UNITED STATES DISTRICT COURT

DICTRICT OF MAINE

JOSEPH G. WORTLEY, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 01-122-P-H***
	)	
PETER M. CAMPLIN,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT

The defendant, Peter M. Camplin, seeks summary judgment on all claims asserted against him in the amended complaint. Plaintiffs Joseph G. Wortley and Barbara Wortley seek summary judgment on the counterclaim asserted against them by the defendant.[1] I recommend that the court deny the defendant's motion and grant the plaintiffs' motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "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 potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could

[1] The motion for summary judgment on the counterclaim purports to be brought by all of the plaintiffs, including Barbara Wortley, wife of Joseph G. Wortley, and Joseph G. Wortley as trustee of the Sea Dog Trust, Plaintiffs' Motion for Summary Judgment ("Wortley Motion") (Docket No. 24) at 1, but the counterclaim by its terms is asserted only against Joseph G. Wortley and Barbara Wortley (*continued on next page*)

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 following undisputed material facts are appropriately supported in the parties' statements of material facts submitted pursuant to this court's Local Rule 56.

The defendant has residential addresses in Florida and Maine. Plaintiffs' Statement of Material Facts Not in Dispute ("Plaintiffs' SMF") (Docket No. 25) ¶ 1; Defendant/Counterclaim Plaintiff Peter M. Camplin's Response to Plaintiffs' Statement of Material Facts ("Defendant's Responsive SMF") (Docket No. 41) ¶ 1. Barbara and Joseph Wortley are residents of Florida. *Id.* ¶ 2. Sea Dog Brewing Company ("Sea Dog") is a Maine corporation that, prior to the events set forth below, was solely owned by the defendant. Defendant/Counterclaim Plaintiff Peter Camplin's

individually, Answer to Amended Complaint, Affirmative Defenses, and Counterclaim, etc. ("Answer")(Docket No. 11) at 12-22.

Statement of Material Facts Not in Dispute (DSMF) ("Defendant's SMF") (Docket No. 23) ¶ 1; Plaintiffs'/Counterclaim Defendants' Response to Defendant/Counterclaim Plaintiff Peter Camplin's Statement of Material Facts Not in Dispute ("Plaintiffs' Responsive SMF") (Docket No. 36) ¶ 1. The defendant had personally guaranteed a loan of approximately $1,169,938.13 from Camden National Bank ("the bank") to Sea Dog and secured the guarantee with a pledge of the stock of the Ravenswake Trust, which held stock in a real estate development firm called Camplin Marino Properties, Inc. Plaintiffs' SMF ¶ 4; Defendant's Responsive SMF ¶ 4. As of December 31, 1999 Sea Dog had accounts payable of $566,437 and only $99,000 in cash on hand. *Id*. ¶ 7. By late March 2000 the defendant was having a difficult time paying vendors and payroll. *Id*. ¶ 10.

The defendant and Mr. Wortley fist met in Florida on March 21, 2001. *Id*. ¶ 12. The defendant claims that he offered the following terms at this meeting, to which Mr. Wortley agreed: (i) the stock of Sea Dog would be transferred to Mr. Wortley; (ii) Mr. Wortley would indemnify the defendant against the bank and other creditors from any personal liability on any of the defendant's existing debts; (iii) Mr. Wortley would pay the defendant $108,000 as reimbursement for funds that the defendant had recently put into the business from household funds and the defendant's salary and benefits would continue until that sum was fully paid; (iv) Mr. Wortley would retain the defendant's two sons in Sea Dog senior management; and (v) the appropriate legal documents would be prepared setting forth these terms. *Id*.

A stock purchase agreement was drawn up to effect the transfer of the Sea Dog stock. Defendant's SMF ¶ 4; Plaintiffs' Responsive SMF ¶ 4. It included a provision that permitted Mr. Wortley to assign it to "any entity of which he or the members of his immediate family are the majority owners, trustees or beneficiaries." *Id*. The defendant and Mr. Wortley entered into this agreement on April 7, 2000 in Coral Springs, Florida. Plaintiffs' SMF ¶ 21; Defendant's Responsive SMF ¶ 21.

As required by the agreement, Mr. Wortley paid the defendant $100 for the purchase of the stock. *Id*. Although the defendant says that he found many elements of the agreement objectionable, he signed it because of the pressure of time; he stated that he did not want to keep Mr. Wortley from going forward because of a very time-sensitive agreement. *Id*. ¶ 23. The agreement includes a term requiring the defendant to transfer the stock "free and clear of all liens, encumbrances, adverse claims, and restrictions." *Id*. ¶ 24.

On May 1, 2000 Mr. Wortley assigned the agreement to Mrs. Wortley under the assignment provision before the stock was to change hands. Defendant's SMF ¶ 5; Plaintiffs' Responsive SMF ¶ 5. By letter dated May 1, 2000 Mr. Wortley's attorney sent an assignment and transfer of rights and a stock power to the defendant to effect the conveyance of the Sea Dog stock to Mrs. Wortley. Plaintiffs' SMF ¶ 25; Defendant's Responsive SMF ¶ 25. Mr. Wortley was advised by an estate-planning attorney to place the stock in a trust with his children as beneficiaries. *Id*. On May 2, 2000 the defendant executed, as "seen and agreed to," the assignment to Mrs. Wortley and signed the stock power transferring the Sea Dog stock to Mrs. Wortley. *Id*. ¶ 26. On that same day Mrs. Wortley transferred the Sea Dog stock to the Sea Dog trust, of which Mr. Wortley is the trustee. *Id*.; Defendant/Counterclaim Plaintiff Peter Camplin's Statement of Material Facts Not in Dispute (DSMF) ("Defendant's Second Reply SMF") (Docket No. 41A) ¶ 89; Plaintiff's Reply Statement of Material Facts ("Plaintiffs' Second Responsive SMF") (Docket No. 45) ¶ 89. Neither Mrs. Wortley nor the Sea Dog Trust made any payments or advances to Sea Dog or other entities or persons in connection with the sale and purchase of the Sea Dog stock. Defendant's SMF ¶ 12; Plaintiffs' Responsive SMF ¶ 12.

On April 7 and May 2, 2000 the defendant's Sea Dog stock was pledged to and in the possession of the bank that had extended the loan guaranteed by the defendant to Sea Dog. Plaintiffs'

SMF ¶ 27; Defendant's Responsive SMF ¶ 27. This fact was not disclosed to Mr. Wortley. Plaintiffs' Responsive SMF ¶ 19;[2] Defendant/Counterclaim Plaintiff Peter Camplin's Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 49) ¶ 19.

By letter dated May 2, 2000 Mr. Wortley's attorney notified all creditors of Sea Dog that the stock of the company had been sold by the defendant to the Sea Dog Trust. Plaintiffs' SMF ¶ 30; Defendant's Responsive SMF ¶ 30. On April 14, 2000 Mr. Wortley caused $30,000 to be forwarded to a trust maintained by the defendant's attorney; the money was intended to be used to fund the purchase of merchandise by Sea Dog and to allow the defendant to be paid back for some of his $108,000 advance by arranging for the sale of the merchandise. *Id*. ¶ 32. The defendant did not receive any of this money. Defendant's Second Reply SMF ¶ 88; Plaintiffs' Second Responsive SMF ¶ 88. Mr. Wortley caused Sea Dog to continue paying the defendant's salary and health benefits from the date of the stock sale until the company filed for bankruptcy protection on November 1, 2000 except for a three-week interruption during June or July. Plaintiffs' SMF ¶ 33; Defendant's Responsive SMF ¶ 33.

After the sale of the stock on May 2, 2000 the bank notified the defendant, through his attorney, that the transfer of the stock was a default under the terms of the loan to Sea Dog. *Id*. ¶ 39. Mr. Wortley then arranged to pay the bank $25,000 to obtain forbearance. *Id*. During the summer of 2000 Mr. Wortley and his representatives were unable to convince the bank to remain in the lending relationship with Sea Dog. *Id*. ¶ 40. On October 20, 2000 an officer of the bank wrote to the defendant and threatened to foreclose on the assets of Sea Dog with a sale to occur on November 21,

[2] The plaintiffs' opposing statement of material facts required by Local Rule 56(c) actually ends at paragraph 16 of this document. Without creating a separate section as required by that rule or otherwise identifying the fact that they have now begun to add additional, new facts, the plaintiffs begin at paragraph 17 of this document to provide separate additional facts.

2000. *Id*. ¶ 41.[3] At Mr. Wortley's direction, Sea Dog filed for bankruptcy protection on November 1, 2000. *Id*. ¶ 47. Shortly after filing, Mr. Wortley caused Sea Dog to seek and obtain an agreement with the bank to the effect that the bank would not pursue the defendant on his guarantee for a specified period of time, provided that Sea Dog continued to make payments to the bank during the bankruptcy proceeding. *Id*. By letter dated December 6, 2000 the bank, through its attorney, informed the defendant that the bank would sell him the debt and its claims against Sea Dog. *Id*. ¶ 51. The bank debt was assigned to WWN Group on or about December 19, 2000. *Id*. The name "WWN Group" referenced "Wortley's Worst Nightmare" and was chosen by the defendant. *Id*. When Mr. Wortley and the defendant met in January 2001, Mr. Wortley asked the defendant if the defendant owned WWN Group. *Id*. ¶ 52. The defendant said no and did not disclose that it was actually owned by his wife and had been arranged by him. *Id*.

On or about March 14, 2001 the defendant caused WWN Group to publish notice of a secured creditor's sale of the Sea Dog stock. *Id*. ¶ 53. At the sale, WWN Group purchased all of the Sea Dog stock. *Id*. By March 23, 2001 WWN Group owned all of the outstanding stock of Sea Dog, including the stock that the defendant had represented to have been sold free and clear of all liens and encumbrances to Mrs. Wortley on May 2, 2000. *Id*. On or about April 27, 2001 the defendant, WWN Group, Mr. Wortley, Sea Dog and others entered into an agreement pursuant to which the claims of WWN Group and West Branch, another entity associated with the defendant, were to be paid over a 15-year period. *Id*. ¶¶ 35, 55. Sea Dog then filed a disclosure statement and plan of reorganization which was confirmed by the bankruptcy court on August 20, 2001. *Id*. ¶ 55. Sea Dog has made all payments required under the plan to the defendant, West Branch and WWN Group. *Id*.

[3] The defendant objects to the document cited in support of this paragraph of the plaintiffs' statement of material facts as "inadmissible hearsay." Defendant's Responsive SMF ¶ 41. However, the statement is not offered for the truth of the matter asserted, Fed. R. Evid. 801(c), but rather to support the proposition that the defendant had notice of a possible foreclosure, s*ee Kelley v. Airborne* (*continued on next page*)

Since April 4, 2000 Mr. Wortley has advanced $312,021.22 to Sea Dog to fund its reorganization. Plaintiffs' Responsive SMF ¶17; Defendant's Reply SMF ¶ 17. Mr. Wortley expects that he will be required to advance at least another $100,000 this year to fund the continuing reorganization of Sea Dog. *Id*. ¶ 20. If the defendant had disclosed to Mr. Wortley that the Sea Dog stock had already been pledged to the bank, Mr. Wortley would not have entered into the stock purchase agreement and would not have involved his wife in the transfer of the stock. *Id*. ¶ 19.

One of the defendant's two sons ceased to be employed by Sea Dog on June 17, 2000. Plaintiffs' SMF ¶ 43; Defendant's Responsive SMF ¶ 43. The other son's employment by Sea Dog ended in May or June of 2001. *Id*.

III. Discussion

A. Defendant's Motion

The defendant seeks summary judgment on all of the plaintiffs' claims,[4] which include allegations of violations of federal and state securities laws, breach of warranty under the Maine Commercial Code and common-law claims of fraud, negligent infliction of emotional distress and breach of contract. Amended Complaint (Docket No. 9) at 8-14.

The defendant first contends that Mr. Wortley "is not entitled to any damages at all in this case" because he never owned the stock and because he "never performed his obligations under the contract." Defendant/Counterclaim Plaintiff Peter Camplin's Motion for Summary Judgment, etc. ("Defendant's Motion") (Docket No. 22) at 4. The former contention is dispositive as to any claims asserted by Mr. Wortley (and subsequently assigned to the Sea Dog Trust) in Counts I, II and VI of the amended complaint, which allege violations of federal and state securities statutes. The latter

Freight Corp., 140 F.3d 335, 346 (1st Cir. 1998).

[4] The parties agree that Mr. and Mrs. Wortley "have assigned all their claims against Defendant to the [Sea Dog] Trust," Plaintiffs' Responsive SMF ¶ 21; Defendant's Reply SMF ¶ 21, and therefore, from all that appears in the summary judgment record, only the (*continued on next page*)

contention addresses only Count V of the amended complaint, which alleges breach of contract. The defendant does not address the remaining counts in the amended complaint with respect to Mr. Wortley and must accordingly be deemed to have waived any claim to summary judgment on those counts.[5] *United States v. Orama*, 956 F. Supp. 81, 85 (D. P.R. 1997).

Count I of the amended complaint alleges a violation of 15 U.S.C. § 78j(b), which provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> * * *
>
> **(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Private rights of action under this statute exist only in actual purchasers and sellers of securities. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730, 749 (1975). Mr. Wortley, who never took title to the shares at issue, was neither a purchaser nor a seller of those shares. He has no standing to bring a private claim under this statute.[6]

Count II invokes 32 M.R.S.A. § 10201, which provides:

Trust remains an appropriate plaintiff in this action.

[5] The defendant's contention, raised for the first time in his reply brief, Reply Memorandum of Law in Support of Defendant's Motion for Summary Judgment ("Defendant's Reply Brief") (Docket No. 48) at 15, that his initial argument concerning Mr. Wortley must be deemed to apply to all claims in the amended complaint because "[t]he standing requirements are the same for all of these claims, because . . . they are all based on fraud," is, in addition to being untimely raised, simply incorrect. The plaintiffs' state common-law claims for negligent misrepresentation and fraud do not have identical standing requirements; the elements of these claims are quite distinct from those of the federal and state securities claims. The defendant has waived any claim to summary judgment against Mr. Wortley (and thus the Sea Dog Trust) on Counts III and IV.

[6] The plaintiffs cite several cases in support of a contrary argument, Plaintiffs'/Counterclaim Defendants' Opposition to Defendant/Counterclaim Plaintiff Peter Camplin's Motion for Summary Judgment ("Plaintiffs' Opposition")(Docket No. 35) at 5-6, but those cases are distinguishable because they all involved potential plaintiffs who were beneficial owners of the stock at issue. Here, the plaintiffs assert that Mrs. Wortley immediately conveyed ownership of the stock to the Sea Dog Trust, the beneficiaries of which were the Wortleys' children. Plaintiffs' SMF ¶¶ 25-26; Defendant's SMF ¶ 2, Plaintiffs' Responsive SMF ¶ 2. Mr. Wortley is not a beneficial owner of the stock.

> In connection with the offer, sale or purchase of any security, a person shall not, directly or indirectly:
>
> **1. Fraud.** Employ any device, scheme or artifice to defraud;
>
> **2. Untrue statements, material omissions.** Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> **3. Deceptive practices.** Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

A private right of action under this statute is created by 32 M.R.S.A. § 10605(1), which limits the right to "the person purchasing the security." Again, Mr. Wortley was not the purchaser of the stock at issue and accordingly lacks standing to bring this claim.

Count VI alleges violation of 11 M.R.S.A. § 8-1108, which provides, in relevant part:

> **(1)** A person who transfers a certificated security to a purchaser for value warrants to the purchaser . . . .
>
> **(2)** A person who originates an instruction for registration of transfer of an uncertificated security to a purchaser for value warrants to the purchaser . . . .
>
> **(3)** A person who transfers an uncertificated security to a purchase for value and does not originate an instruction in connection with the transfer warrants . . . .

Again, the warranties at issue run to the purchaser, Mr. Wortley is not the purchaser in this case, and this statute accordingly provides him with no cause of action.

The defendant concedes for purposes of his motion and with respect to Count I that Mrs. Wortley was a purchaser of the Sea Dog stock. Defendant's Motion at 9 n.6. He argues that he is entitled to summary judgment on her claims because she cannot prove any damages resulting from the purchase of the stock. *Id*. This argument is based on the defendant's contentions that (i) the plaintiffs are limited to $100, the purchase price of the stock, as recoverable damages, *id*. at 5-7, and that, since Mr. Wortley paid that $100, Plaintiffs' SMF ¶ 21, Mrs. Wortley presumably has not been damaged, and (ii) all of the consequential damages, if recoverable, were incurred solely by Mr. Wortley.

The first contention is based on 15 U.S.C. § 78bb(a), which provides that "no person permitted to maintain a suit for damages under the provisions of this chapter [including § 78j] shall recover . . . a total amount in excess of his actual damages on account of the act complained of." The defendant construes this language to limit the plaintiffs to their "out-of-pocket" damages, which he asserts is merely the sum they actually paid for the stock. First Circuit case law suggests that the defendant's position is incorrect. In a case alleging violation of section 78j, the court of appeals held:

> With respect to damages we draw a distinction between cases where, by fraud, one is caused to buy something that one would not have bought or would not have bought at that price, and where, by fraud one is induced to convey property to the fraudulent party. In the former case the damages are to be reckoned solely by the difference between the real value of the property at the date of its sale to the plaintiffs and the price paid for it, with interest from that date, and, in addition, such outlays as were legitimately attributable to the defendant's conduct, but not damages covering the expected fruits of an unrealized speculation.

Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965) (citation and internal quotation marks omitted). That measure of damages is more than just the money paid for the security. The Supreme Court has said that "the correct measure of damages under . . . 15 U.S.C. § 78bb(a)[] is the difference between the fair market value of all that the . . . seller received and the fair value of what he would have received had there been no fraudulent conduct, except for the situation where the defendant received more than the seller's actual loss." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128,155 (1972). However, it expanded on this theme in *Randall v. Loftsgaarden*, 478 U.S. 647, 663 (1986), stating that "this Court has never interpreted [section 78bb(a)] as imposing a rigid requirement that every recovery on an express or implied right of action under the 1934 Act must be limited to the net economic harm suffered by the plaintiff." Other courts have held specifically that plaintiffs may recover both the difference between the consideration paid and the actual value of the securities and consequential damages that resulted from the fraud. *E.g., Volk v. D.A. Davidson & Co.*, 816 F.2d

1406, 1413 (9th Cir. 1987); *Osofsky v. Zipf*, 645 F.2d 107, 111-14 (2d Cir. 1981). I find this view to be persuasive and in line with the First Circuit's language in *Jernigan*.

The question thus becomes whether Mrs. Wortley has alleged consequential damages of her own. While the plaintiffs do contend that it is Mr. Wortley who "advanced" the funds that make up the consequential damages sought by the amended complaint, Plaintiffs' Responsive SMF ¶ 17, they also contend that Mrs. Wortley "viewed" these funds "as marital funds or family funds, so in that respect she had contributed funds." *Id*. ¶ 12. The pages of Mrs. Wortley's deposition cited in support of this paragraph include sufficient testimony to allow a reasonable fact finder to conclude that the funds were "family money" and therefore that the loss of the funds damaged Mrs. Wortley as well as Mr. Wortley. The defendant makes no argument concerning Mrs. Wortley with respect to the state-law claims, and, for the reasons already discussed, I have rejected his belated contention that the arguments he does make should apply to those claims. Accordingly, I conclude that the defendant is not entitled to summary judgment on any claims asserted initially by Mrs. Wortley and now held by the Sea Dog Trust. This conclusion makes it unnecessary to consider the defendant's additional argument that the Sea Dog Trust cannot prove any damages. Defendant's Motion at 10.

With respect to Count V, the defendant contends that the claim for breach of contract is barred by Mr. Wortley's failure to perform certain terms alleged to be part of the parties' oral agreement. Defendant's Motion at 4-5. The plaintiffs respond that the purchase and sale agreement contains an integration clause and that the alleged terms are not included in the purchase and sale agreement and therefore cannot provide any basis for the defendant's claim. Plaintiffs' Opposition at 7-8. The defendant does not respond to this argument in the context of his own motion, although the issue is discussed at length by both sides in connection with the plaintiffs' motion for summary judgment.

The stock purchase agreement provides, in pertinent part: "This Agreement constitutes the parties' entire agreement with respect to the subject matter hereof, and supersedes any and all prior oral or written agreements, expressions or understandings with respect thereto." Stock Purchase Agreement (attached to Defendant's SMF) ¶ 5(a). The stock purchase agreement does not mention the obligations which the defendant contends Mr. Wortley failed to fulfill: "to let defendant's sons operate Sea Dog, to indemnify defendant for any outstanding personal guarantee, and to pay back Mr. Camplin's $108,000 loan to Sea Dog. Defendant's Motion at 5.

Under Maine law, where a contract provides for concurrent duties of performance by both parties, performance by one party of his duties is a prerequisite for a demand for performance by the other party. *Pelletier v. Dwyer*, 334 A.2d 867, 870 (Me. 1975). However, in this case the written contract says nothing about the alleged duties at issue and in fact states clearly that any previous oral agreements are superseded. As a general rule, the existence of an integrated agreement bars the use of parole evidence to modify the agreement. *General Elec. Capital Corp. v. Ford Motor Credit Co.*, 149 B.R. 229, 232 (D. Me. 1993). An integration clause "puts to rest" a party's argument that statements made prior to the execution of the contract indicated that the parties intended to be bound by additional terms. *Portland Valve, Inc. v. Rockwood Sys. Corp.*, 460 A.2d 1383, 1388 & n.5 (Me. 1983). The question whether an agreement is integrated is to be determined by the court. *Ford Motor Credit*, 149 B.R. at 233. "Where, as here, in the final written contract the parties have expressly agreed that the contract fully integrates their understandings, the contract must be construed independently of extrinsic evidence of any previously existing parole understanding not integrated into the writing." *Portland Valve*, 460 A.2d at 1388 n.5.

The defendant contends that the stock purchase agreement is ambiguous, making the admission of extrinsic evidence possible. *Id*. at 1388. Specifically, he asserts that the integration clause states

that the document presents the parties' entire agreement "with respect to the subject matter hereof," and that the quoted phrase is reasonably susceptible of more than one meaning. Defendant Peter Camplin's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment ("Defendant's Opposition") (Docket No. 40) at 6 n.2. He suggests that this phrase could be interpreted to mean either that the agreement deals with the transfer of the business or that it deals only with the transfer of the Sea Dog stock, independent of other parts of the agreement concerning the business. *Id*. However, the transfer of all of the Sea Dog stock was, as a practical matter, the transfer of the business. There is no ambiguity in the quoted contract language.

The defendant's primary argument is that the additional terms are "implied obligations" that are enforceable under *Top of the Track Assocs. v. Lewiston Raceways, Inc.*, 654 A.2d 1293 (Me. 1995). Defendant's Opposition at 5-8. In that case, the contract at issue, which obligated the plaintiff to make certain improvements to a racetrack and to operate food and drink concession services during racing days, included an integration clause. 654 A.2d at 1294. During the term of the contract, the defendant ceased operating the racetrack. *Id*. The defendant relied on the integration clause as a defense against the plaintiff's claim for breach of an implied term in the agreement — that the defendant was obligated to continue to seek racing dates during the term of the agreement. *Id*. at 1295. The Law Court stated that

> The 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. In establishing the intent of the parties at the time the contract was executed the undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included.

Id. (citations and internal quotation marks omitted). Here, the additional terms at issue are not inconsistent with any express term of the stock purchase agreement, but the language of the agreement

itself does not give rise to an inference that it is absolutely necessary to introduce any of these terms in order to effectuate the intention of the parties. The defendant must rely on the circumstances in which the parties entered into the contract, but none of the alleged additional terms is necessary to accomplishment of the stock transfer in the way in which the existence of racing is necessary to the operation of concessions at a racetrack. The defendant's argument would allow a party to a contract with an express integration clause to reach the factfinder in spite of that clause merely by contending that additional terms not appearing in the written contract were absolutely necessary to him in entering into the contract. The summary judgment record does not include evidence sufficient to allow the application of the *Top of the Track* exception in this case.[7]

The defendant's motion for summary judgment should be denied.[8]

B. The Plaintiffs' Motion

The plaintiffs move for summary judgment on all counts of the defendant's counterclaim, which asserts claims for violation of 15 U.S.C. § 78j(b), fraudulent inducement and fraudulent transfer by Mr. and Mrs. Wortley; and breach of contract, fraud, intentional infliction of emotional distress, violation of 32 M.R.S.A. § 10201 and negligent misrepresentation by Mr. Wortley. Answer at 12-21. The counterclaim also seeks punitive damages. *Id*. at 21.

1. Mrs. Wortley. Contending that all of the claims set forth in the counterclaim against Mrs. Wortley are based on the allegation that she aided and abetted Mr. Wortley, the plaintiffs argue that the defendant cannot prove any liability on her part. Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") (Docket No. 24) at 7-9. The defendant responds that "Mrs. Wortley took affirmative actions in aid of Mr. Wortley's financial dealings with Peter Camplin" and "that is enough

[7] The fact that a written contract with an integration clause exists does not, as a matter of law, bar a claim for fraud in connection with that agreement. *Francis v. Stinson*, 760 A.2d 209, 218 (Me. 2000); *Ferrell v. Cox*, 617 A.2d 1003, 1006 (Me. 1992).

[8] The defendant requests in the alternative, as a motion *in limine*, that the plaintiffs be barred from offering certain evidence at trial. (*continued on next page*)

to make her vicariously liable for her husband's torts." Defendant's Opposition at 18-19. The only "affirmative action[]" mentioned by the defendant is that "Barbara Wortley played a key and indispensable part in the transfer of the Sea Dog stock to the Sea Dog Trust by acting as a 'straw' to whom the shares were directly transferred by Mr. Camplin and who then transferred them, for token consideration, to the Sea Dog Trust." *Id*. at 17-18.[9]

The defendant offers nothing in support of a claim of fraudulent inducement against Mrs. Wortley in his brief or his various statements of material facts. To the extent that Count IV of the counterclaim is asserted against Mrs. Wortley, she is entitled to summary judgment on that claim.

The parties direct their respective arguments on this issue to Maine law on civil conspiracy, Plaintiffs' Motion at 8-9, Defendant's Opposition at 18-19, despite the fact that the term is not used in the counterclaim. The defendant cites only paragraph 4 of the counterclaim, Defendant's Opposition at 17, which alleges that Mrs. Wortley "had knowledge of Joseph Wortley's intention with regard to Mr. Camplin and Sea Dog and aided and abetted Mr. Wortley and acted as his agent in all of the activities alleged in this Counterclaim," Answer at 13. To the extent that the defendant's claims against Mrs. Wortley are based on a civil conspiracy theory, Maine law requires "the actual commission of some independently recognized tort" in order to support such a claim. *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286 (Me. 1998). This court has determined that violation of Maine's Uniform Fraudulent Transfers Act, the gravamen of Count VI in this case, does not constitute a tort for purposes of liability for civil conspiracy. *FDIC v. S. Prawer & Co.*, 829 F. Supp. 453, 455 (D. Me. 1993). While an individual may be liable for aiding and abetting a violation of the federal Securities Act, *Brick v. Dominion Mortgage & Realty Trust*, 442 F. Supp. 283, 292 (W.D. N.Y.

Defendant's Motion at 1-2. Resolution of this request is best left to the judge who will preside at trial.

[9] This sentence in the defendant's memorandum concludes with the phrase "of which her husband is the sole trustee and whose only asset is the Sea Dog stock." Defendant's Opposition at 18. Neither of these factual assertions is supported by the record citation (*continued on next page*)

1977), the defendant in this case has not presented any factual allegations in his statements of material facts that would allow a factfinder so to conclude. Accordingly, Mrs. Wortley is entitled to summary judgment on all counts alleged against her in the counterclaim to the extent that they rely on a theory of civil conspiracy.

If the underlying theory is instead that of aiding and abetting the violations alleged in those counts, Maine has adopted section 876 of the Restatement (Second) of Torts.[10] *Barnes v. McGough*, 623 A.2d 144, 145 (Me. 1993). Under that section of the Restatement "there must be alleged tortious conduct by another before aiding and abetting liability can be imposed." *S. Prawer*, 829 F. Supp. at 457. For the reasons discussed in connection with a conspiracy theory, therefore, Mrs. Wortley is entitled to summary judgment on all counts alleged against her in the counterclaim to the extent that they rely on a theory of aiding and abetting.

2. Breach of contract. The plaintiffs contend that the fact that the stock purchase agreement is integrated bars the defendant from claiming a breach of a prior or subsequent oral contract. Plaintiffs' Motion at 11-19.[11] I have already discussed the parties' arguments on this issue in connection with the defendant's motion for summary judgment. For the reasons set forth above, I conclude that the plaintiffs are entitled to summary judgment on Count II of the counterclaim, which alleges breach of contract.

3. Statutory claims. The plaintiffs contend that the defendant cannot prove the necessary elements of scienter, duty and injury to support his claims of violation of 15 U.S.C. § 78j(b) and 17 C.F.R.

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given.

[10] That section provides: "For harm resulting to a third person from the tortuous conduct of another, one is subject to liability if he (a) does a tortuous act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortuous result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1979).

[11] The defendant's opposition to the plaintiffs' motion does not mention any alleged subsequent oral agreement. Defendant's Opposition at 2-8.

§ 240.10b-5 (Count I of the counterclaim) and that he is not protected by the state securities statute, 32 M.R.S.A. § 10201, that provides the basis for Count VII of the counterclaim. Plaintiffs' Motion at 20-22, 29-31. The defendant briefly responds that the evidence supports his allegation of knowing misrepresentation and that the plaintiffs misread the opinion of the Maine Law Court on which they base their argument with respect to the state statute. Defendant's Opposition at 21-22.

> In addition to proving that the defendant made a materially false or misleading statement or omitted to state a material fact necessary to make a statement not misleading, a Rule 10b-5 plaintiff . . . must establish that the defendant acted with scienter, and that the plaintiff's reliance on the defendant's misstatement caused his injury.

Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1217 (1st Cir. 1996). In this case, the defendant identifies the same alleged promises by Mr. Wortley discussed in connection with his breach of contract claim as the misleading statements of material fact providing the basis for this claim. Answer at 17 (Counterclaim ¶ 37).

The plaintiffs first argue that the counterclaim fails to plead the elements of this statutory claim with sufficient particularity, Plaintiffs' Motion at 20, but that argument is appropriate to a motion to dismiss rather than to a motion for summary judgment. The defendant's statements of material facts include sufficient facts, albeit disputed by the plaintiffs, to allow a reasonable factfinder to infer that Mr. Wortley knew when he made the promises that he did not intend to keep them. *See, e.g.*, Defendant's SMF ¶¶ 3, 8; Defendant's Second Reply SMF ¶¶ 70, 72-75, 82-86. There is also disputed evidence which, if believed, would allow the drawing of a reasonable inference that the alleged promises were material, that is, that a reasonable person would have viewed the promises as "having significantly altered the total mix of information made available," *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988), and that the defendant relied on the promises. *See, e.g.*, Defendant's Second Reply SMF ¶¶ 76-77; Defendant's Responsive SMF ¶ 23. With respect to evidence of injury, the

plaintiffs contend that Sea Dog was "out of working capital" at the time of the stock transfer and that "[i]f Mr. Camplin had not transferred the stock to Mr. Wortley, the Company would have failed without Mr. Wortley's infusion of working capital, and Mr. Camplin would have been left to deal with the Bank guaranty on his own." Plaintiffs' Motion at 22. Lack of injury to Sea Dog is not the same thing as lack of injury to the defendant, an individual. The transfer of stock did not in itself save the defendant from dealing with his personal guarantee of the bank loan on his own and, in any event, the fact that the defendant might have been "saved" from one type of injury does not mean that he was not injured in some other way. The defendant does not address the "injury" requirement of the statutory cause of action either in his brief response to the motion on Count I or in his response to the motion on Count III, to which his argument on Count I refers, Defendant's Opposition at 12-17, 21-22, but his assertion that he has not been paid the promised $108,000 is sufficient to show injury.[12] On the showing made, the plaintiffs are not entitled to summary judgment on Count I of the counterclaim.

The same is true of the state statutory claim. The essence of the plaintiffs' position is that a "regretful seller" may not recover under 32 M.R.S.A. § 10201. Plaintiffs' Motion at 30. The only Maine case law which they cite in support of this position, *Bahre v. Pearl*, 595 A.2d 1027, 1031 (Me. 1991), does not so hold, and the cases from California and Wyoming cited by the plaintiffs in support of this argument are easily distinguishable, if indeed they can reasonably be interpreted to so hold. Nor does *Bahre* provide support for the plaintiffs' alternative argument that the integrated stock purchase agreement bars this statutory claim. While the stock purchase agreement does recite that it supercedes all previous agreements, that does not mean that material misrepresentations made in connection with the sale of the stock are thereby forgiven.

[12] The plaintiffs' argument that Mr. Wortley had no duty to disclose to the defendant, Plaintiffs' Motion at 22, seems inapposite in the factual context of this case. The allegation is that Mr. Wortley made false representations, knowing them to be false, upon which the defendant relied. There is no claim that Mr. Wortley failed to disclose other material information. *See generally Roeder v. Alpha* (*continued on next page*)

The statute prohibits untrue statements of material fact in connection with the sale *or* purchase of a security. 32 M.R.S.A. § 10201(2). Clearly, sellers are protected from deceptive purchasers by this language; it is not applicable only to purchasers defrauded by sellers. This point is reinforced by the plain language of 32 M.R.S.A. § 10605(2): "Any person who purchases a security in violation of section 10201, subsection 2, is liable to the person selling the security to that person."

The plaintiffs are not entitled to summary judgment on Count VII of the counterclaim.

4. Fraudulent transfer. The plaintiffs contend that Mr. Wortley is entitled to summary judgment on Count IV of the counterclaim because the only transfer of stock in which the defendant was involved was his transfer to Mrs. Wortley. Plaintiffs' Motion at 10. The defendant relies on 14 M.R.S.A. § 3575(1)(A), contending that Mrs. Wortley's acceptance of the transfer of stock was part of Mr. Wortley's plan to defraud him. Defendant's Opposition at 19. The statute provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> **A.** With actual intent to hinder, delay or defraud any creditor of the debtor
>
> . . . .

14 M.R.S.A. § 3576(1)(A). The defendant maintains that Mr. Wortley intended to defraud him by making the alleged promises to hire his sons, indemnify him and pay him $108,000 and that the transfer to Mrs. Wortley is evidence of this intent because she is an "insider" under 14 M.R.S.A. § 3575(2)(A). Defendant's Opposition at 19. By the terms of the statute, it is the debtor who must make the transfer in order for liability to attach, and neither of the Wortleys made the transfer that involved the defendant; only the defendant made that transfer. The defendant apparently contends that Mr. Wortley incurred an obligation to him as a result of the stock transfer deal and incurred that obligation with the intent to defraud him, even though the transfer was made to Mrs. Wortley, a relative of Mr.

Indus, Inc., 814 F.2d 22, 26-28 (1st Cir. 1987).

Wortley.[13] *See* 14 M.R.S.A. § 3572(7)(A) & (11). This strained interpretation of the statute does not comport with its intended purpose and does not provide an appropriate legal basis for the defendant's claim. *See Leighton v. Fleet Bank of Maine*, 634 A.2d 453, 458 (Me. 1993). Other legal theories are available that may provide the defendant with relief for the fraud he alleges. This theory does not. The plaintiffs are entitled to summary judgment on Count VI of the counterclaim.

5. Fraud. The plaintiffs contend that the defendant cannot present clear and convincing evidence of fraud as required by Maine law. Plaintiffs' Motion at 22-25. The fraud alleged in Count III of the counterclaim is that Mr. Wortley never intended to fulfill the three alleged promises already discussed. Answer at 19 (¶47); Defendant's Opposition at 13. Under Maine law,

> [a] defendant is liable for fraud if he (1) makes 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 in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Butler v. Poulin, 500 A.2d 257, 260 (Me. 1985). A claim for fraud must be proved by evidence that shows that the existence of fraud is highly probable. *Francis*, 760 A.2d at 217.

The plaintiffs first argue that Count III of the counterclaim must be dismissed because the amended complaint fails to state the claim with particularity as required by Fed. R. Civ. P. 9(b). The complaint must set forth specific facts that make it reasonable to believe that the defendant knew that a statement was materially false or misleading. *Greenstone v. Cambex Corp*., 975 F.2d 22, 25 (1st Cir. 1992). Here, the counterclaim states that Mr. Wortley knew that the statements at issue were false or

[13] The defendant specifically argues that "[t]he *only* question presented by the motion on this claim is whether the transfer was made 'with *actual intent* to hinder [sic] delay or defraud' Mr. Camplin." Defendant's Opposition at 19 (emphasis in original). If that is in fact the only question, the plaintiffs are entitled to summary judgment. The Uniform Fraudulent Transfer Act, upon which the defendant's claim is based, defines "transfer" as "every mode, direct or indirect, . . . or [sic] disposing of or parting with an asset or an interest in an asset." 14 M.R.S.A. § 3572(12). The word "or" immediately preceding "disposing" is a typographical error in the Maine statute as published. The word is "of" in the Uniform Act, Unif. Fraudulent Transfer Act § 1(12) (1984), and in the bankruptcy code, 11 U.S.C. § 101(54), the cited source for the Uniform Act definition, 14 MR.S.A. § 3572, Commissioners' Comment (12). Neither Wortley disposed of or parted with the stock that was transferred.

were made in reckless disregard of the truth, Answer at 19 (¶ 47), but that is not enough. The defendant argues that a determination that the stock purchase agreement is integrated and represents the entire agreement between the parties compels the conclusion that Mr. Wortley had the required scienter at the time he entered into the agreement. Defendant's Opposition at 12-13. There are two problems with this argument. First, neither the counterclaim nor the defendant's statements of material facts alleges that the stock purchase agreement was integrated; they allege precisely the opposite. Second, the fact that Mr. Wortley entered into an integrated contract does not necessarily mean that any promises he made at the time that were not included in the written agreement were false when made.[14]

The defendant points to evidence in the record that he believes would allow a jury to conclude that Mr. Wortley knew the promises to be false when he allegedly made them. Defendant's Opposition at 16-17. At this point in the proceedings, if that evidence is enough to avoid the entry of summary judgment, the plaintiffs should not be able to obtain dismissal of the claim as the result of a pleading defect. *See Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 n.4 (2d Cir. 2000). Contrary to the plaintiffs' argument, Plaintiffs' Motion at 24, the parties do not agree that the discussions that gave rise to the allegation that Mr. Wortley made the three specific promises were negotiations and that the parties now merely "dispute what those negotiations mean" or "the legal effect of those negotiations." The defendant has produced evidence, disputed by the plaintiffs, that would allow a reasonable factfinder to infer that Mr. Wortley never intended to be bound by his alleged promises. Defendant's Second Reply SMF ¶¶ 72-75, 82-88.

[14] The "reckless disregard" alternative of the third element of fraud under Maine law does not appear applicable here, where Mr. Wortley is alleged to have made three specific promises to act himself in the future; it would not be possible to make such promises in reckless disregard of whether they were true or false. The promisor could only have intended to fulfill those promises or not to do so at the time he made them.

The plaintiffs next contend that the promises at issue cannot provide the basis for a fraud claim because they are merely promises of future performance, which are not actionable under Maine law. Plaintiffs' Motion at 24-25. While a misrepresentation of opinion or promises of future performance may not traditionally provide the basis for a fraud claim under Maine law, an exception exists in circumstances where the relationship of the parties or the opportunity provided for investigation may transform such a misrepresentation into an actionable statement of fact. *Veilleux v. National Broad. Co.*, 206 F.3d 92, 119-20 (1st Cir. 2000). Here, the alleged promises appear to be misrepresentations, if they are misrepresentations at all, that were made about "specific facts" within Mr. Wortley's exclusive control. As such, they are actionable. *Id*. at 120-21. Accordingly, the plaintiffs are not entitled to summary judgment on Count III of the counterclaim.

6. Fraudulent inducement. The plaintiffs assert that they are entitled to summary judgment on Count IV of the counterclaim, which alleges that the defendant was fraudulently induced to sell the Sea Dog stock, because "nonperformance on a contractual agreement simply does not support a claim for fraudulent inducement." Plaintiffs' Motion at 25. The defendant responds that "[a]ll of the evidence described . . . in relation to the fraud claim is relevant to the fraudulent inducement count as well." Defendant's Opposition at 20. Both parties' treatment of this claim is remarkable primarily for its brevity.

The plaintiffs rely on *U.S. Quest LTD. v. Kimmons*, 228 F.3d 399 (5th Cir. 2000), in which the Fifth Circuit, applying Texas law, held that a merger clause providing that the written agreement was in lieu of any and all prior or contemporaneous agreements or understandings precluded a claim for fraudulent inducement because it "expressly contradicts" the plaintiff's assertion that an oral agreement made before the written contract was executed was to be incorporated in a second written contract. *Id*. at 403. They do no cite any Maine law to this effect. As I noted earlier,

> Maine precedent is clear. A signed agreement that contradicts prior oral statements does not bar an action for fraud as a matter of law. Parol evidence of fraudulent inducement may be introduced to show that a signed document does not reflect the intent of the parties. A plaintiff's reliance on the fraudulent misrepresentations of a defendant is unjustified only if the plaintiff knows the representation is false or its falsity is obvious to the plaintiff.

Ferrell, 617 A.2d at 1006 (citations omitted). In the absence of any indication that the Maine Law Court has adopted the *Kimmons* gloss on this basic tenet of Maine law, this court should not do so. The plaintiffs are not entitled to summary judgment on Count IV of the counterclaim.

7. Intentional infliction of emotional distress. Under Maine law, a plaintiff alleging intentional infliction of emotional distress, as the defendant does in Count V of his counterclaim, must establish:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. . . . In appropriate cases, severe emotional distress may be inferred from the extreme and outrageous nature of the defendant's conduct alone.

Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979) (citations and internal quotation marks omitted). The plaintiffs contend that the defendant cannot establish any of the four elements of this claim. Plaintiffs' Motion at 26-29.

With respect to the second element, "[i]t is for the Court to determine, in the first instance whether the Defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery, or whether it is necessarily so." *Rubin v. Matthews Int'l Corp*., 503 A.2d 694, 699 (Me. 1986) (quoting Restatement (Second) of Torts § 46, comment h (1965)). Here, Mr. Wortley's alleged conduct in making the three specific promises, assuming that he had no intent to keep those promises when made, simply does not rise to the level of extreme and outrageous conduct that is beyond all

possible bounds of decency, even if the defendant was "in a difficult financial and psychological condition," Defendant's Opposition at 25-26, at the time the alleged promises were made. The defendant cites no evidence in support of this assertion concerning his condition or, more important, to demonstrate that Mr. Wortley was aware of this condition. In any event, Maine case law demonstrates that the circumstances alleged here would not allow a factfinder to determine that Mr. Wortley's alleged conduct was sufficiently extreme and outrageous. *See, e.g., Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 616-17 (Me. 1996) (insurer's actions in connection with denial of disability claim not extreme and outrageous); *Loe v. Town of Thomaston*, 600 A.2d 1090, 1091, 1093 (Me. 1991) (publication of terms of settlement of grievance over termination of town employee not extreme and outrageous); *Staples v. Bangor Hydro-Elec. Co.*, 561 A.2d 499, 501 (Me. 1989) (humiliating plaintiff at staff meetings and demoting him without cause insufficient). *Cf. Latremore v. Latremore*, 584 A.2d 626, 630 (Me. 1990) (threats to evict aged and ill parents, sending them monthly bills over $3,000 and demanding total of over $100,000, making vicious remarks to father regarding father's mental condition and eliciting sister's aid in having father declared mentally incompetent sufficient to allow finding of extreme and outrageous conduct).

Because the evidence submitted by the defendant is insufficient to allow him to proceed on the second element of his claim for intentional infliction of emotional distress, it is not necessary to consider the plaintiffs' arguments with respect to the remaining elements. The plaintiffs are entitled to summary judgment on Count V of the counterclaim.

8. Negligent misrepresentation. The Maine Law Court has adopted the definition of the tort of negligent misrepresentation set forth in the Restatement (Second) of Torts.

> 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.

Chapman v. Rideout, 568 A.2d 829, 830 (Me. 1990) (emphasis deleted), quoting Restatement (Second) of Torts § 552(1) (1977). The plaintiffs contend that they are entitled to summary judgment on Count VIII of the counterclaim, which invokes this tort, because the defendant cannot establish the necessary factual predicate. Plaintiffs' Motion at 31-32. The defendant responds that "the same facts that give rise to Mr. Camplin's cause of action for fraud also support his claim of negligent misrepresentation." Defendant's Opposition at 27. Contrary to the defendant's contention that "[i]f a jury did not find that the [three] promises [at issue] were knowingly false at the time they were made, . . . it could still find that they were made negligently," *id*., the nature of those alleged promises is such that Mr. Wortley either knew at the time they were made that he had no intention of fulfilling them or he intended at that time to fulfill them. Even if he intended to carry out the promises when made and later changed his mind, a possibility for which no supporting evidence has been submitted or identified by the defendant in connection with the motions for summary judgment, such a conscious change cannot reasonably be considered to be anything other than intentional, rather than merely negligent. If, as the defendant contends, Mr. Wortley "never intended to carry out" the promises, *id.* at 25, he did not make them carelessly; he made them knowing that they were false. On the summary judgment record, Mr. Wortley cannot reasonably be said to have failed to exercise reasonable care or competence in "obtaining" the alleged promises or in communicating them. The plaintiffs are entitled to summary judgment on Count VIII of the counterclaim.

9. Punitive damages. The plaintiffs contend that they are entitled to summary judgment on Count IX of the counterclaim, which seeks punitive damages on all of the defendant's claims, Answer at 21, for various reasons. Plaintiffs' Motion at 33-36. The defendant acknowledges that punitive damages are not available under Maine law on his claim in Count II for breach of contract, Defendant's Opposition

at 28, and fails to respond to the plaintiffs' assertion that punitive damages are not available on his statutory claims. The plaintiffs are correct on these points. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989) (punitive damages unavailable under Maine law for breach of contract); *Green v. Wolf Corp.*, 406 F.2d 291, 303 (2d Cir. 1968) (punitive damages not available in private actions under § 10(b) of the Securities Exchange Act); *Mirkin v. Wasserman*, 858 P.2d 568, 583 (Cal. 1993) (punitive damages not available under state securities law). The Revised Maine Securities Act specifies the damages available in a private action for violation of 32 M.R.S.A. § 10201, which is the section invoked by the defendant here, Answer at 20, and that specification does not include punitive damages, 32 M.R.S.A. § 10605(1). The plaintiffs are entitled to summary judgment on the claim for punitive damages with respect to Counts I, II and VII of the counterclaim.

With respect to the remaining counts of the counterclaim, the defendant takes the position that evidence in the summary judgment record would allow a reasonable factfinder to conclude that Mr. Wortley acted with malice,[15] and that this is all that is required. Defendant's Opposition at 28-29. The plaintiffs, in contrast, offer various reasons why punitive damages are not available on certain of the defendant's claims, as well as arguing that the summary judgment evidence is not sufficient to allow a factfinder to consider the issue of malice. Plaintiffs' Motion at 33-36.

This court has determined that an allegation of fraudulent conveyance under Maine's Uniform Fraudulent Transfers Act, which is invoked as the basis for Count VI of the counterclaim, Defendant's Opposition at 19, does not constitute a tort. *S. Prawer & Co.*, 829 F. Supp. at 456. Since this claim sounds in contract, *id*. at 455-56, punitive damages are not available under Maine law on this count.

[15] The defendant does not suggest that there is any evidence in the summary judgment record that would support a finding that Mrs. Wortley acted with malice, Defendant's Opposition at 28-30, despite the fact that his counterclaim alleges that both plaintiffs so acted, Answer at 21.

The plaintiffs also argue that the claims in Counts III, IV and VIII are quasi-contractual in nature and that punitive damages therefore are not available on these claims under Maine law. Plaintiffs' Motion at 33-34. This argument is based on *Jourdain v. Dineen*, 527 A.2d 1304 (Me. 1987). All the Law Court held in that case, however, is that damages for emotional or mental pain and suffering are not recoverable in an action for fraud. 527 A.2d at 1307. The opinion is ambiguous at best on the question whether punitive damages are available in such actions. It is not necessary in any event to resolve this question, because the evidence in the summary judgment record is not sufficient to allow the defendant to reach the jury on his claim for punitive damages under Maine law.

Under Maine law

> [a]n award of punitive damages is justified where the plaintiff proves by clear and convincing evidence that the defendant acted with malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985). Express or actual malice exists when the tortuous conduct is motivated by ill will toward the plaintiff, but punitive damages are also available "where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied." *Id*. at 1361.

Boivin v. Jones & Vining, Inc., 578 A.2d 187, 189 (Me. 1990). Here, as the defendant essentially admits,[16] he has offered no evidence of Mr. Wortley's actual ill will toward him. The Maine Law Court has applied the alternate standard of proof — conduct so outrageous that malice may be implied — in a very restricted manner. For example, in *Gayer v. Bath Iron Works Corp*., 687 A.2d 617 (Me. 1996), the defendant had offered positions on October 20 and 21 to twenty-six individuals in an apprenticeship program beginning on November 7 only to advise the apprentices on November 3 or 4 that the program had been terminated; the Law Court found "nothing in the record" to support a claim for punitive damages. *Id*. at 619-20, 622. In *DiPietro v. Boynton*, 628 A.2d 1019 (Me. 1993), the

[16] Specifically, the defendant states, "Although it is unlikely that a jury would find evidence of actual malice in Mr. Wortley's actions, there is substantial evidence of implied malice . . . ." Defendant's Opposition at 29.

Law Court overturned an award of punitive damages based on the defendant's sale of the plaintiffs' property without notice to them. *Id*. at 1024. In *Tuttle*, the Law Court vacated an award of punitive damages where the defendant seriously injured the plaintiff when he drove through a red light at high speed and struck the plaintiff's vehicle with sufficient force to shear her car in half. 494 A.2d at 1354, 1362.

The evidence in the summary judgment record concerning Mr. Wortley's alleged promises and other actions does not reach the level that would allow a factfinder to consider punitive damages under Maine law. The plaintiffs are entitled to summary judgment on Count IX of the counterclaim.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **DENIED** and that the plaintiffs' motion for summary judgment be **GRANTED** as to all claims against Barbara J. Wortley and as to Counts II, V, VI, VIII and IX of the defendant's counterclaim against Joseph G. Wortley 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 10th day of December, 2001.

David M. Cohen
United States Magistrate Judge

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