

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. HAN-99-187

LOU ANN STINSON FRANCIS,
et al.,
Plaintiffs/Appellants

v.

CHARLES B. STINSON, et al.,
Defendants/Appellees /Cross-Appellants

ON APPEAL FROM THE
SUPERIOR COURT FOR HANCOCK COUNTY

BRIEF OF APPELLEES/CROSS-APPELLANTS

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TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	iv
STATEMENT OF FACTS	1
I. PROCEDURAL BACKGROUND	2
II. FACTUAL BACKGROUND	4
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	6
(I) Whether the Superior Court properly granted summary judgment to Defendants with respect to the Francis Family's "fair share" claims in Counts I, V, VII and VIII of the Amended Complaint	6
(II) Whether the Superior Court properly granted summary judgment to Defendants with respect to the misrepresentation claims for fraud and fraud in the inducement in Counts VII and VIII of the Amended Complaint	6
(III) Whether the Superior Court properly granted summary judgment to Defendants with respect to the claim for wrongful interference with a legacy in Count IV of the Amended Complaint	6
(IV) Whether the Superior Court properly granted Defendants' Motion to Dismiss Counts I through V of the Complaint with the exception of the Francis Family's "fair share" claims	6
(V) Whether the Superior Court erred in denying Defendants' Motions to Dismiss Counts I and V of the Complaint in their entirety	6
ARGUMENT	7
I. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE FRANCIS FAMILY'S "FAIR SHARE" CLAIMS IN COUNTS I, V, VI, AND VIII OF THE AMENDED COMPLAINT	7

A.	<u>The Superior Court Properly Found That the Causes of Action Premised on the Francis Family Plaintiffs' "Fair Share" Allegations Were Barred Because Plaintiffs Were Bound by the Terms of Their Contracts and Because of Operation of the Parol Evidence Rule</u>	7
1.	<u>The Francis Plaintiffs Are Bound By The Terms Of Their Stock Purchase Agreements</u>	10
2.	<u>The Parol Evidence Rule Precludes The Francis Plaintiffs' "Fair Share" Claims</u>	11
3.	<u>Defendants' Absence of Duty at the Relevant Time Also Bars the "Fair Share" Claims in Counts I and V</u>	15
B.	<u>The Fraud Claims Premised On The Francis Family Plaintiffs' "Fair Share" Allegations Are Also Precluded Because They Are Based On A Breach Of Promise</u>	17
C.	<u>Plaintiffs' Equity Argument is Without Merit</u>	18
D.	<u>Plaintiffs' Promissory Estoppel Argument is Without Merit</u>	20
E.	<u>The Plaintiffs' Argument that the Parol Evidence Rule Does Not Bar the Francis Plaintiffs' "Fair Share" Claims Sounding in Fraud is Without Merit</u>	20
II.	THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE MISREPRESENTATION CLAIMS FOR FRAUD AND FRAUD IN THE INDUCEMENT IN COUNTS VII AND VIII OF THE AMENDED COMPLAINT	23
A.	<u>The Wight Plaintiffs Failed to Establish a Cause of Action For Fraud</u>	23
B.	<u>The Francis Plaintiffs Failed To Establish A Cause Of Action For Fraud</u>	28
C.	<u>All Fraudulent Misrepresentation Claims Asserted in Counts VII and VIII are Barred by the Statute of Limitations</u>	38
III.	THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE CLAIM FOR WRONGFUL INTERFERENCE WITH A LEGACY IN COUNT IV OF THE AMENDED COMPLAINT	39

A.	<u>Statute Of Limitations Bar</u>	40
B.	<u>Failure To Allege Or Establish Requisite Elements Of Fraud Or Intimidation</u>	41
IV.	THE SUPERIOR COURT PROPERLY GRANTED DEFENANTS' MOTION TO DISMISS COUNTS I THROUGH 5 OF THE COMPLAINT WITH THE EXCEPTION OF THE FRANCIS FAMILY'S FAIR SHARE CLAIMS BASED ON THE STATUTE OF LIMITATIONS	43
A.	<u>The Superior Court Correctly Applied Maine's General 6-Year Statute of Limitations to Plaintiff's Claims</u>	43
B.	<u>Equitable Estoppel Does Not Bar Application of the Statute of Limitations</u>	47
V.	THE SUPERIOR COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS COUNTS I AND V OF THE COMPLAINT IN THEIR ENTIRETY	48
A.	<u>Plaintiffs' Entire Complaint is Barred by 13-A M.R.S.A. §1122 and by M.R.Civ.P. 19(a)(1)</u>	48
CONCLUSION		50
APPENDIX A: Factual Discrepancies Contained In The "Statement Of Facts" In Appellants' Brief		i

TABLE OF AUTHORITIES

CASES

	Pages
<u>Astor v. Boulos Co.</u> , 451 A.2d 903 (Me. 1982).....	11, 12, 14
<u>Atkins v. Firstbank, N.A.</u> , 415 A.2d 567 (Me. 1980).....	46
<u>Atlantic Acoustical & Insulation Co. v. Moreira</u> , 348 A.2d 263 (Me. 1975).....	15
<u>Bozzuto v. Ouellette</u> , 408 A.2d 697 (Me. 1979).....	45
<u>Canney v. New England Telephone and Telegraph Co.</u> , 353 Mass. 158, 228 N.E.2d 723 (1967)	14
<u>Clarke v. Di Pietro</u> , 525 A.2d 623 (Me. 1987).....	11
<u>Cloutier v. Dalkon Shield Claimants' Trust</u> , 152 B.R. 1 (D. Me. 1993)	15, 40, 45
<u>Coffin v. Dodge</u> , 146 Me. 3, 76 A.2d 541 (1950).....	38
<u>Colorado v. New Mexico</u> , 467 U.S. 310, 104 S. Ct. 2438 (1984).....	25
<u>Cyr v. Cote</u> , 396 A.2d 1013 (Me. 1979).....	41, 42
<u>Di Pietro v. Casco Northern Bank</u> , 490 A.2d 215 (Me. 1985).....	41
<u>Eastern Trust & Banking Co. v. Cunningham</u> , 103 Me. 455, 70 A. 17 (1908).....	49
<u>Ferrell v. Cox</u> , 617 A.2d 1003 (Me. 1992).....	21, 22

<u>Gawne v. Bicknell,</u> 162 F. 587 (D. Me. 1908)	50
<u>General Electric Capital Corp. v. Ford Motor Credit Co.,</u> 149 B.R. 229, 233 (D. Me. 1993)	12
<u>Hale v. Cushman,</u> 51 A. 874, 96 Me. 148 (1902).....	46
<u>Hall v. Board of Environmental. Protection,</u> 498 A.2d 260 (Me. 1985).....	45
<u>Hanusek v. Southern Maine Medical Center,</u> 584 A.2d 634 (Me. 1990).....	47
<u>Harmon v. Harmon,</u> 404 A.2d 1020 (Me. 1979).....	40, 41
<u>In re Gallant,</u> 29 Bankr. 607 (Bankr.D.Me. 1983)	49
<u>Interstate Industrial Uniform Rental Service, Inc. v. V.F.R. LePage Bakery, Inc.,</u> 413 A.2d 516 (Me. 1980).....	12, 14
<u>Jackson v. Borkowski,</u> 627 A.2d 1010 (Me. 1993).....	45
<u>Jourdain v. Dineen,</u> 527 A.2d 1304 (Me. 1987).....	23
<u>Knapp v. Bailey,</u> 79 Me. 195, 9 A. 122 (1887).....	28, 30
<u>Larrabee v. Penobscot Frozen Foods, Inc.,</u> 486 A.2d 97 (Me. 1984).....	45
<u>Letellier v. Small,</u> 400 A.2d 371 (Me. 1979).....	22, 23, 28, 30, 32, 33, 38
<u>Livermore Falls Trust & Banking Co. v. Riley,</u> 108 Me. 17, 78 A. 980 (1911).....	15, 47
<u>Loe v. Town of Thomaston,</u> 600 A.2d 1090 (Me. 1991).....	12

<u>Lone Star Industries v. Redwine,</u> 757 F.2d 1544 (5th Cir. 1985)	49
<u>MacKerron v. Madura,</u> 445 A.2d 680, 683 (Me. 1982).....	41
<u>Manning v. Perkins,</u> 29 A. 1114, 86 Me. 419 (1894).....	46
<u>McAfee v. Cole,</u> 637 A.2d 463 (Me. 1994).....	45
<u>McKeen v. Boothby,</u> 129 Me. 324, 152 A. 53 (1930).....	49
<u>N&D Fashions, Inc. v. DHJ Industries, Inc.,</u> 548 F.2d 722 (8th Cir. 1976)	10
<u>Northeast Harbor Golf Club, Inc. v. Harris,</u> 725 A.2d 1018 (Me. 1999).....	48
<u>Norton v. Benjamin,</u> 220 A.2d 248 (Me. 1966).....	11
<u>Ocor Products Corp. v. Walt Disney Productions, Inc.,</u> 682 F. Supp. 90 (D. N.H. 1988).....	10
<u>Peerless Insurance Co. v. Brennon,</u> 564 A.2d 383 (Me. 1989).....	13
<u>Plimpton v. Gerrard,</u> 668 A.2d 882 (Me. 1995).....	40
<u>Portland Valve, Inc. v. Rockwood Systems Corp.,</u> 460 A.2d 1383 (Me. 1983).....	12
<u>Richards v. Soucy,</u> 610 A.2d 268 (Me. 1992).....	45
<u>Rosenthal v. Rosenthal,</u> 543 A.2d 348 (Me. 1988).....	7, 16, 17
<u>Ruebsamen v. Maddocks</u> 340 A.2d 31, 35 (Me. 1975).....	19

<u>Schott Motorcycle Supply, Inc. v. American Honda Motor Co.,</u> 976 F.2d 58 (1st Cir. Me. 1992).....	17
<u>Sheepscot Land Corp. v. Gregory,</u> 383 A.2d 16 (Me. 1978).....	28, 30
<u>Shine v. Dodge,</u> 130 Me. 440, 157 A. 318 (1931).....	17, 18, 30, 32
<u>Spaulding v. American Realty Co.,</u> 121 Me. 493, 118 A. 322 (1922).....	11
<u>Spritz v. Lishner,</u> 355 Mass. 162, 243 N.E.2d 163 (1969).....	11
<u>Swift v. Patrons' Androscoggin Mutual Fire Insurance Co.,</u> 132 A. 745, 125 Me. 255 (1926).....	13
<u>Taylor v. Commissioner of Mental Health & Mental Retardation,</u> 481 A.2d 139 (Me. 1984).....	25
<u>Townsend v. Appel,</u> 446 A.2d 1132 (Me. 1982).....	47
<u>Waxler v. Waxler,</u> 458 A.2d 1219 (Me. 1983).....	11, 12
<u>Westman v. Armitage,</u> 215 A.2d 919 (Me. 1966).....	38
<u>Wilde v. Madison,</u> 145 Me. 83, 72 A.2d 635 (1950).....	49
<u>Williams v. Ford Motor Co.,</u> 342 A.2d 712 (Me. 1975).....	40, 45

STATUTES

13-A M.R.S.A. §1122	4, 48, 49
14 M.R.S.A. §752	40, 45, 46

14 M.R.S.A. § 859 (Supp. 1995)	38, 46
26 U.S.C. §2031	33

RULES

M.R.Civ.P. 7(d)(1)	4
M.R.Civ.P. 7(d)(2)	5, 32
M.R.Civ.P. 9(b)	24, 32
M.R.Civ.P. 9(f)	24
M.R.Civ.P. 12(b)(6)	1, 4, 15, 45
M.R.Civ.P. 12(b)(7)	1, 2, 4, 15, 49, 50
M.R.Civ.P. 15(c)	41
M.R.Civ.P. 19	1, 4, 15
M.R.Civ.P. 19(a)(1)	4, 48, 50
M.R.Civ.P. 19(a)(2)	4

OTHER AUTHORITIES

17 C.J.S. Contracts §137 (1963)	10
Restatement (Second) of Contracts §139	20
Restatement (Second) of Contracts §209 comment (c) and §210(3)	12
Restatement (Second) of Contracts §209(3)	12
Restatement (Second) of Contracts §214 (1981)	12

STATEMENT OF FACTS

I. PROCEDURAL BACKGROUND

On or about September 28, 1995, Plaintiffs filed their original Complaint in this case. In their Complaint, Plaintiffs generally alleged that Defendants wrongfully induced them to sell their stock in the family company, the Stinson Canning Company, for less than fair value in 1980 and 1983, and asserted causes of action for breach of fiduciary relationship (Counts I and II), breach of contract (Count III), negligent misrepresentation (Count IV), and constructive trust (Count V). All of the alleged wrongful actions of the Defendants consisted of alleged wrongful inducements of the Plaintiffs to sell their stock in the Stinson Canning Company.

On or about November 13, 1995, Defendants filed a Motion to Dismiss Plaintiffs' Complaint pursuant to M.R.Civ.P. 12(b)(6) and (7) and M.R.Civ.P. 19. On July 3, 1996, the Court granted Defendants' Motion to Dismiss based on the statute of limitations except for Count I insofar as it pertained to the Francis Family Plaintiffs' cause of action for breach of fiduciary duty resulting from the allegations contained in Paragraph 14 of the Complaint (the "fair share" allegations), and Count V, the Francis Family Plaintiffs' cause of action for a constructive trust, insofar as it was premised on the remaining portion of Count I. (In Paragraph 14 of their Complaint, the Francises allege that "the defendants further promised the Francis family that if they agreed to sell their stock for a certain price per share, their interests would be protected in the future, to wit: if the said plaintiffs sold their stock at said price per share in 1980, the defendants promised to pay to the plaintiffs the difference between the price per share paid to them in 1980 and the price per share received upon the sale of the company in the future.") These allegations are referenced to as the "fair share" allegations or "fair share" claims.

Subsequently, on August 26, 1996, the Court granted a motion filed by Plaintiffs to amend their Complaint and add causes of action for wrongful interference with a legacy (Count VI), fraud (Count VII), and fraud in the inducement (Count VIII).

On or about September 17, 1996, Defendants filed a Motion to Dismiss Counts I and V of Plaintiffs' Amended Complaint pursuant to M.R.Civ.P. 12(b)(7) for failure to join a party under Rule 19, and this Motion was denied on February 11, 1997.

On August 3, 1998, Defendants filed a Motion for Summary Judgment with respect to all remaining counts of Plaintiffs' Amended Complaint, and on September 18, 1998, Plaintiffs filed a Cross-Motion for Summary Judgment. Prior to the Court's decision, the following causes of action remained:

- Count I:** The Francis Plaintiffs' cause of action for breach of fiduciary duty resulting from the allegations contained in Paragraph 14 of their Complaint ("the fair share allegations");
- Count V:** The Francis Plaintiffs' cause of action for a constructive trust premised on the above;
- Count VI:** Lou Ann Francis' and Eva Wight's cause of action for wrongful interference with a legacy with respect to their alleged entitlement to their respective one-sixth interests in real estate allegedly owned by their father and wrongfully transferred to the Stinson Canning Company;
- Count VII:** A cause of action for fraud on behalf of the Francis and Wight Plaintiffs with respect to misrepresentations concerning the financial condition of the Stinson Canning Company and estate tax consequences relating to the death of their father, and the "fair share allegations" of the Francis Plaintiffs;
- Count VIII:** A cause of action for fraud in the inducement on behalf of the Francis and Wight Plaintiffs with respect to misrepresentations concerning the financial condition of the Stinson Canning Company and estate tax consequences relating to the death of their father, and the "fair share allegations" of the Francis Plaintiffs.

On January 19, 1999, the Court granted Summary Judgment in favor of Defendants with respect to all remaining counts of Plaintiffs' Amended Complaint. First, the Court found that

the contracts executed by the Francis Plaintiffs were unambiguous and fully integrated, so that the parol evidence rule operated to bar the Francis Plaintiffs' "fair share" claims. (Order at 2.) The Court's finding with respect to the operation of the parol evidence rule disposed of Counts I (the Francis Plaintiffs' cause of action for breach of fiduciary duty based on the "fair share" claims) and V (The Francis Plaintiffs' cause of action for constructive trust based on the "fair share" claims) in their entirety and those portions of Counts VII and VIII (causes of action for fraud and for fraud in the inducement, respectively) insofar as they were premised on the Francis family's "fair share" allegations. Second, the Court found that the claims premised on the Francis Plaintiffs' "fair share" allegations should be dismissed because they were based on a breach of promise to perform in the future and not on a misrepresentation of existing fact. (Order at 2.) Thus, the Court also disposed of Counts I and V and those portions of Counts VII and VIII premised on the "fair share" allegations on this independent ground.

After addressing the Francis Plaintiffs' "fair share" allegations, the Court disposed of all of the Plaintiffs' remaining claims, for wrongful interference with a legacy (Count VI), and for fraud and fraud in the inducement (Counts VII and VIII respectively) based on alleged misrepresentations of fact made by Defendants to Plaintiffs. (Order at 2.) The Court found that the Plaintiffs had failed to establish the requisite elements of the causes of action for these claims. (Id.) Finally, the Court determined that Counts VI, VII, and VIII were barred on the independent ground of the statute of limitations. (Id.)

On or about January 29, 1999, the Plaintiffs filed a Motion for New Trial and/or Motion to Alter or Amend Judgment Pursuant to M.R.Civ.P. 59(A) and (E), which was denied by Order entered March 15, 1999.

Subsequently, Plaintiffs filed a Notice of Appeal with respect to the July 3, 1996 Order granting Defendants' Motion to Dismiss except for those portions of Counts I and V of Plaintiffs' Complaint consisting of the "fair share" allegations; with respect to the Court's January 19, 1999 Order granting Summary Judgment in favor of Defendants with respect to Counts I, V, VI, VII and VIII of Plaintiffs' Amended Complaint, and with respect to the Court's March 15, 1999 Order denying Plaintiff's Motion for New Trial and/or Motion to Alter or Amend Judgment pursuant to M.R.Civ.P. 59(A).

Defendants filed a Notice of Cross-Appeal to the Law Court appealing from (1) that portion of the Court's July 3, 1996 Order on Defendants' Motion to Dismiss pursuant to M.R.Civ.P. 12(b)(6) and (7) and M.R.Civ.P. 19 which denied Defendants' Motion to Dismiss Counts I and V of Plaintiffs' Complaint in their entirety based on (a) Defendants' defense of the absence of fiduciary duty of the Defendants to Plaintiffs at the relevant time; (b) Defendants' defense that the entire Complaint is barred by 13-A M.R.S.A. §1122; and (c) Defendants' defense that the entire Complaint is barred by M.R.Civ.P. 19(a)(1), and from (2) the Court's February 11, 1997 Order denying Defendants' Motion to Dismiss Counts I and V of Plaintiffs' Amended Complaint pursuant to M.R.Civ.P. 12(b)(7) for failure to join a party under Rule 19.

II. FACTUAL BACKGROUND

The factual background is set forth completely in the Defendants' Statement of Material Facts submitted in support of their Motion for Summary Judgment, which is contained in the Joint Appendix and incorporated herein by reference. As noted in the Court's January 19, 1999 Order granting summary judgment in favor of Defendants, the Plaintiffs "declined to specifically respond to Defendants' Statement of Material Facts to identify which, if any, [were] controverted." (Order at 1.) Although pursuant to M.R.Civ.P. 7(d)(1), Plaintiffs filed a lengthy

Statement of Material Facts in support of their Cross-Motion for Summary Judgment consisting of 103 statements as to which they contended there was no genuine issue to be tried, they did not, as required by Rule 7(d)(2), file a separate statement of the material facts with respect to Defendants' Motion for Summary Judgment, supported by appropriate record references, as to which they contended there was a genuine issue to be tried. M.R.Civ.P. 7(d)(2) provides:

The party opposing a motion for summary judgment shall file with the material required to be filed by subdivision (c) of this rule a separate, short, and concise statement of the material facts, supported by appropriate record references, as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party, if supported by appropriate record references, will be deemed to be admitted unless properly controverted by the statement required to be served by the opposing party.

Given Plaintiffs' failure to controvert Defendants' Statement of Material Facts, all of those facts must be deemed to be admitted in their entirety.

Furthermore, the purported facts set forth in the Statement of Facts contained in Appellants' Brief should be disregarded for two reasons. First, these facts purport to be derived from Plaintiffs' Statement of Material Facts submitted in support of their Cross-Motion for Summary Judgment. Since the Plaintiffs did not appeal the denial of their Cross-Motion, the Statement of Material Facts submitted in support of their Cross-Motion is not relevant to this appeal. Second, the recitation of the facts in Appellant's Statement of Facts is replete with erroneous statements which are either not supported by the record cited in Plaintiffs' Statement of Material Facts or, in many instances, not even supported by the referenced paragraphs of Plaintiffs' Statement of Material Facts. Many of these discrepancies were addressed in Defendants' Statement of Material Facts as to which there exists a genuine issue to be tried which Defendants filed pursuant to M.R.Civ.P. 7(d)(2) in opposition to the Plaintiffs' Statement of

Material Facts submitted in support of their Cross-Motion for Summary Judgment. (See Joint Appendix Volume I). Examples of these discrepancies, some of which are egregious, are set forth in Appendix A to Appellees' Brief. In addition, the facts asserted in the Argument section of Appellants' Brief are supported by no record citation whatsoever and cannot be deemed to be reliable.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(I) Whether the Superior Court properly granted summary judgment to Defendants with respect to the Francis Family's "fair share" claims in Counts I, V, VII and VIII of the Amended Complaint;

(II) Whether the Superior Court properly granted summary judgment to Defendants with respect to the misrepresentation claims for fraud and fraud in the inducement in Counts VII and VIII of the Amended Complaint;

(III) Whether the Superior Court properly granted summary judgment to Defendants with respect to the claim for wrongful interfere with a legacy in Count IV of the Amended Complaint;

(IV) Whether the Superior Court properly granted Defendants' Motion to Dismiss Counts I through V of the Complaint with the exception of the Francis Family's "fair share" claims;

(V) Whether the Superior Court erred in denying Defendants' Motions to Dismiss Counts I and V of the Complaint in their entirety.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE FRANCIS FAMILY'S "FAIR SHARE" CLAIMS IN COUNTS I, V, VII, AND VIII OF THE AMENDED COMPLAINT.

A. The Superior Court Properly Found That the Causes of Action Premised on the Francis Family Plaintiffs' "Fair Share" Allegations Were Barred Because Plaintiffs Were Bound by the Terms of Their Contracts and Because of Operation of the Parol Evidence Rule.

At summary judgment, the remaining portion of Count I of Plaintiffs' Amended Complaint was the Francis Family Plaintiffs' cause of action for breach of fiduciary duty resulting from the "fair share" allegation contained in Paragraph 14 of their Complaint.¹

As noted above, the Francis Plaintiffs alleged in Paragraph 14 of their Complaint that Defendants promised to pay them their "fair share" of the Company profits upon the eventual sale of the Company. Although this allegation was characterized by Plaintiffs as a breach of fiduciary duty claim, in its Order on Defendants' Motion to Dismiss, the Superior Court properly analyzed the cause of action as one "which sounds in contract." (Order at 6) The fiduciary duty owed by the Defendants to the Plaintiffs did not compel or require the making of the type of promise they are alleged to have made. Rather, as stated in Rosenthal, the duty was to make sure the plaintiffs have enough information upon which to make an informed judgment. See Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988). That the Francis Plaintiffs had enough

¹ Section I of Appellant's Brief addressing the breach of fiduciary claims asserted in Counts I and V is replete with references to allegations of misrepresentations by Defendants relating to the financial condition of the Company and potential estate tax problems, and the failure of Defendants to advise Plaintiffs of a stock redemption policy which would alleviate estate tax problems. The Superior Court dismissed all such claims of misrepresentation based on the statute of limitations in its Order on Defendants' Motion to Dismiss, and these claims were no longer before the Court when it ruled on Defendants' Motion for Summary Judgment. Accordingly, they are not properly a subject of argument in this context. Further, the alleged failure to advise Plaintiffs of the stock redemption policy was nowhere asserted in Plaintiffs' Complaint and may not be advanced now. It is also factually inaccurate as set forth in Section II(B) below.

information in this case cannot seriously be disputed. They had a lawyer representing them, an investigation was performed by the lawyer for the Wights and he reported his findings to the Francis family, the Francis Plaintiffs had copies of Financial Statements showing that the Company was doing well, and, lastly, they knew that a third party, the Zapata Corporation, had offered \$12 million for the Company, of which the Francis family's one sixth share would have been \$2 million, approximately three times the \$700,000 amount for which they sold their stock. (These facts are detailed with record citation at pp. 33-38 of Section II (B) below.) As argued infra, the Francises are deemed to know the contents of the attachments to the Stock Purchase Agreement they signed, which contained offers and inquiries from other companies. Therefore, the voluntary making of the promise which Defendants are alleged to have made is not a fact which supports an element of fiduciary duty owed to the Francis Plaintiffs by Defendants, but, rather, would constitute an offer which must be analyzed in contract terms.

Count V, the Francis Family Plaintiffs' cause of action for a constructive trust is also premised on these fair share allegations, as is a portion of Count VII, a cause of action for fraud, and a portion of Count VIII, a cause of action for fraud in the inducement. The Superior Court properly found that these claims are all barred by operation of the parol evidence rule.

The specifics of the "fair share" allegations are as follows: Mrs. Francis contends that at a meeting at Charles B. Stinson's home in the fall of 1979, he told the Francises that "they" were thinking of selling the Company, and if "they" did and made a good profit, then "they" would

make up the difference to the Francis family. (Statement ¶ 47)² Mr. Francis contends that in late November or early December 1979, he alone met with Charles B. Stinson in Charles B. Stinson's office at Stinson Canning Company, and that on that occasion Charles B. Stinson told him that if the Francis family sold their stock back to the Company and the Company were ever sold for more money than the Francis family had received, that the Company would make up the difference to the Francis family. Mr. Francis testified in his deposition that Charles B. Stinson also told him on that occasion that if anyone else in the Company sold out for more money than the Francis family received, that the Company would make up the difference to the Francis family. (Statement ¶ 46) Mrs. Francis contends that she also was present at a meeting in Prospect Harbor with Mr. Francis and Charles B. Stinson in the fall of 1979 at which Mr. Stinson discussed making up the difference to the Francis family if the Company was sold for a good profit.³ (Statement ¶ 49) Plaintiffs now contend for the very first time in the Statement of Facts in Appellants' Brief that "The subject of the promise by the brothers to make up the difference if the company sold for more later was discussed at the time the [Francis Plaintiffs' Stock Purchase] Agreements were signed." This new allegation is preposterous. It was not alleged in Plaintiffs' Complaint, and was never alleged by the Francis family at deposition, although they were given every opportunity to recite every occasion any such statement might have been made. There is absolutely no support for this contention in Paragraph 22 of Plaintiffs' Statement of Material Facts cited in support of the statement.

² All references herein to "Statement" are to Defendants' Statement of Material Facts submitted in support of their Motion for Summary Judgment.

³ Because the Francis Family "fair share" allegations do not implicate Calvin L. Stinson, Jr., summary judgment also was appropriately granted in his favor for that reason with respect to the causes of action premised on those allegations.

Claims based on these alleged "fair share" representations are barred because the Plaintiffs are bound by the terms of their contracts and because of operation of the parol evidence rule. In this case, subsequent to the time the alleged "fair share" promises were made, each of the Francis Plaintiffs executed Stock Purchase Agreements in which they contracted to accept the respective purchase prices identified in their Agreements as "full payment" in consideration for the sale of their stock, and specifically acknowledged that at some date in the future the other shareholders of the Company might sell the outstanding stock or substantially all of the assets of the Company at a price per share in excess of that realized by the Francises. (Statement ¶¶ 11, 12) In addition, the Francis Plaintiffs are precluded from proceeding on their claims with respect to the allegation that Charles B. Stinson told Mr. Arnold S. Stinson that if anyone else in the Company sold out for more money than the Francises received, that the Company would make up the difference, since this is not an allegation which is asserted in Plaintiffs' Amended Complaint.

1. The Francis Plaintiffs Are Bound By The Terms Of Their Stock Purchase Agreements.

It is the general rule of contract law that a party to a contract is legally bound by its terms, and, in the absence of fraud, misrepresentation and deceit in the execution of the acceptance, cannot avoid the contract on the ground that he or she has not read it or supposed it to be different in its terms. N&D Fashions, Inc. v. DHJ Industries, Inc., 548 F.2d 722, 727 (8th Cir. 1976), citing 17 C.J.S. Contracts § 137 (1963). See also Ocor Products Corp. v. Walt Disney Productions, Inc., 682 F. Supp. 90 (D. N.H. 1988)("Although the New Hampshire Supreme Court has not specifically addressed the issue, it is a well-settled principle of law that, in the absence of fraud, misrepresentation or deceit, a party 'expressly agrees' to terms in a contract by signing that contract, even if the party did not read the terms"), citing N&D Fashions and 17

C.J.S. Contracts § 137; Spritz v. Lishner, 355 Mass. 162, 243 N.E.2d 163, 164 (1969)("The general rule is that, in the absence of fraud, one who signs a written agreement is bound by its terms whether he reads it and understands it or not or whether he can read or not.")

In this case, although the Francis Plaintiffs claim not to have read the terms in their Agreements providing that they accepted the respective purchase prices identified in their Agreements as "full payment" in consideration for the sale of their stock, they are clearly bound by those terms as a matter of basic contract law. As a matter of public policy, this Court must affirm the principle that a party to a contract is entitled to rely on the terms of the contract. Otherwise, what good is a contract? Commercial business relations rely on the sanctity of contracts for predictability in business transactions and this Court should reaffirm that people can rely on the terms of a contract in their business planning.

2. The Parol Evidence Rule Precludes The Francis Plaintiffs' "Fair Share" Claims.

The parol evidence rule "excludes from judicial consideration extrinsic evidence offered to vary, add to, or contradict unambiguous contract language." Waxler v. Waxler, 458 A.2d 1219, 1224 (Me. 1983). See Clarke v. Di Pietro, 525 A.2d 623, 625 (Me. 1987); Astor v. Boulos Co., 451 A.2d 903, 905 (Me. 1982). There are strong public policy reasons for application of the rule, as stated in Norton v. Benjamin, 220 A.2d 248, 251 (Me. 1966):

The rule is well stated in *Spaulding v. American Realty Co.*, (1922) 121 Me. 493, 496, 118 A. 322, 323: "Few rules in the law of evidence are of wider application than that declaring extrinsic evidence of preceding or accompanying negotiations inadmissible to vary or to contradict, or to subtract from or add to, the language of a written instrument which speaks for itself in definite and final terms, fraud not being advanced and proved." The rule can cause hardship, at least in the sense that one may find himself held to a contract which proves unprofitable or disadvantageous.... But the law deems that society gains most from the certainty and finality of such [agreements] and permits the clarifying intention of the parties to be shown only when the language of the written agreement... does not clearly and unmistakably state that which was agreed.

The parol evidence rule presupposes the existence of an integrated agreement. Whether an agreement is integrated is a question of law to be determined by the court. See General Electric Capital Corp. v. Ford Motor Credit Co., 149 B.R. 229, 233 (D. Me. 1993), citing Restatement (Second) of Contracts Secs. 209 comment (c) and 210(3). An integrated agreement contains the final and complete expression of the parties with respect to any term of their agreement. Id. at 233. An agreement is presumed to be integrated "unless it is established by other evidence that the writing did not constitute a final expression." Id., citing Restatement (Second) of Contracts Sec. 209(3). The Court may consider the agreements and negotiations of the parties preceding the formation of a written contract to determine whether the contract was intended to be an integrated agreement and, if so, whether it was partially or completely integrated. Loe v. Town of Thomaston, 600 A.2d 1090, 1092 (Me. 1991). See Waxler v. Waxler, 458 A.2d 1219, 1224 (Me. 1983); Astor v. Boulos Co., 451 A.2d 903, 905 (Me. 1982). Even a partially integrated agreement discharges prior agreements to the extent it is inconsistent with them. Astor v. Boulos Co., 451 A.2d 903, 905 (Me. 1982); Interstate Industrial Uniform Rental Service, Inc. v. V.F.R. LePage Bakery, Inc., 413 A.2d 516, 905 (Me. 1980), both citing Restatement (Second) of Contracts § 214 (1981).

The next step in the analysis, the determination of whether contract language is ambiguous, is also a question of law for the court. See Portland Valve, Inc. v. Rockwood Systems Corp., 460 A.2d 1383, 1387 (Me. 1983):

The interpretation of an unambiguous written contract is a question of law for the Court.... The interpretation of an unambiguous writing must be determined from the plain meaning of the language used and from the four corners of the instrument without resort to extrinsic evidence.

Id. at 1387 (citations omitted). The intention of the parties is to be ascertained from an

examination of the whole instrument. See Peerless Ins. Co. v. Brennon, 564 A.2d 383, 385 (Me. 1989); Swift v. Patrons' Androscoggin Mutual Fire Ins. Co., 132 A. 745, 746, 125 Me. 255, 256 (1926).

When the Superior Court ruled on Defendants' Motion to Dismiss, it determined that it was premature to dismiss the Francis Plaintiffs' "fair share" claims based on application of the parol evidence rule since the Plaintiffs conceivably could prove a set of facts showing that the Stock Purchase Agreements in question were not integrated. See July 3, 1996 Order at 6. At summary judgment, the Francis Plaintiffs had every opportunity to provide evidence that the Stock Purchase Agreements were not intended to be integrated, and they made no such showing. Accordingly, the Superior Court found that the contract was integrated and unambiguous. See January 19, 1999 Order at 2. ("The contract is, on its face, unambiguous. It is clear. It is comprehensive. It requires no outside interpretation.") Id.

In this case, the Francis Plaintiffs all entered into identical integrated Stock Purchase Agreements. (Statement ¶¶ 11-13) The entire and complete subject matter of these Agreements was the purchase by the Stinson Canning Company of the Francis Plaintiffs' stock in the Company. (Id.) The Agreements, on their face, address all relevant terms, including, "(1) sale of stock in the Company by Seller; (2) purchase price and payment; (3) closing date; (4) disclosure; (5) the Company's warranties; (6) Seller's warranties; (7) survival of warranties and representations; (8) applicable law; (9) successors and assigns." (Id.) The Agreements were clearly integrated agreements containing all of the pertinent terms concerning the stock purchase transactions at issue. Paragraphs 4(iii) and (iv) of the Agreements provide as follows:

- (iii) **The other shareholders of the Company may, at some future date, agree to sell the outstanding stock or substantially all the assets of the Company and its subsidiaries at a per share price in excess of that realized by [respective Francis Plaintiff]; and**

- (iv) **The purchase price of [purchase price applicable to respective Francis Plaintiff] is accepted as full payment in consideration for [her /his] Common Stock and Preferred Stock.**

(Id.) (Emphasis added). Since both of the alleged "fair share" representations are alleged to have been made prior to the time the Francis Plaintiffs entered into their Stock Purchase Agreements, any such representations were subsumed by those contracts. See Canney v. New England Telephone and Telegraph Co., 353 Mass. 158, 228 N.E.2d 723 (1967). In that case, where the obligations of the defendant which were found to exist under a prior oral contract were in direct conflict with a subsequent written agreement, the Court held that "the familiar rule applies that the earlier contract [is] superceded by and merged in the written contract." Id. See also Astor v. Boulos; Interstate Industrial Uniform Rental Service, supra.

With respect to the question of ambiguity, the wording of the Agreements could not be more clear within the four corners of the Agreements. The Francis Plaintiffs contracted to accept the respective purchase prices identified in their Agreements as "full payment" in consideration for the sale of their stock in the Stinson Canning Company, and no further payment of any "fair share" of Company profits upon the eventual sale of the Company was contemplated. (Id.) To the contrary, the Francis Plaintiffs specifically acknowledged as part of the "Sellers' Representations" section of their Agreements that "[t]he other shareholders of the Company may, at some future date, agree to sell the outstanding stock or substantially all of the assets of the Company and its subsidiaries at a per share price in excess of that realized by [him or her]." (Id.) No provision was made in the Agreements for the Francis Plaintiffs to receive any share of those proceeds. The clear terms of the Agreements leave no room for the Francis Plaintiffs' "fair share" argument, which is totally contradictory to the terms of the Agreement.

3. **Defendant's Defense of Absence of Fiduciary Duty at the Relevant Time Also Bars the "Fair Share" Claims in Counts I and V.**

Even if Count I were analyzed in fiduciary duty terms, judgment for the Defendants is still appropriate. In their Motion to Dismiss pursuant to M.R.Civ.P. 12(b)(6) and (7) and M.R.Civ.P. 19, Defendants argued that the "fair share" claims in Counts I and V must be dismissed due to the absence of fiduciary duty running from Charles B. Stinson and Calvin L. Stinson, Jr. to the Francis Plaintiffs at the time of the sale of the Stinson Canning Company in 1990, which is when the Defendants' alleged breach of fiduciary duty with respect to these allegations would have occurred, and at which time the Francises were no longer stockholders of the Company to whom the officers and directors owed any fiduciary duty. See Cloutier v. Dalkon Shield Claimants Trust, 152 B.R.1 (D.Me 1993) (cause of action accrues when a wrongful act produces injury). Thus, there was no breach of fiduciary duty because no such duty existed in 1990. The Superior Court declined to grant Defendants' motion on this ground.⁴

Maine law, indeed, recognizes that directors and officers stand in a fiduciary relationship to their corporation and its stockholders. See Atlantic Acoustical & Insulation Co. v. Moreira, 348 A.2d 263, 267 (Me. 1975). See also Livermore Falls Trust & Banking Co. v. Riley, 108 Me. 17, 21, 78 A. 980 (1911). However, no such fiduciary relationship between the Francis Plaintiffs and Defendants existed at the time Defendants are alleged to

⁴ The Superior Court's error in denying Defendants' Motion to Dismiss Counts I and V in their entirety is addressed further in Section V below.

have breached their fiduciary duty by failing to pay the Francis Plaintiffs their "fair share" of the Company's profits upon its sale.

The Francis Plaintiffs sold all of their stock in the Stinson Canning Company in 1980. (Complaint ¶21; Exhibit A to the Affidavit of Charles B. Stinson, the Stock Purchase Agreement of Lou Ann Stinson Francis referenced in the Complaint). Therefore, when the Company was sold on or about January 5, 1990 (Complaint ¶18), the Francis Plaintiffs were no longer shareholders of the Company and were not in a fiduciary relationship with Defendants due to their status as shareholders of the corporation.

No Maine law supports the proposition of an ongoing fiduciary duty of officers and directors to shareholders subsequent to the termination of shareholder status. That such a duty must exist at the relevant time for a finding to be made that it has been breached is established in Rosenthal, 543 A.2d 348, 351 (Me. 1988). In Rosenthal v. Rosenthal, the Court held that "because the evidence of record does not provide rational support for the jury's finding that a confidential relationship, in fact, existed...at the relevant period of time, we reject on appeal the jury's verdict [that such a relationship was violated]. Id.

In the Superior Court's Order on Defendants' Motion to Dismiss Plaintiffs' Complaint, the Court found that the Plaintiffs could bring an action for breach of fiduciary duty based on the Defendants' breach of duty at the time of sale, citing Rosenthal, 543 A.2d at 348 (Me. 1988). (Order at 7) Defendants submit that the facts of the breach of fiduciary duty claim in this case distinguish it from the breach of fiduciary claim in Rosenthal, and that whether or not a cause of action exists for breach of fiduciary duty is determined by the date the cause of action accrued and by whether or not a fiduciary relationship existed at that time. The cause of action for breach of fiduciary duty in Rosenthal was based on the defendants in that case

wrongfully freezing the plaintiff out of the family business and accrued at the time plaintiff and defendants were in a fiduciary relationship. This case is different from Rosenthal, because the cause of action for the Francis Plaintiffs' "fair share" allegations accrued at a time when the fiduciary relationship between the parties had not existed for 10 years. Defendants' Motion to Dismiss should have been granted with respect to the "fair share" claims in Counts I and V for this reason.

The "relevant period of time" under Rosenthal is up to February of 1980, when the Francis family sold their stock and there still existed a fiduciary relationship. In order to support a breach of fiduciary duty claim, the Plaintiffs would have to argue that the Defendants did not intend to honor the "fair share" promise at the time it was allegedly made, and therefore the breach would have occurred while they were shareholders. If they had alleged those facts, then the claim would be barred by the statute of limitations because the Plaintiffs either knew or should have known at the time they signed and received a copy of the Stock Purchase Agreements that the Defendants did not intend to honor the alleged "fair share" promise. The six-year statute therefore expired no later than sometime in 1986.

B. The Fraud Claims Premised On The Francis Family Plaintiffs' "Fair Share" Allegations Are Also Precluded Because They Are Based On A Breach Of Promise.

The Superior Court also correctly found that the fraud claims premised on the Francis Plaintiffs' "fair share" allegations were also barred because they are based on a breach of promise and not a misrepresentation of existing fact. It has long been the law in Maine that "the breach of a promise to do something in the future will not support an action for deceit, even though there may have been a preconceived intention not to perform." Shine v. Dodge, 130 Me. 440, 443, 157 A. 318 (1931). See Schott Motorcycle Supply, Inc. v. American Honda Motor Co., 976 F.2d 58,

65 (1st Cir. 1992)(applying Maine law, the Court held that the complaint was fatally defective because the alleged misrepresentations consisted only of opinions as to future events.)

The allegations in this case are remarkably similar to those asserted by the plaintiff in Shine v. Dodge, supra. In that case, the plaintiff alleged that as an inducement to persuade her to purchase a substantial amount of stock in the defendant's company, the defendant falsely represented to her that defendant would guarantee that she would get dividends on both the common and the preferred stock. 130 Me. at 442. The Shine Court held that the defendant's representation that she would guarantee the dividends on the stock was "quite immaterial, for it is well settled in this state that the breach of a promise to do something in the future will not support an action of deceit."⁵ 130 Me. at 443.

The rule of Shine v. Dodge, supra, requires that the Francis Plaintiffs "fair share" allegations be dismissed because they are premised on a promise to perform in the future.

C. Plaintiffs' Equity Argument is Without Merit.

In their argument with respect to Counts I and V of the Amended Complaint, Plaintiffs assert that the Superior Court erred in applying the parol evidence rule to the "fair share" allegations, in refusing to assess the importance of such equitable factors as "the statements of

⁵ Although the Shine Court noted that, "[t]he relationship of the parties or the opportunity afforded for investigation and the reliance, which one is thereby justified in placing on the statement of the other, may transform into an averment of fact that which under ordinary circumstances would be merely an expression of opinion," 130 Me. at 444, such circumstances do not exist in this case. The Francis Plaintiffs' reliance on the alleged "fair share" statements cannot be said to have been justified in the circumstances that the Francises executed Stock Purchase Agreements which explicitly acknowledged that the other shareholders might at some future date agree to sell all or a portion of the Company at a per share price in excess of that realized by the Francises, and that the purchase price paid was accepted as full payment in consideration for their sale of stock. (Statement ¶ 12) Although the Francises contend that they did not read these provisions when they signed the Agreements, because they signed the Agreements, they are bound as a matter of law by their terms whether they read and understood them or not. See cases cited in Section I(A)(1) supra.

the defendants which misrepresented several critical facts, the breach of fiduciary duties and the relationship of the parties, including the plaintiffs' trust in the defendants, and "in analyzing this case as purely one of law, and not of equity which is the entire thrust of plaintiffs' case."

(Appellants' Brief at 11, 12) The Plaintiffs also discuss at length "a presumption of undue influence" arising in the context of a plaintiff claiming breach of fiduciary duty who proves "the actual placing of trust and confidence in the fact...and a great disparity of position and influence between the parties to the relation, citing Ruebsamen v. Maddocks, 340 A.2d 31, 35 (Me. 1975).

Plaintiffs' arguments are without merit. Again, Plaintiffs refuse in the first instance to acknowledge the fact that the "fair share" claims were the only allegations surviving the Counts I and V causes of action for breach of fiduciary duty and constructive trust at the time the Superior Court ruled on Defendants' Motion for Summary Judgment. Thus, other alleged misrepresentations are entirely irrelevant.

Second, the Plaintiffs have cited no precedent for the proposition that because equitable relief may be available in a cause of action for breach of fiduciary duty, the ordinary principles of common law do not apply and the Court should ignore those principles of law in this instance. Further, the Plaintiffs seek monetary damages and not equitable relief in their Complaint and Amended Complaint.

Finally, the Plaintiffs have cited no authority for the proposition that any presumption of undue influence would defeat the operation of the parol evidence rule. Further, despite their argument to the contrary, the Plaintiffs have ignored the extensive reliance of Lou Ann and Arnold Francis on the investigation and advice of their attorney, William S. Silsby, Jr., Esq., with respect to the value and sale of the Francis family's stock in the Stinson Canning Company. (See Paragraphs 9 and 10 of Defendants' Statement of Material Facts as to which there exists a

genuine issue to be tried, Paragraphs 17-19 of Defendants' Statement of Material Facts, and Section II(B) below.)

D. Plaintiffs' Promissory Estoppel Argument is Without Merit.

The Plaintiffs also argue that the Francis Plaintiffs' "fair share" allegations are actionable in the context of a cause of action for promissory estoppel. This assertion is not supportable for several reasons. First, Plaintiffs never asserted a cause of action for promissory estoppel in either their original or Amended Complaint, so they are estopped from asserting this new cause of action at this time. Second, the parol evidence rule operates to bar the "fair share" claims in this context to the same extent it does with respect to the "fair share" claims advanced in the context of Plaintiffs' breach of fiduciary duty and fraud causes of action. Third, even if this cause of action were otherwise viable, it is not actionable because the alleged "fair share" promise is not one "which the promisor should reasonably expect to induce action or forbearance on the part of the promisee. See Restatement of Contracts (Second) §139. Even if, arguendo, Charles Stinson had made such a promise to the Francis Plaintiffs, given the express inclusion of language to the contrary in the Stock Purchase Agreements, he could not have reasonably expected that the Francis would enter into the Agreements based on the alleged prior oral inducement of the fair share promise.

E. The Plaintiffs' Argument that the Parol Evidence Rule Does Not Bar the Francis Plaintiffs' "Fair Share" Claims Sounding in Fraud is Without Merit.

Although Section I of Appellant's Brief argument purports to address the error of the Superior Court in granting summary judgment to Defendants on Counts I and V of the Amended Complaint, alleging breach of fiduciary duty based on the "fair share" claims, Plaintiffs also argue in this section of their brief that the parol evidence rule does not bar the Francis Plaintiffs' "fair share" claims sounding in fraud (Counts VII and VIII). They argue that the Superior

Court's parol evidence holding in this context was erroneous, citing the case of Ferrell v. Cox, 617 A.2d 1003 (Me. 1992), for the proposition that a signed agreement that contradicts prior oral statements does not bar an action for fraud as a matter of law, and that parol evidence of fraudulent inducement may be introduced to show that a signed document does not reflect the intent of the parties.

The facts in the case of Ferrell v. Cox are distinguishable from the facts of this case, because the holding in Ferrell hinged on a contemporaneous false statement of fact made at the time of the execution of the document in question, expressly with respect to language contained in the document, which statement of fact was not obviously false to the plaintiff and which was made for the express purpose of inducing the plaintiff to sign the document. 617 A.2d 1003, 1006, 1007. In the Ferrell case, the plaintiff signed a deed drafted by the defendant (the document in question) conveying an unrestricted easement to the defendant. Id. Prior to the plaintiff's execution of the deed, the defendant had stated his intention only to use the easement to reach his own property. Id. When the plaintiff read the deed, he telephoned the defendant to expressly question him about the unrestricted easement conveyed in the deed, and the defendant falsely stated that the broader language had been included at the request of the involved utility company, and reaffirmed his previous stated intention to use the easement only to reach his own property. Id. It is the latter misstatement of fact (language included at request of utility) and statement of present intent, contemporaneous with the execution of the deed, that the Court said supported an action for fraud. No such contemporaneous statement was made in this case, nor was any statement of fact made at any time.

In the plaintiff's subsequent suit for fraud in Ferrell, the defendant asserted the defense that when there is a conflict between an oral statement and a written agreement, the court should

accept the written agreement as evidence of the parties' intent and ignore the oral statements. 617 A.2d at 1006. In determining that parol evidence of fraudulent inducement could be introduced in the particular circumstances of the Ferrell case, the Court noted that a plaintiff's reliance on the fraudulent misrepresentations of a defendant is not justified if the plaintiff knows the representation is false or its falsity is obvious to the plaintiff. Id. at 1006. In Ferrell, the key to the Court's decision was its finding that the plaintiff agreed to sign the deed conveying the unrestricted easement after he read the deed, was alerted, and telephoned the defendant to question him specifically about the express language contained in the deed, and after the defendant falsely told him that the broader language had been included at the request of the utility company and reaffirmed his previously stated intention to use the easement only to reach his own property. 617 A.2d at 1006, 1007. The Court stated that, based on this evidence, the jury rationally could have found that the plaintiff did not know that the defendant's representations were false or that the falsity of the defendant's representations were not obvious to him. Id. See Letellier at 400 A.2d 376.

The facts of this case are markedly different from those in Ferrell. In this case, the alleged misrepresentation was not a misstatement of fact made contemporaneously with the Francis Plaintiffs' execution of their Stock Purchase Agreements, and the alleged misrepresentation was not made with reference to the language of the Agreements for the purpose of inducing the Plaintiffs to sign the Agreements. Thus, in this case, no misrepresentation is alleged to have been made to the Francis Plaintiffs concerning their Agreements which would justify their reliance on the misrepresentation, since the express language in the Agreements was unambiguously contrary to the concept of the fair share

promise, and the Plaintiffs allege that the oral conversations took place well before the execution of the Stock Purchase Agreements.

II. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE MISREPRESENTATION CLAIMS FOR FRAUD AND FRAUD IN THE INDUCEMENT IN COUNTS VII AND VIII OF THE AMENDED COMPLAINT.

The Superior Court properly granted summary judgment to Defendants with respect to the claims for fraud and fraud in the inducement in Counts VII and VIII of the Amended Complaint which were based on alleged misrepresentations of fact made by Defendants to Plaintiffs by finding both that the Plaintiffs had failed to establish the requisite causes of action for these claims and that these claims were barred on the independent ground of the statute of limitations.

A. The Wight Plaintiffs Failed to Establish a Cause of Action For Fraud.

The elements of fraud are set forth in Jourdain v. Dineen, 527 A.2d 1304, 1307 (Me. 1987), citing Letellier v. Small, 400 A.2d 371, 376 (Me. 1979):

[A] defendant is liable for fraud...if he (1) makes a false representation (2) of material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

None of the Wight Plaintiffs identified any representations made to them by Charles B. Stinson or Calvin L. Stinson, Jr. which satisfied these elements. The Wight Plaintiffs testified as follows at their depositions concerning the subject.

Carla Wight Intza did not discuss the subject of the sale of her stock in Stinson Canning Company with either Charles B. Stinson or Calvin L. Stinson, Jr. Ms. Intza could not identify any false representations of fact made to her either by Charles B. Stinson or Calvin L. Stinson, Jr. (Statement ¶ 54)

Jean Wight Rakoske did not have discussions with Charles B. Stinson or Calvin L. Stinson, Jr. with regard to the sale of her stock in Stinson Canning Company. She does not believe that any false representations of fact were ever made to her by Calvin L. Stinson, Jr. concerning the Stinson Canning Company, and could not identify any false representations of fact made to her by Charles B. Stinson. (Statement ¶ 55)

The only representation Eva Wight contends was made to her which could be viewed as false was that Stinson Canning Company was in financial trouble. She recalls that somebody told her this, but could not testify under oath at her deposition that it was more probably than not a particular person. It is most probable that it would have been Calvin L. Stinson, Jr., Charles B. Stinson, her husband Carl Wight, or Dana Stratton. Mrs. Wight was not able to identify any financial information provided by Stinson Canning Company to her attorneys or accountants prior to the time she sold her stock in 1983 which was false. (Statement ¶ 56)

It is clear in the first instance that no representations whatsoever were made by Charles B. Stinson or Calvin L. Stinson, Jr. to Carla Wight Intza or Jean Wight Rakoske concerning the sale of their stock in the Stinson Canning Company. Eva Wight's contention that she was told that the Stinson Canning Company was in financial trouble by one of four people who most probably would have included Calvin L. Stinson, Jr. and Charles B. Stinson is so indefinite that it would not survive the requirements of M.R.Civ.P. 9(b) and (f) on a motion to dismiss. With four possibilities, it is not probable that it was Charles B. Stinson who made the alleged representation and it is not probable that it was Calvin L. Stinson, Jr. It is not even probable that it was either Charles B. Stinson or Calvin L. Stinson, Jr. M.R.Civ.P. 9(b) provides that "[i]n all averments of fraud...the circumstances consisting fraud...shall be stated with particularity." The contention of Eva Wight certainly does not satisfy the evidentiary standard applicable to fraud,

which requires "clear and convincing" evidence. Pursuant to this standard, the plaintiff may prevail "only if he can 'place in the ultimate fact finder an abiding conviction that the truth of [his] factual contentions are highly probable.'" Taylor v. Commissioner of Mental Health & Mental Retardation, 481 A.2d 139, 153 (Me. 1984), citing Colorado v. New Mexico, 467 U.S. at 310, 104 S. Ct. 2438 (1984).

Assuming, arguendo, that Charles B. Stinson or Calvin L. Stinson, Jr. had made a representation that the Stinson Canning Company was in financial trouble, and that such a representation was false, the Wight Plaintiffs' fraud claim is precluded because they could not have justifiably relied upon such a representation as true. As set forth in more detail below, the Wight family was represented by Duane Fitzgerald, Esq. as early as September 1979 to investigate the whole Stinson stock situation on their behalf, and he obtained full financial disclosure of the Stinson Canning Company's financial situation for the period he requested preceding the Wights' sale of the stock to the Company. Mr. Fitzgerald communicated with the Company's lawyer, Thomas J. Van Meer, Esq., and the Company's accountant, Robert Kruger, and received financial information about the Company and information about benefits, salaries and bonuses that family members active in the Company were receiving. He shared this information with the Wights. Mrs. Wight also cannot say that any of the information Mr. Fitzgerald got from Mr. Van Meer and Mr. Kruger was false. (Statement ¶ 56)

Mr. Fitzgerald obtained the 1976 and 1977 financial statements of Stinson Canning Company from the Wights who had them in their possession. On October 10, 1979, he wrote Mr. Van Meer and requested current financial statements. On October 18, 1979, Mr. Van Meer provided the financial statements for 1978. Mr. Fitzgerald learned from reviewing the financial statements for 1976-1978 that the Company had had three good years, and is sure he discussed

that fact with Carl Wight, who would have been aware of it independently. (Statement ¶ 29) On January 2, 1980, Mr. Fitzgerald wrote Mr. Van Meer and requested to inspect Stinson Canning Company's minutes of meetings of directors and shareholders, and the list or record of shareholders. Mr. Van Meer wrote back on January 4, 1980 and told Mr. Fitzgerald he was welcome to review Stinson Canning Company's books by appointment. Mr. Fitzgerald reviewed the records for the period of 1975-1979 on February 7, 1980. (Statement ¶ 30) In a February 11, 1980 letter to Mr. Van Meer, Mr. Fitzgerald requested copies of schedules from the stock register, and under cover of a letter dated February 19, 1980 Mr. Van Meer forwarded a list of stockholders in response. (Statement ¶ 31) On June 26, 1980, Mr. Fitzgerald wrote to Mr. Van Meer and requested to review the corporate record books for the years 1976-1979, requested a copy of the 1979 financial statement and copies of tax returns for the years 1976-1979, and suggested that in the alternative the Company might wish to respond to an enclosed list of specific questions. In response, on August 22, 1980, Mr. Van Meer wrote Mr. Fitzgerald and enclosed the requested financial statements and tax return and a schedule addressing the specific questions. Mr. Fitzgerald is sure that he shared this information with the Wights. (Statement ¶ 32) Mr. Fitzgerald never received any information from any agent of Stinson Canning Company which he ever learned or suspected was false or misleading, and he never learned or suspected that any material information had been omitted from the data that was provided him at any time. (Statement ¶ 33) Mr. Fitzgerald also executed the Stock Purchase Agreement of Mrs. Wight as witness to her signature, and if he had seen anything in the Agreement which he thought was not in Mrs. Wight's interest, he would have so advised her at the time. (Statement ¶ 34)

Mrs. Wight did not ask for or receive any additional financial information concerning Stinson Canning Company between the time Mr. Fitzgerald obtained information concerning the

Company in 1979 and 1980 and the time the Wights sold their stock in 1983. (Statement ¶ 36)

Mrs. Wight testified in her deposition that the material the Wights received from Mr. Fitzgerald indicated that Stinson Canning Company was in "excellent" financial condition in the late 1970's and early 1980's. (Statement ¶ 35) In addition to being advised by Duane Fitzgerald, Esq., Mrs. Wight consulted with her accountant, Maurice Boucher, CPA, who advised her as to her best options tax-wise and every other way, and advised her to accept the offer of \$1.9 million at 13% interest that she ultimately did accept. (Statement ¶ 39) Mr. Boucher also obtained financial information concerning the Stinson Canning Company on the Wights' behalf, and never formed the opinion that there was anything inaccurate, false, or misleading in the Stinson Canning Company financial statements or any other information he obtained from Mr. Fitzgerald's file. (Statement ¶ 40)

It is also evident from a note received from the Wights which was contained in Mr. Boucher's file that the Wights were aware of a "present offer of \$15 million plus \$3 million interest made by Connors Bros. Ltd. of Canada." This offer was obviously indicative of the strong financial health of the Company. In addition, the Wight family had been advised previously on or about August 22, 1978 by the Stinson Canning of an offer received from Zapata Protein, Inc. to purchase the Company for \$12 million. (Statement ¶¶ 16, 41)

In the above-described circumstances, where the Wight Plaintiffs were well represented by competent legal counsel and a certified public accountant during the period preceding the sale of their stock, where they were in possession of financial information which indicated to them and their advisors that the Company was in "excellent" financial condition in the late 1970's and early 1980's, and where they had been made aware of offers to purchase the Company for sums indicative of its strong financial health, the Wights cannot be deemed to have justifiably relied on

any statement which might have been made by Charles B. Stinson or Calvin L. Stinson, Jr. to the effect that the Company was in financial trouble. See Knapp v. Bailey, 79 Me. 195, 204, 9 A. 122, 124 (1887):

If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, *and he avoids the inquiry*, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the 'signs and signals' seen by him. *It may well be concluded that he is avoiding notice of that which he in reality believes or knows*. Actual notice of facts which, to the mind of a prudent man, indicate notice - is proof of notice. (Emphasis supplemental).

See also Sheepscot Land Corp. v. Gregory, 383 A.2d 16, 23, 24 (Me. 1978)(citing Knapp).

Finally, to the extent that it is alleged that any misrepresentation concerning the financial condition of the Company was made by Charles B. Stinson, the Wight Plaintiffs cannot maintain that such a representation was made "for the purpose of inducing another to act or to refrain from acting in reliance upon it." See Letellier v. Small, 400 A.2d at 376. It is undisputed in this case that Charles B. Stinson voted against the Company's purchase of the Wight family stock in the Company (Statement ¶ 57), and therefore the Wight Plaintiffs cannot maintain that he made any representation to them for the purpose of inducing them to sell their stock back to the Company.

B. The Francis Plaintiffs Failed To Establish A Cause Of Action For Fraud.⁶

The misrepresentations alleged by the Francis Plaintiffs also failed to satisfy the elements of a cause of action for fraud. See Letellier, 400 A.2d at 376. In the first instance, neither of the Francis children, Marion Leona Francis Alley nor Arnold G. Francis contended that any misrepresentations were made to them.

⁶ The "fair share" allegations made in support of the Francis Plaintiffs' fraud claims are addressed in Section I (E), supra.

Marion Leona Francis Alley did not discuss the subject of the sale of her stock in Stinson Canning Company with either Charles B. Stinson or Calvin L. Stinson, Jr. She is not aware of any misrepresentations made by either of her uncles concerning the financial condition of the Company or of any facts which support an allegation that misrepresentations were made concerning estate tax consequences to the Francis or Wight families in the event of her grandfather's death. No representative of the Company ever told her that if the Company was later sold for more money that the difference would be made up to her. (Statement ¶ 42) Arnold G. Francis also does not recall discussing the sale of his stock in Stinson Canning Company with Charles B. Stinson or Calvin L. Stinson, Jr. He does not recall that either of his uncles ever stated to him that if the Company were later sold for more money that the difference would be made up to him. He has no personal knowledge of facts which support the allegation "the attendant circumstances were part of an intentional plan or course of conduct to defraud Plaintiffs of their fair share in the family's Company," of facts which support the allegation that misrepresentations as to the financial condition of the Company were made by either of his uncles, or of facts which support the allegation that misrepresentations were made by either of his uncles concerning "the supposed onerous estate tax consequences to the families in the event of their father's death." (Statement ¶ 43)

Mr. Arnold S. Francis does not believe that Charles B. Stinson or Calvin L. Stinson, Jr. made any material false representation to him concerning the financial condition of Stinson Canning Company. (Statement ¶ 44) He testified at deposition that at a meeting he and his wife arranged at Charles B. Stinson's house, which he believes occurred in the fall of 1979, he was led to believe that if the Company went bankrupt or was in debt, the Francis family would have to be

responsible for their share of the debt. (Statement ¶ 45) This alleged misrepresentation is not actionable for two reasons. First, it does not constitute a false representation of a material fact. See Letellier v. Small, 400 A.2d at 376. At most, it would be the expression of an opinion of what could happen if certain circumstances ever came to pass, and there is no liability in an action of fraud for the false statement of an opinion. See Shine v. Dodge, 130 Me. at 443. Second, the Francises cannot be deemed to have justifiably relied upon the representation as true. The proposition expressed is patently untrue as a matter of law and common knowledge, and neither Mr. nor Mrs. Francis thought the alleged statement of sufficient import to inquire of their attorney, William S. Silsby, Jr., Esq., whether in fact as stockholders of Stinson Canning Company they could be held liable for any debt of the Company. (Statement ¶ 51) Since Mr. Silsby provided general legal counsel to the Francis family at the time of their stock sale in February of 1980 and in the preceding years (Statement ¶¶ 17, 18), the Francises could easily have inquired of him and learned that the proposition was untrue. See Knapp v. Bailey, 79 Me. 195, 204, 9 A. 122, 124 (1887), holding that if a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. See also Sheepscot Land Corp. v. Gregory, 383 A.2d 16, 23, 24 (Me. 1978)(citing Knapp).

According to Lou Ann Francis, the following representations were made by Charles B. Stinson at a meeting she and Mr. Francis had with him at his house in the fall of 1978 or 1979, prior to the time the Francises signed their Stock Purchase Agreements:

(a) He and Calvin L. Stinson, Jr. were not getting along well;

(b) If something should happen to Lou Ann Francis as a major stockholder, the chances were that the inheritance tax could wipe out her husband's business. If she died, the value of her stock would be taxed in her estate;

(c) If the Company got in financial bankruptcy or bad trouble, the Francis family would be responsible for their 1/6th of the debts;

(d) The Company was in financial trouble.

(Statement ¶ 47)

She testified that Calvin L. Stinson, Jr. made the following representations to her and Mr. Francis when they met with him at his home following their meeting with Charles B. Stinson:

(a) He and Charles B. Stinson were not getting along well;

(b) The Company was rocky financially; if Charles B. Stinson kept spending money the way he was they were all going down the tubes.

(Statement ¶ 48)

The misrepresentations alleged by Lou Ann Francis also are not actionable. First, if either Charles B. Stinson or Calvin L. Stinson, Jr. stated that they were not getting along well, there is no evidence that this was not true. Lou Ann Francis was aware on the evening that she and Mr. Francis met with her brothers that they never really got along very well and did not see eye-to-eye. She testified at deposition that she has no information that what she was told that night about them not getting along was untrue. (Statement ¶ 50)

The second representation attributed to Charles B. Stinson by Lou Ann Francis is not actionable for many reasons. First, the portion of the representation to the effect that if

something should happen to her as a major stockholder, the chances were that the estate taxes could wipe out her husband's business, is not an allegation which is asserted in the Complaint, as is required to state a cause of action for fraud pursuant to M.R.Civ.P. 9(b). Second, it does not constitute a false representation of a material fact. See Letellier v. Small, 400 A.2d at 376. Again, it is at most the expression of an opinion as to something that might happen in the future, and there is no liability for the false statement of an opinion. See Shine v. Dodge, 130 Me. at 443. Third, the Francises cannot be deemed to have justifiably relied on this statement as true. On April 25, 1978, the Board of Stinson Canning Company voted to adopt a Stock Redemption Agreement which provided for the redemption of Class B common stock and/or preferred stock from the estate of a deceased stockholder to assure liquidity for the payment of federal estate tax and state inheritance tax attributable to the ownership of such stock. (Statement ¶ 52) Mr. and Mrs. Francis attended a meeting of stockholders of the Company on June 9, 1978 at which three options available to stockholders with relation to estate planning were reviewed, which were: (1) for the stockholders to retain their stock and do nothing; (2) for the Company to purchase enough of a deceased stockholder's stock as necessary to pay estate taxes [pursuant to the provisions of the recently adopted Stock Redemption Agreement], and (3) for the Company to buy back all of a family's stock. Mrs. Francis testified in her deposition that by the time the Francises met with Charles B. Stinson and Calvin L. Stinson, Jr. in the fall of 1978, she felt that the redemption option was available. (Statement ¶ 53) The alleged failure of Defendants to inform Plaintiffs of the Board's adoption of a stock redemption policy that would have eliminated any estate tax problems cannot be countenanced, because Plaintiffs have admitted being aware of the redemption option both in the above-referenced deposition testimony and by virtue of their failure to controvert pursuant to M.R.Civ.P. 7(d)(2) Statement 53 of Defendants' Statement of

Material Facts. The Francises could not justifiably have had any fear that inheritance tax generated as a result of Lou Ann Francis's death "could wipe out her husband's business." Further, such a proposition is patently untrue as a matter of law and common knowledge, and, again, the Francises easily could have ascertained that fact from their attorney, Mr. Silsby. Finally, that portion of the representation to the effect that if Lou Ann Francis died, the value of her stock would be taxed in her estate, is true. See Section 2031 of the Internal Revenue Code, as amended, which provides that stock held by a decedent at the time of his or her death is includable in his or her gross estate for federal estate tax purposes.

The third representation attributed by Lou Ann Francis to Charles B. Stinson concerning personal liability for debt of the Company has been addressed above in the context of Mr. Francis's allegations.

The misrepresentations attributed by Lou Ann Francis to both of the Stinson brothers to the effect that Stinson Canning Company was in financial trouble are not actionable because the Francis Plaintiffs cannot have reasonably relied on any such representation. See Letellier v. Small, 400 A.2d 371 at 376 (reliance is unjustified if the plaintiff knows the representation is false or its falsity is obvious). It is clear from the information provided to the Francis Plaintiffs in their Stock Purchase Agreements and in the exhibits to those Agreements that the Francises could not justifiably have relied on misrepresentations that the Company was in poor financial condition. The Stock Purchase Agreements of the Francis Plaintiffs itemized 14 different inquiries with regard to acquisition of the outstanding stock or assets of the Company, and attached copies of the inquiries as exhibits B through V. (Statement ¶ 12) The disclosure section also revealed that the Company had recently received two offers to purchase the outstanding stock of the Company and its subsidiaries and one offer to acquire the assets of the Company,

which offers ranged between \$11 million and \$16 million. (Id.) Copies of these offers to purchase were attached to the Agreements as Exhibits W, X and Y. (Id.)

The aggregate purchase price the Francis Plaintiffs accepted for their stock was \$700,000 (\$699,999.11). (Statement ¶ 11) The Francis Plaintiffs owned one-sixth of the outstanding stock in the Company. (Statement ¶ 8) When they agreed to the \$700,000 purchase price, they were well aware that they were selling their one-sixth interest in the Company for a price far below what they would have received had they sold their stock pursuant to the \$11 million and \$16 million offers to purchase the Company's assets which were disclosed in their Stock Purchase Agreements. The Francis Plaintiffs' one-sixth share of \$11 million would have been \$1,833,333; their one-sixth share of \$16 million would have been \$2,666,666. Thus, the Francis Plaintiffs knowingly sold their stock for a price which was only 38% of what they would have received pursuant to the \$11 million offer and only 26% of what they would have received pursuant to the \$16 million offer.

Also attached to the Stock Purchase Agreements of the Francis Plaintiffs were audited financial statements of the Company for the period of January 3, 1976 through December 30, 1978, and an unaudited financial statement for the period ending December 29, 1979. (Statement ¶ 13) The consolidated balance sheets reflected the following assets, gross profit, and net earnings per share during this period:

Assets

12/29/79:	\$20,555,120
12/30/78:	\$15,102,965
12/31/77:	\$12,746,264
01/01/77:	\$11,051,755/\$11,120,420
01/03/76:	\$10,503,388

Gross Profit

12/29/79:	\$8,095,424
12/30/78:	\$7,233,416
12/31/77:	\$6,441,876
01/01/77:	\$4,822,346
01/03/76:	\$3,554,416

Net Earnings Per Share

12/29/79:	[not provided]
12/30/78:	\$1,533.67
12/31/77:	\$1,164.83
01/01/77:	\$ 870.06
01/03/76:	\$ 490.43

The most casual review of these financial statements makes it obvious that not only was the Company in strong financial condition, but that its value was increasing steadily on a yearly basis, and dramatically within the years immediately preceding the Plaintiffs' sale of stock.

It is also undisputed that prior to February 1980, when the Francises executed their Stock Purchase Agreements, they were in possession of other financial information indicative of the financial health of the Company. On June 9, 1978, at a meeting of the stockholders of the Stinson Canning Company, the Francis family was provided with financial statements for the year ending 1977, which reflected the assets, gross profit and net earnings per share set forth above. (Statement ¶ 14) Lou Ann Francis testified at her deposition that she was aware from reviewing these statements that the Company was successful. Also, it is undisputed that on or about August 22, 1978, the Francis family was advised in writing by Stinson Canning Company of an offer received from Zapata Protein, Inc. to purchase the Company for \$12 million. (Statement ¶ 16) Again, this offer indicated a value per share well in excess of the value the Francis family accepted for their shares. The Francis family's one sixth share of this amount would have been \$2 million. Thus, they knowingly sold their stock for a price which was only

35% of what they would have received pursuant to the \$12 million Zapata offer. This information would be sufficient by itself to make any purported reliance on statements to the effect that the Company was in financial trouble unjustified.

Also of significance to the reasonable reliance issue is the fact that William S. Silsby, Jr., Esq. provided general legal counsel to the Francis family at the time of their stock sale in February of 1980 and in the preceding years, and on behalf of the Francis family obtained information from Stinson Canning Company concerning the value of the Company's common stock. At a meeting he attended on February 17, 1978 with Thomas Van Meer, Esq., then counsel to the Company, and Robert Kruger, then accountant for the Company, Mr. Silsby obtained the book value of the common stock, which was \$8,700 per share. At the time, he was aware that generally the book value of stock is lower than its market value. (Statement ¶¶ 17-19) Since the Francis family owned 202,844 shares of common stock, they were on notice that this stock alone had a book value of \$1,764,742.80. Thus, the Francis family knowingly sold their common stock and their preferred stock for a price more than \$1 million less than the book value of the common stock alone.

At the request of Mr. and Mrs. Francis, Mr. Silsby also attended a meeting in Bath, Maine on January 12, 1980 with Mr. and Mrs. Francis, Mr. and Mrs. Wight, Ida Stinson Trenholm and Duane Fitzgerald, Esq., counsel for the Wight family. The purpose of the meeting was to learn the value of the Company stock and the rights of the stockholders. Lou Ann Francis had asked Mr. Silsby to find out what the stock was worth. Mr. Fitzgerald had investigated the financial condition of the Company on behalf of the Wights, and shared what information he had. He was aware from reviewing the financial statements that the Company had had three good years in

1976, 1977 and 1978. (Statement ¶ 19) This meeting occurred three weeks prior to the date the Francis family sold their stock.

Perhaps most significant with respect to the Francis' knowledge of the financial condition of the Company is the fact that prior to selling their stock, the Francis family contends that they themselves had received an offer to purchase their stock in the Stinson Canning Company at a price per share which was three times the value per share that they accepted for their stock. According to Lou Ann Francis, after receiving a \$300,000 offer for her family's stock from Charles B. Stinson, she discussed it with a businessman named J.C. Strout who was visiting at her house. J.C. Strout is now deceased. Mr. Strout told her that he knew a man named Shaw Mudge who he was sure would offer more than \$300,000 for the Francis family's stock. Mr. Strout subsequently informed Mrs. Francis that he had checked with Mr. Mudge and that Mr. Mudge said he would buy the Francis' stock for \$10,000 per share of common stock and \$100 per share of preferred stock. (Statement ¶ 22) On November 27, 1979, after her conversations with J.C. Strout, Lou Ann Francis wrote a letter to Stinson Canning Company signed by all of her family advising of the offer from Shaw Mudge, as she stated she believed was required by the by-laws of the Company. The letter read as follows:

Gentlemen:

Please be advised that the undersigned is selling their Class B Common and Preferred stock in the Company, copy of said stocks attached hereto and marked Exhibit A, at a price for the Common stock of \$10,000 per share and the Preferred stock at \$100.00 per share.

This notice is given in accordance with the By-Laws of the Company, Article 7, Section 7.3.

(Statement ¶ 23)

According to Lou Ann Francis, after receiving the November 27, 1979 letter, Charles B. Stinson telephoned Lou Ann Francis and offered approximately \$700,000 for all of the Francis

family stock. After discussing it with her husband, Lou Ann Francis called back and accepted the offer. Lou Ann Francis testified at her deposition that at the time she accepted the Company's offer of approximately \$700,000, she was aware that Shaw Mudge had offered approximately \$2,170,000, but she accepted the \$700,000 offer and gave up approximately \$1,470,000. (Statement ¶¶ 24, 25) In fact, since the Francis family owned a total of 202.844 shares of common stock and a total of 1,862 shares of preferred stock, the value of Mr. Mudge's offer was actually \$2,214,640. (Statement ¶ 11)

The alleged misrepresentation by Calvin L. Stinson, Jr. that the Company was "rocky financially" and that if Charles B. Stinson "kept spending money the way he was they were all going down the tubes" is also not actionable for the reason that it is not sufficiently definite to constitute a "material fact," see Letellier v. Small, 400 A.2d at 376, but, rather, merely constitutes a statement of opinion. See Coffin v. Dodge, 146 Me. 3, 6, 76 A.2d 541 (1950)(statement of opinion not actionable).

C. All Fraudulent Misrepresentation Claims Asserted in Counts VII and VIII are Barred by the Statute of Limitations.

14 M.R.S.A. § 859 (Supp.) provides that a cause of action for fraud may be filed "at any time within 6 years after the [plaintiff] discovers that he has just cause of action." The Law Court has made it clear that in these circumstances, the statute begins to run when the existence of the cause of action or fraud is discovered "or should have been discovered by plaintiff in exercise of due diligence and ordinary prudence." Westman v. Armitage, 215 A.2d 919 (Me. 1966).

In this case, such full disclosure of the financial health of the Company was made to all of the Plaintiffs prior to the execution of their respective Stock Purchase Agreements in February of 1980 (Francis Plaintiffs) and February of 1983 (Wight Plaintiffs) that "in the exercise of due

diligence and ordinary prudence” the Plaintiffs should have discovered that any misrepresentation concerning the financial health of the Company was false. (See details of financial disclosure set forth in Sections II (A) and (B) supra.)

III. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO THE CLAIM FOR WRONGFUL INTERFERENCE WITH A LEGACY IN COUNT IV OF THE AMENDED COMPLAINT.

In Count VI of their Amended Complaint, Plaintiffs allege wrongful interference with a legacy. They contend that Defendants Charles B. Stinson and Calvin L. Stinson, Jr. obtained Calvin L. Stinson, Sr.’s signature on certain deeds of real estate in the years immediately before he died and during a time when he was mentally incompetent, and that Calvin L. Stinson, Sr. received no consideration for his interest in this real estate. They contend that but for the wrongful interference of Charles B. Stinson and Calvin L. Stinson, Jr., the real estate in question would have become a part of the estate of Calvin L. Stinson, Sr., and that Plaintiffs Lou Ann Francis and Eva Wight would each have inherited a one-sixth interest in the real estate “according to the long-standing provisions of the late Mr. Stinson’s will.” (Amended Complaint, ¶¶ 43-45). Plaintiffs have identified the following deeds as those at issue in their claim:

1. Quitclaim Deed with Covenant from Calvin L. Stinson, Sr., to Stinson Canning Company, dated October 12, 1989, recorded in Book 1789, Page 582 (the “Clam Dock parcel”);
2. Quitclaim Deed with Covenant from Calvin L. Stinson, Sr., to Stinson Canning Company, dated January 3, 1990, recorded in Book 1789, Page 583 (3.87 acres of the “Reservoir Parcel”);
3. Release Deed from Calvin L. Stinson to Stinson Seafood Company, L.P., a Delaware limited partnership, dated July 18, 1990, recorded in Book 1918, Page 212 (the same 3.87 acres of the “Reservoir Parcel”); and
4. Quitclaim Release Deed from Calvin L. Stinson to SST & S, INC., “successor to Stinson Canning Company,” dated July 18, 1990, recorded in Book 1918, Page 211 (37 and 3/4 acres of the “Reservoir Parcel”).

(Plaintiffs’ Motion to Amend Complaint, pp. 1, 2)

The Superior Court properly granted summary judgment to Defendants on this cause of action, both because it is barred by the applicable statute of limitations, and because the Plaintiffs failed to allege or raise disputed issues of material fact as to the requisite elements of fraud or intimidation.

A. Statute Of Limitations Bar

Maine's general six-year statute of limitations is applicable to Plaintiffs' claim for wrongful interference with a legacy. See 14 M.R.S.A. § 752, providing that "[a]ll civil actions shall be commenced within six years after the cause of action accrues and not afterwards." In most cases, the statute begins to run at the time a wrongful act produces injury. See Cloutier v. Dalkon Shield Claimants' Trust, 152 B.R. 1 (D. Me. 1993); Williams v. Ford Motor Co., 342 A.2d 712 (Me. 1975).

It has been recognized that a cause of action for tortious interference with an intended bequest is available when a defendant unlawfully causes a testator to convey inter vivos that which would have passed under the will. Plimpton v. Gerrard, 668 A.2d 882, 885 (Me. 1995). The Law Court has recognized that "an action for tortious interference exists even before the testator has died." Id. at 886, citing Harmon v. Harmon, 404 A.2d 1020, 1025 (Me. 1979). As the Harmon Court observed:

If the legatee is injured due to some wrongful conduct on the part of a third party against the prospective testator, such act must necessarily occur within the life of the testator. The injury at this point is complete. The problem then becomes the valuation of the chance of benefit that has been lost.

404 A.2d at 1022, 1023. All of the transfers of real estate complained of by Plaintiffs in this case occurred more than six years before August 26, 1996, when Plaintiffs' Motion to Amend their

Complaint was allowed. Therefore, their claim for wrongful interference with a legacy is time barred.⁷

B. Failure To Allege Or Establish Requisite Elements Of Fraud Or Intimidation

The Court also properly granted summary judgment on Plaintiffs' cause of action for wrongful interference with a legacy on the independent grounds that Plaintiffs' Amended Complaint does not even allege, and the Plaintiffs made no showing, of the requisite elements of fraud or intimidation. See Di Pietro v. Casco Northern Bank, 490 A.2d 215, 219 (Me. 1985)(fraud or intimidation are required elements of tort of interference with an expectancy, citing MacKerron v. Madura, 445 A.2d 680, 683 (Me. 1982); Harmon v. Harmon, 404 A.2d 1020, 1025 (Me. 1979); Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979). Because Plaintiffs did not allege the requisite elements of this cause of action, judgment should have been granted to Defendants for this reason alone, without the necessity of examining the sufficiency of the evidence on this issue. Id.

If the evidence in the record with respect to fraud and intimidation is examined, it indicates that any allegation of fraud or intimidation on the part of Calvin L. Stinson, Jr. defies logic, since Calvin L. Stinson, Jr. had been granted his father's full Power of Attorney as of August 27, 1980. (Statement ¶ 58) That Power of Attorney empowered Calvin L. Stinson, Jr. "to sell, mortgage, lease or otherwise dispose of any or all real estate owned by [Calvin L. Stinson, Sr.] and to sign all deeds, mortgages, notes, leases and other documents necessary or

⁷ M.R.Civ.P. 15(c) provides that an amendment of a pleading relates back to the date of the original pleading in limited circumstances which do not apply in this case, i.e., the claims in the Amended Complaint do not arise out of "the conduct, transaction, or occurrence set forth...in the original [Complaint]." See Id.

convenient for the purpose and to join in any deed to release any rights by descent.” In addition, the power of attorney provided:

This power of attorney shall not be affected by any disability which I may suffer subsequent to the date hereof, it being my intention that the authority conferred herein shall be exercisable notwithstanding any such subsequent disability.

Any person dealing with said attorney or substituted attorney may rely without inquiry on the continuing validity of this power unless he has had notice that it has been revoked by me.

I hereby ratify and confirm, and agree to ratify and affirm whatever said attorney or substituted attorney shall do or cause to be done by virtue hereof.

Id. Thus, Calvin L. Stinson, Jr. was authorized to execute deeds on his father’s behalf, and had no need to resort to fraud or intimidation to obtain his father’s signature on such deeds.

Further, Plaintiffs have conceded that they were not present on any occasion when Calvin L. Stinson, Jr. obtained his father’s signature to any deeds, and that it was their understanding that he was the only one of the two brothers who requested that his father sign deeds. (Statement ¶ 59)⁸ Thus, they obviously did not bear witness to any fraud or intimidation on the part of Calvin L. Stinson, Jr. or Charles B. Stinson, and there is no such evidence in the record. The Plaintiffs’ mere allegation that their father was mentally incompetent at the time he executed the deeds in the question does not suffice to support their claim. See Cyr v. Cote, 396 A.2d at 7, fn. 7, stating that because the plaintiffs’ claim that the testator lacked the requisite mental capacity to deed or sign the property “cannot be considered a wrong perpetrated by the defendants,” no cause of action for wrongful interference could lie. Further, there is no competent evidence in this record that Calvin L. Stinson, Sr. was mentally incompetent when the deeds were signed.

⁸ Because the Plaintiffs do not contend that Charles B. Stinson requested that his father sign any of the deeds, summary judgment was also appropriately granted in his favor on the wrongful interference with a legacy claim for that reason.

IV. THE SUPERIOR COURT PROPERLY GRANTED DEFENANTS' MOTION TO DISMISS COUNTS I THROUGH 5 OF THE COMPLAINT (WITH THE EXCEPTION OF THE FRANCIS FAMILY'S "FAIR SHARE" CLAIMS) BASED ON THE STATUTE OF LIMITATIONS

A. The Superior Court Correctly Applied Maine's General 6-Year Statute of Limitations to Plaintiffs' Claims.

The particular actions of Defendants alleged in support of each count of Plaintiffs' original Complaint and the dates when they are alleged to have occurred are summarized below.

Count I

Breach of Fiduciary Relationship --
The Francis Family vs. Defendants

1. Misrepresenting the condition of the company in the late 1970's, claiming that the company was in poor financial condition. (Complaint, ¶ 20)
2. Misrepresenting the assets of the company in 1980 by supplying the Plaintiffs with inaccurate and incomplete financial information and records of assets and debts. (Complaint, ¶ 20)
3. Promising the Plaintiffs their "fair share" of the company profits upon the eventual sale of the company. (Complaint, ¶ 20)
4. Seizing corporate opportunities for their own personal benefit. (Complaint, ¶ 20)

Count II

Breach of Fiduciary Relationship --
The Wight Family vs. Defendants

1. Misrepresenting the condition of the company in 1982, claiming that the company was in poor financial condition, and that if Calvin L. Stinson, Sr. died, they would lose their personal assets to estate taxes. (Complaint, ¶ 29)
2. Misrepresenting the assets of the company in 1982 by supplying the Plaintiffs with inaccurate and incomplete financial information and records of assets and debts. (Complaint, ¶ 29)

3. Seizing corporate opportunities for their own personal benefit (Complaint, ¶ 29)

Count III

Breach of Contract

1. The Stinson Canning Company misrepresenting by warranty in each Plaintiff's stock purchase agreement that the financial statements attached to the agreement, purporting to show the existing financial condition of the company and its assets, "have been prepared in accordance with generally accepted accounting principles." (Complaint, ¶ 32)

Count IV

Negligent Misrepresentation

1. That the company was in poor financial condition. (Complaint, ¶ 37)
2. As to the Francis family, that the company would protect said Francis Plaintiffs' financial interests by paying them their "fair shares" upon the eventual sale of the company. (Complaint, ¶ 37)
3. That the assets covered by the sale of Plaintiffs' stock were only those listed in the financial statements attached to the stock purchase agreements. Complaint, ¶ 37)

Count V

Constructive Trust

1. Plaintiffs repeat and reallege the allegations stated in Paragraphs 1-39 above. (Complaint, ¶ 40)

All of the alleged actions of the Defendants consist of alleged wrongful inducements of the Plaintiffs to sell their stock in the Stinson Canning Company.

The Francis family sold their stock in 1980. (Complaint, ¶ 21; Exhibit A to the Affidavit of Charles B. Stinson, the Stock Purchase Agreement signed by Lou Ann Stinson Francis). The Wight family sold their stock in 1983. (Exhibits E, F and G to the Affidavit of

Charles B. Stinson, the Stock Purchase Agreements signed by Eva Stinson Wight, Carla Wight Intza, and Jean Wight Rakoske). The Complaint mistakenly alleges that the Wight family sold their stock in 1982, an error which is of no significance to the statute of limitations defense and which could only benefit the Defendants. (Complaint, ¶¶ 23, 25, 29 and 30). The Stinson Canning Company is alleged to have been sold by Defendants Calvin L. Stinson, Jr. and Charles B. Stinson on or about January 5, 1990, at a price per share exceeding that paid for Plaintiffs' stock. (Complaint, ¶ 18)

M.R.Civ.P. 12(b)(6) provides for dismissal of a complaint on the grounds of failure to state a claim upon which relief can be granted. A motion to dismiss tests the legal sufficiency of the complaint. McAfee v. Cole, 637 A.2d 463 (Me. 1994), citing Richards v. Soucy, 610 A.2d 268, 270 (Me. 1992). For purposes of a 12(b)(6) motion, the material allegations of the complaint must be taken as admitted. Id., citing Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97, 98 (Me. 1984). A dismissal should occur when it appears "beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." Id., citing Hall v. Board of Environmental. Protection, 498 A.2d 260, 266 (Me. 1985).

Maine's general six-year statute of limitations is applicable to all of the claims in this action. See 14 M.R.S.A. § 752, providing that "(a)ll civil actions shall be commenced within six years after the cause of action accrues and not afterwards." In causes of action sounding in tort, the statute begins to run at the time a wrongful act produces injury. See Cloutier, 152 B.R. 1 (D. Me. 1993); Williams v. Ford Motor Co., 342 A.2d 712 (Me. 1975). Ignorance of a cause of action does not prevent the statute of limitations from running. See Jackson v. Borkowski, 627 A.2d 1010, 1014 (Me. 1993); Bozzuto v. Ouellette, 408 A.2d 697, 699 (Me.

1979). In the case of a cause of action on a contract or liability, expressed or implied, the cause of action accrues only when there is a breach of the duty. Hale v. Cushman, 51 A. 874, 96 Me. 148 (1902); Manning v. Perkins, 29 A. 1114, 86 Me. 419 (1894).

In this case, the Plaintiffs' alleged injuries would have occurred at time they sold their stock in the Stinson Canning Company, which was in 1980 with respect to the Francis family, and in 1983 with respect to the Wight family, because these are the dates the Plaintiffs allegedly received less than fair or full value for their stock and were damaged thereby, with the alleged breach of fiduciary duty based on misrepresentation and negligent misrepresentation both having occurred on or before that date. Similarly, the injuries claimed from the alleged breach of warranty contained in the Stock Purchase Agreement of the Francis Plaintiffs would have been sustained in 1980, at the time the Agreements were executed with the allegedly incorrect financial statements. (In fact, the Wight Agreements contained no such warranty.) The Complaint in this matter was not filed and service of the Complaint was not effected until October 5, 1995, a minimum of 12 years after the harm alleged. Thus, these claims are barred by 14 M.R.S.A. § 752.

As the Superior Court noted in its Order, citing Atkins v. Firstbank, N.A., 415 A.2d 567, 569 (Me. 1980), 14 M.R.S.A. §859 (Supp.1995), allowing a cause of action to be filed within six years of its discovery, rather than its accrual, applies in cases where a defendant fraudulently conceals a cause of action or the cause of action is for fraud itself, and these circumstances were not alleged in Counts I-V of Plaintiffs' original Complaint.

B. Equitable Estoppel Does Not Bar Application of the Statute of Limitations.

In Appellants' Brief, the Plaintiffs argue that the doctrine of equitable estoppel should prevent application of the statute of limitations in this case. This argument is misguided, and fails to acknowledge some of the critical elements required for application of the doctrine.

This Court has recognized that, if its elements are present, estoppel may be applied to prevent an otherwise valid affirmative defense of the statute of limitations from successfully being raised. Hanusek v. Southern Maine Medical Center, 584 A.2d 634, 636 (Me. 1990). The Court in Townsend v. Appel, 446 A.2d 1132, 1134 (Me. 1982) set forth the elements of equitable estoppel, noting that the party seeking to assert the estoppel bears the burden of establishing the facts necessary to support the successful application of the doctrine. Id.

The gist of an estoppel barring the defendant from invoking the defense of the statute of limitations is that the defendant has conducted himself in a manner in which actually induces the plaintiff not to take timely legal action on a claim. The plaintiff thus relies to his detriment on the conduct of the defendant, by failing to seek legal redress while the doors to the courthouse remain open to him.... Only upon a determination that the plaintiff had in fact intended to seek legal redress on his claim during the prescriptive period can his failure to file suit be specifically attributed to the defendant's conduct. If, on the other hand, the evidence does not indicate that the plaintiff intended to bring suit, even if the defendant's conduct otherwise satisfies the principles of equitable estoppel, the defendant should not be estopped from asserting the bar.

Id. (emphasis added). In the case of Livermore Trust and Banking Co. v. Riley, 108 Me. 17, 78 A. 980 (1911), cited by Plaintiffs, the conduct of the corporate fiduciary giving rise to estoppel "amounted to a concealment from the corporate entity of a cause of action against [the corporate beneficiary] on a note." See Townsend, 446 A.2d at 1133.

Thus, the doctrine of estoppel requires that the defendant takes some action which induces the plaintiff not to take timely legal action on an existing claim. In the context of this case, it would require allegations that the Defendants took some action subsequent to the Plaintiffs' execution of the Stock Purchase Agreements to induce the Plaintiffs to refrain from bringing suit in a timely fashion, and allegations that the Plaintiffs otherwise, in fact, intended to bring suit within the statute of limitations. These critical elements were never alleged in Plaintiffs' Complaint, and are not supported by any evidence.

Plaintiffs' discussion of the "corporate opportunity doctrine" in the context of Northeast Harbor Golf Club, Inc. v. Harris, 725 A.2d 1018, 1024 (Me. 1999) is irrelevant to their equitable estoppel argument with respect to the statute of limitations, and therefore is not further addressed here.

V. THE SUPERIOR COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS COUNTS I AND V OF THE COMPLAINT IN THEIR ENTIRETY.

A. Plaintiffs' Entire Complaint is Barred by 13-A M.R.S.A. §1122 and by M.R.Civ.P. 19(a)(1).⁹

Charles B. Stinson, and Calvin B. Stinson, Jr. are named as the Defendants in all Counts of Plaintiffs' Complaint. In all actions alleged, Charles and Calvin Stinson were acting in their capacities as officers and directors of Stinson Canning Company, and have no personal liability. They executed the Stock Purchase Agreements at issue in this case in their capacities as officers of the corporation, and any representations they made to Plaintiffs concerning the

⁹ Appellants' argument that the Superior Court erred in denying Defendants' Motion to Dismiss the "fair share" claims in Counts I and V based on the Defendants' defense of absence of fiduciary duty at the relevant time is addressed in Section I(A)(3).

purchase of Plaintiffs' stock were made in their capacity as disclosed agents speaking for their principal. It is the Company, and not the Stinson brothers, who would be liable for any breach of fiduciary duty found to have occurred. See Wilde v. Madison, 145 Me. 83, 86, 72 A.2d 635 (1950) (holding that "in the case of private corporations the rule is that a corporation is liable for unlawful acts and neglects of their officers when done in the scope of their employment.")¹⁰ See also McKeen v. Boothby, 129 Me. 324, 326, 152 A. 53 (1930)("when an agent names his principal, the principal is responsible, not the agent.") Thus, the proper defendant in this case was the Stinson Canning Company. However, because this lawsuit was not brought until on or about October 5, 1995, more than two years subsequent to the May 10, 1993 dissolution of SST&S, Inc. (the name of Stinson Canning Company was changed to SST&S, Inc.)(see ¶¶ 7 and 8 of the Affidavit of Charles B. Stinson), the suit is barred against the corporation pursuant to 13-A M.R.S.A. § 1122. Section 1122 provides that no action or proceeding for any right or claim existing prior to the dissolution of a corporation may be commenced against such corporation, its directors, officers or shareholders unless it is commenced within two years of the corporation's dissolution. Id. Thus, the Plaintiffs' Complaint is barred by Maine corporate law.

Even assuming, arguendo, that the Complaint should not have been dismissed pursuant to 13-A M.R.S.A. § 1122, it should have been dismissed pursuant to M.R.Civ.P. 12(b)(7) for failure to join a party under Rule 19. The proper defendants in a cause of action against a dissolved corporation are the transferees of the corporation's assets. See generally Lone Star

¹⁰ Although under Maine law a corporate officer may be held individually liable for his fraudulent acts on behalf of a corporation, see, In re Gallant, 29 Bankr. 607 (Bankr.D.Me. 1983), citing Eastern Trust & Banking Co. v. Cunningham, 103 Me. 455, 461, 70 A. 17 (1908), the instant motion is addressed only to Counts I and V, the Francis Plaintiffs' claims of breach of fiduciary duty and constructive trust premised on their "fair share allegations." The Francis Plaintiffs' claims for fraud are separately asserted in Counts VII (Fraud) and Count VIII (Fraud in the Inducement) of their Amended Complaint.

Industries v. Redwine, 757 F.2d 1544, 1552, 1553 (5th Cir. 1985). In this case, Charles B. Stinson and Calvin B. Stinson, Jr. were but two of 23 shareholders of SST&S, Inc. at the time SST&S, Inc. was dissolved and its assets distributed to the shareholders in May of 1993. (Affidavit of Charles B. Stinson, ¶¶ 7 and 8). Pursuant to M.R.Civ.P. 19(a)(1), if Plaintiffs' Complaint is to be maintained against the Stinson brothers, all of the other shareholders to whom the Company's assets were distributed must be joined by Plaintiffs, because "in [their] absence, complete relief cannot be accorded among those already parties." See also Gawne v. Bicknell, 162 F. 587, 588 (D. Me. 1908), holding that in all actions on contract, every person must be made a defendant who is subject to legal liability.

In this case, any liability which was deemed to attach to the transferees of SST&S, Inc.'s assets would need to be apportioned among those 23 shareholders according to their respective percentage receipts of corporate assets. This could not be accomplished when only two of 23 of the potentially liable parties were named as defendants. To join only two of 23 of the proper Defendants in this case is unduly prejudicial to Charles B. Stinson and Calvin B. Stinson, Jr. Therefore, the Plaintiffs' Complaint should have been dismissed pursuant to M.R.Civ.P. 12(b)(7) for failure to join a party under Rule 19.

CONCLUSION

For the foregoing reasons, the Court should deny the appeal of Plaintiffs/Appellants and grant the appeal of Defendants/Appellees/Cross-Appellants.

DATED at Portland, Maine, this 18th day of August, 1999.

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**APPENDIX A: EXAMPLES OF FACTUAL DISCREPANCIES CONTAINED IN THE
"STATEMENT OF FACTS" IN APPELLANTS' BRIEF**

1. Plaintiffs' Statement (Appellants' Brief at 8)

"The subject of the promise by the brothers to make up the difference if the company sold for more later was discussed at the time the agreements were signed. (SMF Para. 22)."

Discrepancy From Record

This statement is false. There is absolutely no support for the statement in Paragraph 22 of Plaintiffs' Statement of Material Facts cited in support of the statement, and this proposition was **never** alleged by the Francises at deposition although they were given every opportunity to recite every occasion any such statement might have been made. It is even contradicted by Paragraph 19 of Plaintiffs' Statement of Material Facts, which states, "At the closing on February 4, 1980, the Francises went to the company offices, were there about five minutes, **there was no real discussion**, they went into the conference room, and there were the Stock Purchase Agreements which they signed." (Emphasis added).

2. Plaintiffs' Statement (Appellants' Brief at 7)

"Calvin testified to his belief that the Francises should have gotten more for their stock. (SMF Para. 91)."

Discrepancy From Record

There is no support for this statement in the referenced portion of Calvin L. Stinson, Jr.'s deposition, which did not address the subject at all.

3. Plaintiffs' Statement (Appellants' Brief at 4)

"The Wights and the Francises had no representation on the Board and were unaware of the Board discussions. (SMF Para. 56)"

Discrepancy From Record

This is inaccurate. Paragraph 56 of the Plaintiffs' Statement of Material Facts states only that the Wights and Francises had no representation on the Board, and does not say that the Wights and Francises were unaware of the Board discussions.

4. Plaintiffs' Statement (Appellants' Brief at 3)

"Lou Ann Francis and her husband were not told of the offers and inquiries by Charles Stinson or Calvin L. Stinson, Jr., Charles Stinson, stating that he saw 'no reason why' he should advise the Francis family. (SMF Para. 79-80)."

Discrepancy From Record

The statement that Lou Ann Francis and her husband were not told of the offers and inquiries by Charles Stinson or Calvin L. Stinson, Jr., is not stated in Paragraphs 79-80 of Plaintiffs' Statement of Material Facts, which state merely that "Charles Stinson 'had no reason to' communicate the Connors Brothers' offer of 16 million dollars for the company to Lou Ann and Arnie Francis" and "Charles Stinson believed that he had 'no reason why I should' advise the Francis family about the numerous inquiries and offers coming in about purchasing the company in 1978 and 1979, and he did not." The statement is also misleading because it does not reflect the undisputed fact that on or about August 22, 1978, the Francis family was advised in writing by the Stinson Canning Company of an offer received from Zapata Protein, Inc. to purchase the Company for \$12 million. (See ¶16 of Defendants' Statement of Material Facts)

5. Plaintiffs' Statement (Appellants' Brief at 6)

"He [Calvin L. Stinson, Jr.] felt that family members were being pressured 'into selling their stock at a cheap price, and ...felt that there should be other options other than solve (sic) an inheritance tax problem by selling their stock back to the company.' (SMF para. 59).

Discrepancy From Record

This is inaccurate. Calvin L. Stinson, Jr., did not state that **he felt that family members were** being pressured into selling their stock at steep price. Rather, what he stated was, "I had reason to believe that **some of the crowd felt that they were** being pressured by the visit from Tom and Kruger into selling their stock at a cheap price, and I thought that there should be other options other than solve an inheritance tax problem by selling their stock back to the company." (See ¶ 59 of Plaintiffs' Statement of Material Facts and Dep. of Calvin L. Stinson, Jr., P. 69, Lines 18-23.)

6. Plaintiffs' Statement (Appellants' Brief at 7)

"Moreover, [Calvin L. Stinson, Jr.] admits that the Francis family did not, in fact, receive fair market value for their stock. (SMF Para. 74)"

Discrepancy From Record

This is inaccurate. Mr. Stinson qualified his answer by stating, "As I said before, I have no idea what the market value for a minority interest in a family-owned business would be." (Calvin L. Stinson, Jr., Dep. P. 109, Lines 21-23). On redirect examination, Mr. Stinson further clarified his response to Ms. Collier's question as follows: "Sandy Collier referred just previous to that time to the asset value of 20 million, and when I answered, I was assuming the book value or asset value of the company which I agreed they didn't receive 1/6 of that," and stated that he believed the Francisces received the fair market value for their minority interest. (Calvin L. Stinson Dep. P. 128, Lines 18-25). All of this explanation was omitted by Plaintiffs.

CERTIFICATE OF SERVICE

STATE OF MAINE
CUMBERLAND, SS.

August 18, 1999

I, Kate S. Debevoise, attorney for Defendants/Appellees/Cross-Appellants, hereby certify that on this date I made service of the Brief of the Defendants/Appellees/Cross-Appellants by mailing two copies of the Brief, first class mail, postage prepaid, to Sandra Hylander Collier, Esq., 121 Main Street, P.O. Box 1391, Ellsworth, ME 04605, and William S. Silsby, Jr., Esq., Silsby & Silsby, 49 Church Street, P.O. Box 449, Ellsworth, ME 04605, attorneys for Plaintiffs/Appellants.

Date: August 18, 1999


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