summary judgment based on the doctrine of judicial estoppel. The trial court granted the motion.

¶88. On appeal, Bidani argued that he did not convince the court in his divorce proceeding to adopt his position of non-ownership, so the doctrine of judicial estoppel cannot be applied. His argument was rejected:

> Judicial estoppel provides that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding. It is designed to promote the truth and protect the integrity of the court system by preventing litigants from deliberately

> shifting positions to suit the exigencies of the moment. Having affirmed under oath that certain facts exist, a party cannot be allowed to later affirm that the contrary is true.
>
> . . .
>
> Dr. Bidani argues that Dr. Lewis did not prove that Dr. Bidani prevailed in the divorce proceeding based on his previous position, which is an element of judicial estoppel. . . .That is overstating the requirement.
>
> . . .
>
> Dr. Bidani's argument is similar to the argument rejected in *Kale*, where the plaintiff argued that he had not prevailed on his previous position in the divorce proceeding because the divorce court approved the property settlement without deciding any issue in his favor. . . Similarly, Dr. Bidani successfully advanced his position regarding his business interests in his divorce case despite there being no judicial decision on that issue. . . .
>
> . . .
>
> Dr. Bidani's argument has no merit. . .
>
> . . .
>
> We conclude that summary judgment was properly granted on the basis of judicial estoppel as Dr. Bidani's sworn testimony in his previous divorce action was totally inconsistent with his position in this case.

675 N. E. 2d at 650, 652, 653.

¶89. Like the estopped parties in *Kale* and *Bidani*, Mattheis was able to leverage the positions taken in the Divorce Proceedings and Federal Case to sidestep a determination of the disputed issue—his ownership of business interests, including MI Family Builders and Over the Top Roofing & Construction, Inc.—and, for all intents and purposes, prevail.

¶90. The Court finds that all three elements of judicial estoppel are met and, as a result, application of the doctrine against Mattheis is in the Court's sound discretion.

¶91. Given the facts and circumstances discussed above, the Court finds, in the exercise of its discretion, that equity and justice warrant the application of the doctrine to bar Mattheis's claims. In making this finding, the Court is cognizant not only of the positions previously advanced by Mattheis, but the effect on the judicial system if he were now permitted

to advance the inconsistent positions here. In addition, the Court notes the shifting and unsubstantiated positions Mattheis has asserted to this Court in an effort to avoid estoppel and survive summary judgment. Mattheis is not entitled to yet another opportunity at trial to recast his vacillating positions, and the Court exercises its discretion to say enough is enough.

III. APPLICATION OF THE SHAM AFFIDAVIT RULE ENTITLES IHNEN TO SUMMARY JUDGMENT.

¶92. Ihnen argues that in addition to his other grounds for summary judgment, his motion should be granted because Mattheis submitted a sham affidavit to oppose the Motion for Summary Judgment. Ihnen contends that the affidavit Mattheis submitted in response to Ihnen's Motion for Summary Judgment was done to create a disputed issue of fact, but was contrary to prior sworn testimony.

¶93. The United States Court of Appeals for the Seventh Circuit adopted the sham affidavit rule in *Essick v. Yellow Freight Sys., Inc.*, 965 F. 2d 334 (1992), holding that

> [A] party should not be allowed to create issues of credibility by contradicting his own earlier testimony. . . . [I]f we allowed a party to create a genuine issue of material fact by changing his prior testimony, the very purpose of the summary judgment motion - to weed out unfounded claims, specious denials, and sham defenses - would be severely undercut.

Id. at 335 (citations omitted).

¶94. The sham affidavit rule was adopted by the Wisconsin Supreme Court in *Yahnke v. Carson*, 2000 WI 74, 236 Wis. 2d 257, 613 N.W.2d 102. The rule precludes "the creation of genuine issues of fact on summary judgment by the submission of an affidavit that directly contradicts earlier deposition testimony." *Id.* ¶15. The Supreme Court adopted the rule because of the similarity between federal and state summary judgment procedures and because the rule "furthers the purposes of summary judgment procedure in this state by helping circuit

courts determine the existence of genuine factual disputes, thereby avoiding unnecessary trials and conserving the resources of the courts and litigants alike." *Id.* ¶20.

¶95. The sham affidavit rule has been applied to preclude affidavits that contradict not only prior deposition testimony, but all types of prior sworn testimony, including court testimony, affidavits, discovery responses, and income tax returns. *See, e.g., AtPac, Inc. v. Aptitude Sols, Inc.*, 787 F. Supp. 2d 1108, 1111 & n.1 (E.D. Cal. 2011); *Viasystems Techs. Corp. v. Landstar Ranger, Inc.*, 2011 WL 2912763, at *3 (E. D. Wis. July 15, 2011) ("The 'sham affidavit' rule prohibits litigants from creating sham issues of fact with affidavits that contradict their prior sworn testimony, such as answers to interrogatories."); *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 91 (Tex. 2018) ("[T]he district court did not abuse its discretion by relying on the tax documents as the equivalent of sworn statements for purposes of the sham affidavit rule.").

¶96. As the United States District Court for the Eastern District of Wisconsin recently held, the key to the sham affidavit rule is not the form of the prior sworn statement, it is its timing:

> The key to the sham affidavit rule is not the form of the sworn statement—i.e., affidavit versus deposition—but the timing of the statements. . . . The nature of each statement is immaterial. What matters is that the witness' earlier statement must stand unless he can adequately explain why his more recent statement is necessary.

CapitalPlus Equity, LLC v. Glenn Rieder, Inc., 2018 WL 276352, at *4 (E. D. Wis. Jan. 3, 2018) (citation omitted).

¶97. Mattheis's affidavit filed in opposition to the Motion for Summary Judgment states that the January 2010 sale of his MI Family Builders stock is not valid because he was not paid for his shares and because the Share Purchase Agreement did not reflect his "inchoate right" to repurchase his shares. As a result, "no stock transfer document selling or

transferring my shares of stock in MI Family Builders, Inc. to Thomas Manley was ever executed by me." Mattheis goes on to state that "[t]he nature and value of my financial interest in the 'MI Family Builders, Inc.' and 'Over The Top Roofing and Construction' business entity has been the subject of uncertainty and dispute between myself and Richard Ihnen since the aborted SPA closing on January 3, 2010." Finally, Mattheis states in his affidavit, "[n]otwithstanding continuing unresolved issues of legal ownership in 'MI Family Builders, Inc.' and 'Over the Top Roofing and Construction, Inc.', I and Richard Ihnen continued until December of 2017 to conduct ourselves as between each other, as equal owners and operators of the roofing and construction business enterprise which was known variously to the public as 'MI Family Builders, Inc.'; 'Over The Top Roofing and Construction', a division of 'MI Family Builders, Inc.' and 'Over The Top Roofing and Construction, Inc.'"

¶98. The Court has already held that these statements are directly contrary to his statements, under penalty of perjury, in the Divorce Proceedings. These statements are also directly contrary to his statements, under penalty of perjury, in his 2010 state and federal income tax returns, that he sold his shares in MI Family Builders.

¶99. Mattheis provided no credible explanation for the contradiction. The only explanation offered was his statement in the supplemental brief that attempted to jibe the various positions under the guise of a "chose in action," which this Court finds makes no sense, and provides no explanation for the prior statements.

¶100. Given the foregoing, as an additional and alternative ground for granting the Defendant's Motion for Summary Judgment, the Court finds that Mattheis's affidavit is a sham filed in an effort to create factual issues when none exist. It is therefore stricken. Having

failed to proffer evidence from which this Court could find in Plaintiff's favor, summary judgment is granted to Ihnen on all of the various claims.

IV. SUMMARY JUDGMENT IS NOT APPROPRIATE ON THE DEFENSE OF UNCLEAN HANDS.

¶101. As an additional and alternative ground for his motion, Ihnen argues that summary judgment should be granted on his defense of unclean hands.

¶102. Because the Court is granting summary judgment based on the application of judicial estoppel and striking Mattheis's sham affidavit, it technically does need to address this alternative ground for barring Mattheis's claim. To provide a complete record on the various arguments submitted to the Court for decision, however, the Court will address the argument and whether it, too, independently warrants granting the Motion for Summary Judgment.

¶103. It is well established that "a plaintiff who seeks affirmative equitable relief must have 'clean hands' before the court will entertain his plea." *S & M Rotogravure Service, Inc. v. Baer*, 77 Wis. 2d 454, 466, 252 N.W.2d 913, 918-919 (Wis. 1977) (*citing Martinson v. Brooks Equipment Leasing, Inc.*, 36 Wis.2d 209, 223, 152 N.W.2d 849 (1967)).

¶104. "For relief to be denied a plaintiff in equity under the 'clean hands' doctrine, it must be shown that the alleged conduct constituting 'unclean hands' caused the harm from which the plaintiff seeks relief." *Security Pacific Nat'l Bank v. Ginkowski*, 140 Wis. 2d 332, 339, 410 N.W.2d 589, 593, (Ct. App. 1987). "The general principle is that a plaintiff will be denied relief if it has been guilty of substantial misconduct regarding the matter in litigation, so that it has affected the equitable relations existing between the parties and arising out of the transaction." *Timm v. Portage Cnty. Drainage Dist.*, 145 Wis. 2d 743, 753, 752, 429 N.W.2d 512 (Ct. App. 1988).

¶105. A recent case describing the purpose of the doctrine of unclean hands is *Sands v. Menard*, 2016 WI App 76, 372 Wis. 2d 126, 887 N.W.2d 94:

> Equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness, will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly "within the law." Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as a crime or to constitute the basis of legal action. Under this maxim, any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean.

(quoting *David Adler & Sons Co. v. Maglio*, 200 Wis. 153, 160, 228 N.W. 123 (1929) (quoting *Weegham v. Killefer*, 215 F. 168, 171 (W.D. Mich. 1914))).

¶106. Ihnen alleges that Mattheis is manipulating the judicial system. According to Ihnen, Mattheis either lied to the IRS, his ex-wife, the court in his Divorce Proceedings, and the court in the Federal Case, or he is lying now. His prior statements under oath or under penalties of perjury created the position he now finds himself—seeking this Court to declare legitimate and valid what he previously disclaimed and disavowed.

¶107. At the summary judgment hearing, the Court questioned the propriety of granting summary judgment on the defense of unclean hands absent a complete record by which to weigh the equities and assess the conduct of both parties. The Court asked the parties to address the issue in supplemental briefs.

¶108. Mattheis cited no authority on the issue. Ihnen, however, cited a host of cases where courts had granted summary judgment on the defense of unclean hands. Ihnen cited two cases factually similar to this case: *Guildeau v. Domingues*, 149 So. 3d 825 (La. Ct. App. 2014), and *Debaillon v. Alfred*, 539 B. R. 277 (W. D. La. 2015).

¶109. The difficulty in addressing the defense of unclean hands on this summary judgment record, however, is that Mattheis contends that Ihnen induced him to sell his stock and, for all intents and purposes, was a co-conspirator in the deception played on the bank, the IRS, Mattheis's ex-wife, and the plaintiffs in the Federal Case.

¶110. In addressing the defense of unclean hands, this Court must not only assess the conduct of the plaintiff but also that of the defendant raising the equitable defense, because unclean hands on the part of the defendant may preclude the defendant from succeeding on the defense. *See UMB Bank, N.A. v. Whitehead*, 2018 WI App 16, ¶ 26, 380 Wis. 2d 281, 913 N.W.2d 233 (noting that "the court found that both parties' hands were unclean, thus barring the [defendants'] reliance on that defense.").

¶111. Taking the evidence in the light most favorable to Mattheis, including the deposition testimony of Ihnen himself, the Court finds that there are disputed facts which prevent the Court from granting the Motion for Summary Judgment on this defense.

***

¶112. For the foregoing reasons, Ihnen's Motion for Summary Judgment is GRANTED. IT IS ORDERED that Judgment be entered in favor of Ihnen and against Mattheis dismissing with prejudice all claims raised in the Amended Complaint, and awarding statutory costs and fees to Ihnen.

Dated this 10th day of August, 2020.

BY THE COURT:

/s/ Michael J. Aprahamian

Circuit Court Judge