

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FORUM FINANCIAL GROUP, et al.,)

Plaintiffs)

v.)

Docket No. 00-306-P-C

**PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, et al.,**)

Defendants)

**RECOMMENDED DECISION ON DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

Each of the defendants, the president and fellows of Harvard College (“Harvard”), Andrei Shleifer and Jonathan R. Hay, moves for summary judgment on all counts of the complaint. Shleifer also seeks summary judgment on the asserted ground of this court’s lack of personal jurisdiction over him.¹ I recommend that the court grant the motions for summary judgment in part and deny them in part.

¹ Shleifer purported to “adopt[] and incorporate[] by reference his previously-filed memoranda of law in support of his motion to dismiss,” Andrei Shleifer’s Memorandum of Law in Support of His Motion for Summary Judgment (“Shleifer Mem.”) (Docket No. 70) at 1, which was denied by this court on November 19, 2001, Docket No. 57. A motion for summary judgment must be accompanied by a supporting statement of material facts pursuant to this court’s Local Rule 56. No such requirement applies to a motion to dismiss, to which a separate and distinct legal standard applies. This court expects memoranda of law submitted in support of a motion for summary judgment to refer to the required statement of material facts and to discuss how the application of the legal standard governing such motions, when applied to those specific facts, requires the entry of summary judgment for the moving party. A memorandum submitted in support of a motion to dismiss does not present such an analysis. Accordingly, after a telephone conference with counsel for all the parties, I directed Shleifer, over the objection of counsel for the plaintiffs, to file a separate supplemental motion for summary judgment on this issue in accordance with this court’s Local Rule 56. Harvard’s motion for summary judgment suffered from the same deficiency with respect to its argument that Shleifer is an indispensable party whose absence, should his motion be granted, would require the entry of summary judgment for Harvard. I therefore ordered Harvard to file a supplemental motion as well, directed to this argument. Hay requested and was granted leave to file an additional memorandum joining in either or both of these supplemental motions. These motions have now been filed, as have the plaintiffs’ responses and any reply memoranda.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the statements of material facts submitted by Harvard² and the plaintiffs pursuant to Local Rule 56.

Plaintiff Forum Financial Group, LLC (“Forum”) is a limited liability company with a principal place of business in Portland, Maine. Statement of Undisputed Material Facts in Support of Defendant Harvard’s Motion for Summary Judgment (“Defendants’ SMF”) (Docket No. 78) ¶¶ 1-2; Plaintiffs’ Statement of Material Facts in Opposition to the Defendants’ Motions for Summary Judgment, Plaintiffs’ Responses to Defendants’ Statement of Material Facts (“Plaintiffs’ Responsive SMF”) (Docket No. 86) ¶¶ 1-2. Forum, which has operations in Portland, Bermuda and Poland, provides, *inter alia*, administrative or “back office” services to mutual fund management companies. *Id.* ¶¶ 3-4. Plaintiff John Keffer is and has since its inception been Forum’s president and owner. *Id.* ¶ 7.³ Since Forum’s inception, Keffer has managed its day-to-day activities, including its activities in Russia as set forth below. *Id.* ¶ 8.

Defendant Harvard is a non-profit educational institution incorporated under the laws of the Commonwealth of Massachusetts.⁴ *Id.* ¶ 9. The Harvard Institute for International Development (“HIID”) was created by Harvard in 1974. *Id.* ¶ 10.⁵ From December 1992 through mid-1997 HIID

² Shleifer and Hay both expressly adopt the statement of material facts filed by Harvard. Shleifer Mem. At 1; Statement of Undisputed Material Facts in Support of Defendant Jonathan R. Hay’s Motion for Summary Judgment (Docket No. 72) at 1. They each adopt only some of Harvard’s responses to the plaintiffs’ statement of material facts. Defendant Andrei Shleifer’s Reply to Plaintiffs’ Statement of Additional Facts (“Shleifer Responsive SMF”) (Docket No. 93); Defendant Jonathan R. Hay’s Reply to Plaintiffs’ Statement of Additional Facts (“Hay Responsive SMF”) (Docket No. 95). Accordingly, a reference to Harvard’s statement of material facts will be a reference encompassing all of the defendants. The defendants’ responses to the plaintiffs’ statement of material facts will be stated separately. Hay makes several general objections to the plaintiffs’ statement of material facts. Hay Responsive SMF at 1-2. In the absence of any attempt to identify the particular paragraphs to which these objections apply, they will not be considered further.

³ The plaintiffs purport to qualify this asserted fact with the statement that “Keffer owns ninety-nine percent of Forum,” Plaintiffs’ Responsive SMF ¶ 7, but they provide no citation to support this statement, which accordingly will be disregarded.

⁴ According to its charter, Harvard promotes and provides opportunities for education, study and research in a broad range of disciplines and academic fields. Defendants’ SMF ¶ 365; Plaintiffs’ Responsive SMF ¶ 365. Harvard is entitled to exemptions from state and federal income taxes, has not capital stock and has no authority to issue or distribute dividends or profits. *Id.* ¶ 367.

⁵ The plaintiffs purport to deny this paragraph in the defendants’ statement of material facts, asserting that “HIID had no legal existence and was part of Harvard.” Plaintiffs’ Responsive SMF ¶ 10. The record evidence cited by the parties establishes that HIID was created in 1974, Deposition of Prof. Dwight H. Perkins (Document 35 in Transcript Record Appendix to Statement of Undisputed (continued on next page)

administered an economic reform advisory program in Russia (the “Russia Project”) funded by the United States government through the United States Agency for International Development (“USAID”).⁶ *Id.* ¶ 11.

Since 1991, defendant Shleifer has been a tenured full professor of economics in Harvard’s Faculty of Arts and Sciences. *Id.* ¶ 12. At all times relevant to the complaint, Shleifer advised the Russian government on the creation and operation of the Russian equivalent of the Securities and Exchange Commission (the “Russian SEC”). *Id.* ¶ 13. Beginning in 1992 and at all times relevant to the complaint, Shleifer served as a consultant to HIID on the Russia Project and was a project director of the Russia Project. *Id.* ¶¶ 14-15. As project director, Shleifer was principally involved with the intellectual content of the Russia Project; he was also involved with certain aspects of administration of the project. *Id.* ¶ 16.

In December 1992 defendant Hay entered into an employment agreement with HIID. *Id.* ¶ 17. From that time through May 23, 1997 Hay remained employed by HIID on the Russia Project. *Id.* ¶ 18. Hay resided in Moscow during his employment with HIID. *Id.* ¶ 19. In July 1994 he became general director of the Russia Project. *Id.* As part of his work on the Russia Project, Hay advised and assisted the efforts of the Russian government to create and develop capital markets. *Id.* ¶ 20. Hay’s work for the Russia Project included work as a director of the Russian entity called the Institute for Law-Based Economy (“ILBE”). *Id.* ¶ 21.⁷ The ILBE was formally chartered as a Russian non-profit

Material Facts in Support of Defendant Harvard’s Motion for Summary Judgment) (“Defendants’ Tr. App.”) at 6-7, and that it was contained within the administrative structure of Harvard, Telephone Deposition of Prof. Jeffrey D. Sachs (Document 2 in Plaintiffs’ Appendix of Transcripts in Opposition to Defendants’ Motions for Summary Judgment) (“Plaintiffs’ Tr. App.”) at 12. Harvard does not take the position that HIID rather than Harvard is the proper party defendant in this action. I will refer throughout this recommended decision to HIID and Harvard interchangeably.

⁶ The parties disagree about whether USAID also administered the program. Defendants’ SMF ¶ 11; Plaintiffs’ Responsive SMF ¶ 11. None of the record material cited by the parties in support of their respective positions may fairly be read to resolve this dispute. It is in any event irrelevant to the issues presented by the motions for summary judgment.

⁷ The plaintiffs deny this paragraph of the defendants’ statement of material facts, Plaintiffs’ Responsive SMF ¶ 21, but their denial does not address the facts included in the paragraph, which are supported by the citation to the record given by the defendants.

organization in April 1995. *Id.* ¶ 93. It received its funding from USAID through a series of subcontracts with HIID. *Id.* ¶ 94. It was founded to create an independent Russian public policy “think-tank” of Russian experts to work on the development of a legal basis for the emerging market economy. *Id.* ¶ 97. In and about 1996 Hay’s Russia Project work on capital markets included work for the Russian Federation Commission on Securities and the Capital Market (the “Russian SEC”) with respect to various aspects of the creation and development of Russia’s mutual fund (or “unit investment fund”) industry, including the creation and development of the specialized depository sector of that industry. *Id.* ¶¶ 24, 26.

In 1996 Forum capitalized and worked to form a custodial and back office administrative services operation or specialized depository in Russia called the First Russian Specialized Depository (“FRSD”). *Id.* ¶ 5. Forum licensed and capitalized the FRSD through Forum Financial Group Russia LLC, which was a wholly-owned Russian affiliate of Forum. *Id.* ¶ 6.⁸ Hay’s dealings with Forum with respect to the FRSD were part of his Russia Project work. *Id.* ¶ 25.

The Russian SEC was at all relevant times the principal Russian governmental body charged with the development of the capital markets industry. *Id.* ¶ 26. In July 1996 the Russian SEC executed a contract with Forum Financial Group Consulting, LLC (“Forum Consulting”) entitled “Contract for Consulting Services between The Russian Federation Commission on Securities and the Capital Market and Forum Financial Group Consulting, Limited Liability Company” (the “July 25 contract”). *Id.* ¶ 27.

⁸ The plaintiffs purport to deny this paragraph of the defendants’ statement of material facts, Plaintiffs’ Responsive SMF ¶ 6, but the denial does not address the facts included in the paragraph, which are supported by the citation to the record given by the defendants, and they do not cite any record support for their denial, which accordingly must be disregarded in any event.

From the spring of 1995 through at least January 1997 Dmitry Vasiliev was a member and executive director, and/or the acting chairman or chairman, of the Russian SEC. *Id.* ¶ 29. He was responsible for, *inter alia*, implementing the decisions of the Russian SEC. *Id.* ¶ 30.

In or about early 1995 the Resource Secretariat was formed by the Russia Project to serve as a “think-tank” for the Russian SEC with respect to the capital market activities of the Russia Project. *Id.* ¶ 34.

Julia Zagachin was an employee of the Russia Project from early 1993 through April 1996. *Id.* ¶ 38.⁹ Her work included serving from early 1993 through the summer of 1994 as director of the Moscow Auction Center, a Russian organization which presided over auctions through which privatizing companies in Russia sold their shares. *Id.* ¶ 39. While employed by HIID, Zagachin served from the summer of 1994 through approximately October 1995 as president of the Depository Clearing Company (“DCC”), a Russian custodial services provider for brokerage firms and banks. *Id.* ¶ 40. From approximately winter 1995 until May 1996 Zagachin continued to work for the Russia Project. *Id.* ¶ 41. From on or about July 5, 1996 through approximately August 20, 1996 Zagachin held the position of general director of the FRSD. *Id.* ¶ 43. On or about September 4, 1996 Zagachin, through a company called Oasis Financial Services LLC, purchased the FRSD from Forum. *Id.* ¶ 44. At this time, Zagachin owned and controlled Oasis. *Id.* ¶ 45.¹⁰

Beth Hebert worked professionally in the area of Russian investments and capital markets for several years prior to 1996. *Id.* ¶ 46. From 1992 through approximately June 1996 she worked primarily in Russia as general manager of Flemings (CIS) Limited’s Russian investment business, and

⁹ The plaintiffs deny this paragraph of the defendants’ statement of material facts, asserting that Zagachin was an employee of Harvard during this period. Plaintiffs’ Responsive SMF ¶ 38. For purposes of the pending motions, this is a distinction without a difference.

¹⁰ The plaintiffs deny paragraphs 44 and 45 of the defendants’ statement of material facts “in part,” asserting facts concerning the source of the funds used by Oasis to purchase FRSD. Plaintiffs’ Responsive SMF ¶¶ 44-45. The source of the funds is not relevant to the fact of the purchase or Zagachin’s ownership and control of Oasis.

as the investment manager of the Flemings Russia Securities Fund. *Id.* In or about June 1996 Hebert formed Pallada Asset Management, a mutual fund management company, in which ILBE Consulting and Zagachin also had interests. *Id.* ¶ 47.¹¹ On August 8, 1996 Pallada received a license from the Russian SEC to operate as a mutual fund management company in Russia. *Id.* ¶ 48.¹² Hebert and Hay were married in December 1998. *Id.* ¶ 52.

In 1996 Nancy Zimmerman managed a Boston-based hedge fund called Farallon Fixed Income Associates. *Id.* ¶ 53. She was at all relevant times married to Andrei Shleifer. *Id.* ¶ 55.

HIID's early work in Russia was conducted pursuant to an initial cooperative agreement entered into by USAID and HIID in December 1992. *Id.* ¶ 56. In October 1995 USAID and HIID entered into a second cooperative agreement. *Id.* ¶ 57. By its terms, the purpose of the first cooperative agreement was for HIID "to facilitate [Russia's] transition to a market economy through privatization" and to provide legal and economic advice to the Russian agency charged with developing and implementing the Russian privatization program. *Id.* ¶ 58. By the time the second cooperative agreement was executed, much of the privatization reform effort that was the focus of the Russia Project in the early 1990s had been completed. *Id.* ¶ 59. By the terms of the second cooperative agreement, HIID's primary objective expanded to include, *inter alia*, development of capital markets. *Id.* ¶ 60. As part of the Russia Project, HIID personnel supported and assisted the Russian government in developing the Russian SEC. *Id.* ¶ 61. Harvard received \$43 million through the two cooperative agreements to advise the Russian government on how to conduct a peaceful and stable transition from its government-owned economy to a market economy. Plaintiffs' Statement of Additional Facts ("Plaintiffs' SMF"), included in Docket No. 86 at 36-56, ¶ 1; Reply Statement of

¹¹ The plaintiffs contend that Oasis "owned" Pallada "in part," Plaintiffs' Responsive SMF ¶ 47, but their citations to the record do not support this assertion.

¹² The plaintiffs purport to deny this paragraph of the defendants' statement of material facts, but their denial does not address the facts (*continued on next page*)

Material Facts of Defendant President and Fellows of Harvard College, etc. (“Harvard Responsive SMF”) (Docket No. 97) ¶ 1.¹³

The Russian SEC was created in 1994 to address concerns among Russian investors arising out of pyramid schemes that had flourished in Russia after the fall of communism and to create a stock market for investment in Russia. Defendants’ SMF ¶¶ 63, 66; Plaintiffs’ Responsive SMF ¶¶ 63, 66. The Russian SEC sought to achieve these goals by promoting the development of a system of registration, clearing and custody for securities and other assets being traded in the market. *Id.* ¶ 67. In an attempt to address the crisis in investor confidence that existed by 1996 the Russian government established the Investor Protection Fund in early 1996 (the “IPF”). *Id.* ¶ 68. The purpose of the IPF was to reimburse Russians who had lost money as a result of pyramid schemes; the Russian SEC was charged under Russian law with the responsibility of supervising the operation of the IPF. *Id.* ¶¶ 69-70. In order to generate income to pay the IPF’s intended beneficiaries, the Russian SEC sought, in 1996, to invest IPF monies through one of the country’s new mutual fund management companies. *Id.* ¶ 71. The Russian SEC selected Pallada for this task because “no [company] other than Pallada was willing to manage [the fund] for as little money as Pallada.” *Id.* ¶ 72.¹⁴

By 1995 and through 1996 the development of the Russian capital markets industry, including the mutual fund industry, was a top priority of the Russian SEC and the Russian government. *Id.* ¶ 73. The Russian SEC sought to develop the Russian mutual fund industry through a combination of numerous pilot projects involving various commercial entities. *Id.* ¶ 75. The Russian SEC’s mutual fund industry pilot projects provided financial assistance and support to private entities participating

asserted by the defendants. Plaintiffs’ Responsive SMF ¶ 48.

¹³ Defendants Hay and Shleifer filed separate responses to the plaintiffs’ statement of material facts but adopted Harvard’s response to this paragraph, among others. Shleifer Responsive SMF at 1; Hay Responsive SMF at 2. Hay also purports to object to the plaintiffs’ statement of material facts on three general grounds, *id.* at 1-2, but in the absence of specific objections to specific paragraphs, the objections will be disregarded.

in various aspects of the development of the mutual fund and other capital markets in Russia. *Id.* ¶ 76.

Six mutual fund management companies were licensed to operate by August 8, 1996. *Id.* ¶ 77.

Pallada was not one of the mutual fund management companies involved in a pilot project. *Id.*

A central component of the Russian SEC's plans in 1996 for the successful development of the Russian mutual fund industry was the creation of functioning specialized depositories to provide a registry and custody system for shares of mutual funds. *Id.* ¶ 79. As of early 1996 there were no specialized depositories in Russia. *Id.* ¶ 80. In 1996 the Russian SEC sought to promote the specialized depository industry by engaging a private entity to form a specialized depository that would serve as a pilot in the new industry. *Id.* ¶ 82.

Hay was never a member of the Russian SEC. *Id.* ¶ 85. Only members of the Russian SEC had a vote and its decisionmaking required majority votes by members. *Id.* ¶¶ 87-88. Hay never attended a meeting of the Russian SEC. *Id.* ¶ 90. By the spring of 1996 Forum understood that the licensing of specialized depositories and the ultimate decisions as to what ownership and management structures would be acceptable were functions of the Russian SEC. *Id.* ¶ 92.¹⁵

ILBE was formally chartered as a Russian non-profit organization in April 1995. *Id.* ¶ 93. As of 1995 and continuing through the period of March 1996 to January 1997 ILBE was a subcontractor to HIID under the cooperative agreements. *Id.* ¶ 98. Hay was at all relevant times a representative of ILBE. *Id.* ¶ 100.¹⁶ ILBE shared office space with HIID. *Id.* ¶ 103.

In or about the spring of 1996 the Russian government executed a loan agreement with the World Bank. *Id.* ¶ 104. Pursuant to this loan agreement, the Russian SEC had \$31 million available

¹⁴ Again, the plaintiffs purport to deny this paragraph of the defendants' statement of material facts, but their denial does not address the facts asserted in the paragraph. Plaintiffs' Responsive SMF ¶ 72.

¹⁵ The plaintiffs purport to deny this paragraph of the defendants' statement of material facts, but their factual assertions do not address the subject matter of this paragraph. Plaintiffs' Responsive SMF ¶ 92.

¹⁶ The plaintiffs purport to deny this paragraph of the defendants' statement of material facts, but their factual assertions do not address (continued on next page)

for disbursement to various capital markets development-related projects. *Id.* ¶ 105. The Russian SEC designated \$2.5 million of the loan funds to be used for its specialized depository project. *Id.* ¶ 106. In connection with this funding, the Russian SEC prepared a “terms of reference” (“TOR”) seeking proposals to provide services to the Russian SEC with respect to the development of the specialized depository industry. *Id.* ¶ 107. HIID participated in drafting the TOR. Plaintiffs’ SMF ¶ 43; Harvard Responsive SMF ¶ 43.

On March 5, 1996 Russian SEC chairman Vasiliev approached Forum by writing to Keffer to encourage him to “consider the establishment of a company in Russia that would supply fund administration services” to the developing Russian mutual fund industry and stated that the Russian SEC intended to “work closely” with Forum to “support the establishment of” such an operation. Defendants’ SMF ¶¶ 109, 111; Plaintiffs’ Responsive SMF ¶¶ 109, 111. Vasiliev stated in this letter that he would appreciate it if Forum could acquaint his “advisor,” Hay, with Forum’s fund administration business in Poland. *Id.* ¶ 110. He also stated that it was likely that technical assistance funds would be available and used by the Russian SEC in its effort to support the establishment of the fund administration sector in Russia. *Id.* ¶ 112.

On March 6, 1996 Keffer responded to Vasiliev’s March 5 letter stating that Forum was “seriously considering” the Russian SEC’s “invitation . . . to establish a mutual fund administration business in Russia.” *Id.* ¶ 114. By March 6, 1996 Forum had determined that it “prefer[red] to work with the [Russian] SEC on a pilot basis to establish th[e contemplated] business” and that in order for Forum to do so “technical assistance funds [would] be needed” by Forum. *Id.* ¶¶ 115-16. In mid-March 1996 Keffer traveled to Russia and had a meeting with Vasiliev and Hay, neither of whom he had met before, about the subject of the March 5 and 6 correspondence. *Id.* ¶¶ 117-18. At this

the subject matter of this paragraph. Plaintiffs’ Responsive SMF ¶ 100.

meeting, Hay told Keffer that he “expected regulations to be promulgated that would not permit [Forum] to have ownership and, possibly not permit [Forum] to have 100 per cent ownership and possibly not more than 49 per cent ownership [of the contemplated specialized depository business], but that management control could be accomplished.” *Id.* ¶ 119. At this meeting, Hay suggested that the DCC or Zagachin could possibly share ownership with Forum. *Id.* ¶ 120. Zagachin traveled to Forum’s offices in Maine to conduct due diligence of Forum’s operations for the Russian SEC to confirm Forum’s capability to start a specialized depository in Russia. Plaintiffs’ SMF ¶ 41; Harvard Responsive SMF ¶ 41.

On March 28, 1996 Forum proposed to the Russian SEC that Forum create a company which would provide specialized depository services and “commence all operations” by May 31, 1996. Defendants’ SMF ¶ 122; Plaintiffs’ Responsive SMF ¶ 122. On April 2, 1996 Keffer wrote to Hay at ILBE to thank him for discussing the specialized depository project with him and stating that Forum understood that the Russian SEC’s short term goal for the project was to have an operational fund by June 1, 1996. *Id.* ¶ 123. On April 12, 1996 the Russian SEC formally invited Forum to submit a proposal in response to the TOR. *Id.* ¶ 124. The invitation provided that a responsive proposal could form the basis for future negotiations “and, ultimately, a contract between [Forum] and [the Russian SEC]” and that such a proposal “could include plans to establish a new specialized depository provider with assistance from Russian staff or partners.” *Id.* ¶¶ 125-26. The TOR stated that the Russian SEC had assigned ILBE responsibility for oversight of work under the contemplated contract. *Id.* ¶ 130.

On April 25, 1996 Forum submitted its proposals to ILBE pursuant to the TOR. *Id.* ¶ 131. These proposals did not propose establishing a specialized depository. *Id.* ¶ 132. On or about May 13, 1996 the Russian SEC informed Forum that it had been selected under the TOR. *Id.* ¶ 134. The

written notification was signed by an employee of HIID. Plaintiffs' SMF ¶ 48; Harvard Responsive SMF ¶ 48. Negotiations began in approximately mid-May 1996. Defendants' SMF ¶ 137; Plaintiffs' Responsive SMF ¶ 137. The July 25 contract was executed on July 25, 1996. *Id.* ¶ 138. Forum executed the contract through its Russian affiliate, Forum Consulting. *Id.* ¶ 139. Hay was the principal person with whom Forum negotiated the July 25 contract. *Id.* ¶ 144. HIID employees David Weiler and Stuart MacLennan were also involved in the negotiations on behalf of the Russian SEC. *Id.* ¶ 145.

By May 10, 1996 Zagachin had told Forum that she wanted to have management control of the contemplated specialized depository. *Id.* ¶ 150. By mid-May 1996 Forum had been told that it could not expect in the long term to own more than 49 per cent of the equity in the contemplated specialized depository. *Id.* ¶ 151. Throughout the negotiations Vasiliev, Hay and other representatives of the Russian SEC told Forum that the Russian SEC required that someone other than Forum, but nevertheless known and trusted by the Russian SEC, own at least 51 per cent of the contemplated specialized depository. *Id.* ¶ 152. In mid-May 1996 Hay advised Forum that it "could have [management] control [of the contemplated specialized depository] but that Zagachin had to be involved in the management." *Id.* ¶ 155. Prior to May 20, 1996 Hay told Keffer that Hay's "feeling" was that the Russian SEC would not approve a license application unless the contemplated specialized depository employed a Russian general director. *Id.* ¶ 158. By the end of May 1996 Forum had agreed that Zagachin would "have to be involved" and have some management role at the depository and that "Forum would retain management control." *Id.* ¶ 159.

On or about May 30, 1996 Forum delivered to Zagachin a draft term sheet addressing issues of ownership and management control and Zagachin's level of involvement. *Id.* ¶ 160. A draft of the July 25 contract contained a component entitled "Formation of Specialized Depository," which

provided that Forum would, *inter alia*, “establish a specialized depository,” “[f]orm [a] legal entity and complete ancillary documents,” “[r]egister with, and apply for licenses,” “[a]pply for licensure as a Specialized Depository,” and “[h]ire key management staff.” *Id.* ¶ 161. On or about July 3, 1996 Forum and Hay further agreed that Forum would retain the right to fire the general director of the contemplated specialized depository, including Zagachin. *Id.* ¶ 164.

Forum claims that it relied on Hay’s statements made to Forum about ownership and management control in mid-March 1996 and later during the period of negotiations between Hay and Forum in determining to do business in Russia and to form and capitalize the FRSD. *Id.* ¶ 170. It claims that it relied on Hay’s statements about ownership and management control because it viewed Hay “as Harvard.” *Id.* ¶ 171. Forum claims it also relied on Hay due to its knowledge that Hay was an influential advisor to Vasiliev and/or the Russian SEC. *Id.* ¶ 173. Keffer turned to Hebert throughout his dealings with Hay for guidance on all issues “to try to understand the situation.” *Id.* ¶ 174.

The July 25 contract provides that all work under the contract will be performed under the direction and supervision of ILBE. *Id.* ¶ 180. It also provides that Forum will establish a specialized depository and that, where ILBE determines that it is desirable, the specialized depository may be formed by Forum and one or more Russian shareholders. *Id.* ¶ 178. The contract provides for termination by the Russian SEC in its discretion. *Id.* ¶ 182. It also provides for an initial payment to Forum Consulting of \$450,000 within ten days. Plaintiffs’ SMF ¶ 68; Harvard Responsive SMF ¶ 68.

Forum and Keffer capitalized the FRSD on or about July 5, 1996 by depositing \$400,000 in a cash custody account at Citibank in Moscow. Defendants’ SMF ¶ 190; Plaintiffs’ Responsive SMF ¶ 190. The plaintiffs claim that they capitalized the FRSD in reliance on Hay’s representations as to Forum’s management control of the FRSD. *Id.* ¶ 191. The capitalization gave Forum, or Forum and

Keffer, 100% ownership of the FRSD. *Id.* ¶ 192. The July 1996 capitalization of the FRSD was a prerequisite to licensure of the FRSD by the Russian SEC. *Id.* ¶ 193. The Russian SEC granted the FRSD its license to operate as a specialized depository on August 8, 1996. *Id.* ¶ 197. At this time Keffer and Forum also created Forum Consulting. Plaintiffs' SMF ¶ 62; Harvard Responsive SMF ¶ 62.

The TOR stated that the specialized depository project was an urgent priority of the Russian government. Defendant's SMF ¶ 128; Plaintiffs' Responsive SMF ¶ 128; TOR, included in Document 12 Defendants' Doc. App., at 5. Shleifer and Hay were under significant time pressure because President Yeltsin and Vasiliev were already late in fulfilling their public promises of the start of the Russian mutual fund industry. Plaintiffs' SMF ¶ 24; Harvard Responsive SMF ¶ 24. By August 1996 the Russian SEC had selected Pallada as the mutual fund management company that would manage investment of the Investor Protection Fund, the operation of which was of great importance to the Russian SEC because it had been promised to the Russian people by President Yeltsin. Defendants' SMF ¶ 205; Plaintiffs' Responsive SMF ¶ 205. On or about August 11, 1996 Keffer met with Hay and informed him that the FRSD would not begin operations at that time. *Id.* ¶¶ 207, 211-13. Forum never operated a specialized depository in Russia. *Id.* ¶ 210. Forum stated that it would be willing to stay on the project as a subconsultant for three to four months in order to support the FRSD's operations while a new owner's staff was trained. *Id.* ¶ 213.

In August 1996 tensions developed between Forum and Keffer on the one hand and Hay on the other hand when Forum was not paid its \$450,000 advance within ten days of July 25, 1996. *Id.* ¶ 225. On August 1, 1996 Forum (or Forum Consulting) submitted a request for an advance payment under the July 25 contract. *Id.* ¶ 226. The Russian SEC did not pay this request. *Id.* ¶ 227. In August 1996 disagreements developed between Forum and Keffer and Hay concerning Zagachin's role in the

management of the FRSD. *Id.* ¶ 232. According to the plaintiffs, Keffer met with Vasiliev early in August 1996 to discuss, *inter alia*, whether Forum would have management control of the FRSD and Vasiliev told him that Forum would have complete management control. *Id.* ¶ 233-34. Also, according to the plaintiffs, on or about August 9, 1996 Hay reiterated his agreement that Forum would have management control of the FRSD. *Id.* ¶ 235. On or about August 20, 1996 Forum terminated Zagachin’s position as general director of the FRSD. *Id.* ¶ 236.

On August 19, 1996 representatives of Forum, including Keffer, met with Hay and Michael Butler, and possibly others, to reach a resolution regarding the ownership and management of the FRSD and Forum’s remaining obligations under the July 25 contract. *Id.* ¶ 237. Butler was an attorney who had previously worked as a consultant to HIID and may have been employed by Harvard at the time. *Id.* ¶ 238. According to the plaintiffs, at this meeting Forum described to Butler “[the alleged] fraud that had been perpetrated against Forum [by Hay]” or “Mr. Hay’s misuse of his position and influence with respect to the [July 25] contract.” *Id.* ¶ 241. Specifically, Forum described to Butler, *inter alia*, “the history of [Forum’s] involvement in Russia, [Forum’s] involvement in the FRSD, . . . the history [of Forum’s] involvement with the [July 25] contract, [Forum’s] involvement with Mr. Hay, [Forum’s] involvements with Ms. Hebert, [Forum’s] involvements with Ms. Zagachin, Mr. Hay’s activities in negotiating for Ms. Zagachin’s partial ownership, Mr. Hay’s insistence that Ms. Zagachin be the general manager of the company.” *Id.* ¶ 242. Following the meeting, on the same day, a document entitled “Mike’s Proposal” was presented to Forum which suggested options that Keffer had suggested to Hay on August 11, including Forum’s sale of the FRSD. *Id.* ¶ 243.¹⁷

¹⁷ The plaintiffs purport to deny this paragraph of the defendants’ statement of material facts, Plaintiffs’ Responsive SMF ¶ 243, but their denial does not controvert any of the factual assertions included in the paragraph.

By mid- or late August 1996 Forum had decided to cease doing business in Russia and sell the FRSD. *Id.* ¶ 245.¹⁸ At all times prior to the sale of the FRSD in September 1996 Forum retained complete management control and ownership of the FRSD. *Id.* ¶¶ 248-49, 253. On or about September 4, 1996 Keffer and Forum sold their interest in the FRSD to Zagachin (through Oasis) for \$408,000. *Id.* ¶ 255. Of this amount, \$8,000 was reimbursement of Forum’s attorney fees associated with its sale of the FRSD. *Id.* ¶ 258. Zagachin’s purchase of the FRSD was financed by a loan from Hebert. *Id.* ¶ 259. Hebert obtained the money as a loan from Hay’s father. Plaintiffs’ Statement of Plaintiffs’ SMF ¶ 84; Harvard Responsive SMF ¶ 84. Hay’s father borrowed half of these funds from a joint account that he held with Hay. Defendants’ SMF ¶ 262; Plaintiffs’ Responsive SMF ¶ 262.¹⁹ Shleifer did not have any personal financial stake in any of these loans. *Id.* ¶ 264. No Harvard or Shleifer money was used in any way in connection with any loan or transaction related to the purchase of the FRSD. *Id.* ¶ 326.²⁰

On October 10, 1996 the Russian SEC terminated the July 25 contract. *Id.* ¶ 267. On that date the Russian SEC told Forum that it “[was] entitled to payments equal to costs of services [rendered under the contract]” and encouraged Forum to submit invoices so it could be paid for such services. *Id.* ¶ 268. Forum or Forum Consulting submitted an invoice to ILBE on or about October 25, 1996 with copies to Vasiliev and Hay. *Id.* ¶¶ 270-71. Discussions and negotiations about payment began in late October 1996 and continued for approximately three months. *Id.* ¶ 269. On or about November 4, 1996 Forum submitted to ILBE a revised invoice in response to questions raised by ILBE about the

¹⁸ The plaintiffs purport to deny this paragraph of the defendants’ statement of material facts, Plaintiffs’ Responsive SMF ¶ 245, but their denial does not controvert any of the factual assertions included in the paragraph.

¹⁹ The plaintiffs purport to deny this paragraph of the defendants’ statement of material facts, Plaintiffs’ Responsive SMF ¶ 262, but their denial does not address any of the facts asserted in the paragraph.

²⁰ The plaintiffs purport to deny this paragraph of the defendants’ statement of material facts, Plaintiffs’ Responsive SMF ¶ 326, but their denial does not address any of the facts asserted in the paragraph.

October invoice. *Id.* ¶ 275. On or about December 18, 1996 Forum submitted to ILBE a further revised invoice. *Id.* ¶ 280.

On or about January 17, 1997 Forum Consulting entered into a set of mutual releases with the Russian SEC pursuant to which Forum Consulting was paid approximately \$397,000 for its work performed under the July 25 contract. *Id.* ¶ 289. One of these releases is the release at issue in this action (“the Release”); it was negotiated with Butler. *Id.* ¶ 292.

Forum did not have any communications or other interactions with Shleifer. *Id.* ¶ 329. Shleifer never made any false or misleading statements to Forum. *Id.* ¶ 334. He never made any statement that induced Forum to act in any way in connection with Forum’s business dealings in Russia. *Id.* ¶ 335.

On May 20, 1997 USAID suspended Harvard’s cooperative agreements, stating, *inter alia*, “Activities for individual gain by personnel placed in a position of trust in Russia and financed under these USAID cooperative agreements is not in the national interest of the United States. . . . [The General Director in Moscow and the Project Director] have abused the trust of the United States government by using personal relationships, on occasion, for private gain.” Plaintiffs’ SMF ¶ 93; Harvard Responsive SMF ¶ 93. On May 23, 1997 Harvard removed Shleifer and Hay from their positions with HIID and the Russia Project. *Id.* ¶ 94.

III. Discussion

The plaintiffs allege that Hay engaged in fraudulent misrepresentation, negligent misrepresentation and tortious interference with a prospective economic advantage and that Shleifer aided and abetted Hay in these torts. Complaint (Docket No. 1) ¶¶ 88-132. They assert that Harvard is vicariously liable for the actions of Shleifer and Hay and that it negligently failed to supervise

Shleifer and Hay. *Id.* ¶¶ 133-48. The plaintiffs seek punitive damages from all three defendants. *Id.* ¶¶ 149-53.

Harvard contends that the plaintiffs' claims are barred by the Release signed on or about January 17, 1997, that no false promises were made, that any reliance by the plaintiffs was unreasonable and that the plaintiffs suffered no damages. Memorandum in Support of Motion for Summary Judgment of President and Fellows of Harvard College ("Harvard Mem.") (filed with Docket No. 75) at 2. The other defendants join in these arguments. Shleifer Mem. at 1; Motion for Summary Judgment of Jonathan R. Hay, etc. ("Hay Motion") (Docket No. 71) at 1-2. Harvard also argues that it cannot be held liable for the torts of Hay and Shleifer, that negligent supervision is not a cause of action under Maine law, that the claim for punitive damages fails as a matter of law and that it is entitled to charitable immunity. Harvard Mem. at 24-36.²¹ Shleifer contends that this court lacks personal jurisdiction over him. Motion [for Summary Judgment filed by Andrei Shleifer] (Docket No. 102).

The plaintiffs respond that the question of this court's jurisdiction over Shleifer has been foreclosed by its ruling on an earlier motion to dismiss brought by Shleifer on this ground, Memorandum of Decision and Order Denying Defendants' Motions to Dismiss ("Dismissal Decision") (Docket No. 57); that this court's ruling on the defendants' motion to dismiss also forecloses any further litigation concerning the effect of the release; that they have provided sufficient evidence to allow their tort claims and claim for punitive damages to proceed; that a cause of action for negligent supervision of employees does exist in Maine law; and that Harvard is not entitled to

²¹ Harvard also suggests that it is entitled to summary judgment on an claims arising out of its alleged vicarious liability for the actions of Hay or Shleifer if the court determines that it lacks jurisdiction over either of those defendants, because such a defendant would be an indispensable party. Motion for Summary Judgment of Defendant President and Fellows of Harvard College (Docket No. 75) at 1-2; Motion for Summary Judgment on the Basis of Fed. R. Civ. P. 19 of Defendant President and Fellows of Harvard College, etc. ("Harvard's Rule 19 Motion") (Docket No. 105).

charitable immunity. Plaintiffs' Consolidated Objection and Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment ("Plaintiffs' Opposition") (Docket No. 85) at 20-50.

A. Personal Jurisdiction over Shleifer

This court found in November 2001 that the plaintiffs had alleged sufficient facts to make a *prima facie* showing that it has specific personal jurisdiction over Shleifer. Dismissal Decision at 20-26. Contrary to the plaintiffs' argument, this does not mean that Shleifer may not attempt to establish at the summary judgment stage of the proceedings that the court does not in fact have such jurisdiction. It is true, as the plaintiffs point out, Plaintiffs' Objection and Memorandum of Law in Opposition to Defendant Andrei N. Shleifer's Motion for Summary Judgment (Docket No. 107) at 2, that the First Circuit said in *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671 (1st Cir. 1992), that

if . . . [a trial court] applies the *prima facie* standard [to a motion brought pursuant to Rule 12(b)(2)] and denies the motion to dismiss, it is implicitly, if not explicitly, ordering "that hearing and determination [of the motion to dismiss] be deferred until the trial."

Id. at 676 (quoting Rule 12(d)). Such an implicit order does not bar consideration of the issue in the context of summary judgment, however, when the factual record that will be presented at trial has presumably been fully developed.

Using the test set forth in *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088 (1st Cir. 1992), this court found in connection with Shleifer's motion to dismiss for lack of personal jurisdiction that the plaintiffs had sufficiently alleged that Hay, Hebert, Zagachin and Zimmerman were agents of Shleifer; that they had sufficiently alleged facts to support a conclusion that legal cause and cause-in-fact for their injuries existed in Maine; that the defendants were alleged to have purposefully sought out the plaintiffs in Maine and initiated contacts with the plaintiffs in Maine to an extent that established purposeful availment of the benefits of doing business

in Maine; and that exercise of jurisdiction over Shleifer would be reasonable under the circumstances. Dismissal Decision at 21-26 & n.22.

Shleifer now contends that the evidence adduced in discovery has established that “there is not a scintilla of evidence” that Shleifer himself traveled to Maine in connection with the business transactions at issue; that Shleifer directed any mail, fax or telephone communications to Maine; that Hebert or Zagachin were agents of Shleifer or that he directed their actions in Maine; or that Zimmerman ever had any contacts with Forum or with Maine. Shleifer Mem. at 3. This argument focuses on the element of the test for exercise of specific personal jurisdiction that is generally referred to as minimum contacts with the forum state. *See generally 163 Pleasant St. Corp.*, 960 F.2d at 1088-89 (setting out three elements of test for specific personal jurisdiction). With respect to this element, the court found in connection with the motion to dismiss that alleged co-conspirators of defendants Hay and Shleifer traveled to Maine “at the direction of Hay to solicit the contract with Forum” and that they “focused their business efforts on entities and persons in the State of Maine.” Dismissal Decision at 23-24. While it is true that the summary judgment record contains no evidence that Shleifer, unlike Hay, controlled or supervised the activities of Hebert or Zagachin or that he personally directed any of their contacts with Forum in Maine or was even aware that Forum was the target of the efforts of Hay, Hebert and Zagachin, and that any conclusion that he did so would require the drawing of inferences not supported by the record evidence, the court also found that Hay and Shleifer sought to benefit financially from the contacts with Forum in Maine. *Id.* at n.23. The court concluded that this provided an additional basis for the exercise of specific personal jurisdiction over them. *Id.* There is evidence in the summary judgment record, albeit disputed, to support such a conclusion. *E.g.*, Plaintiffs’ Statement of Additional Facts (included in Plaintiffs’ Statement of Material Facts in Opposition to: Defendant Shleifer’s Motion for Summary Judgment Based on

Absence of Personal Jurisdiction, etc. (Docket No. 109) at 6-21) ¶¶ 9, 10, 12-23, 29-32, 36, 38-40, 44-50.²² Accordingly, summary judgment on this issue is not appropriate; the ultimate determination concerning the existence of specific personal jurisdiction must await the attention of the factfinder at trial.²³ Shleifer's motion for summary judgment on this basis (Docket No. 102) should be denied.

B. Effect of the Release

In response to the defendants' argument in connection with the motion to dismiss that the Release barred the plaintiffs' claims because they were "connected to," "in connection with" or made "under" the July 25 contract, this court held that the language of the release "is insufficient to plainly and unequivocally release claims for damages not based on the Contract" and that the claims asserted in the complaint are not based on the contract. Dismissal Decision at 49-50. The defendants now contend that "evidence adduced in discovery . . . establishes that plaintiffs' present claims are within the scope of the Release since they are 'in connection with the Contract.'" Harvard Mem. at 13-14. To the contrary, none of the evidence cited by the defendants suggests any reason why the language of the release should be interpreted differently from the way in which the court construed it in ruling on the motion to dismiss.²⁴ That evidence, summarized in Harvard's reply memorandum, Reply Memorandum of Defendant President and Fellows of Harvard College, etc. ("Harvard Reply")

²² Harvard denies paragraphs 9 and 38 of the plaintiffs' statement of additional facts, asserting in each case that "[t]he cited authority does not support this Statement." Reply Statement of Material Facts of Defendant President and Fellows of Harvard College, etc. (Docket No. 115) ¶¶ 9, 38. In the case of paragraph 9, the cited authority supports the assertion that Shleifer had to approve Zimmerman's investments; it does not support the assertion that Shleifer had to approve the investments of Hebert and Hay. Plaintiffs' Appendix of Transcripts, etc., filed with Docket No. 109), Exh. 11 (Videotape Deposition of Jonathan Hay) at 533-37, 540-41. With respect to paragraph 38, the cited authority supports the assertions that the four named individuals met at the time and location stated and that Shleifer and Hay discussed in the same month the possibility of Zimmerman providing funding for the FRSD. *Id.* Exh.3 (Deposition of Grant Felgenhauer) at 73-74; Exh. 4 (Continued Deposition of Jonathan Hay) at 178-80.

²³ This conclusion renders moot the motions of Harvard and Hay for summary judgment under Fed. R. Civ. P. 19 alleging that Shleifer is an indispensable party. Defendant Jonathan R. Hay's Motion for Summary Judgment on the Basis of Fed. R. Civ. P. 19, etc. (Docket No. 101); Harvard's Rule 19 Motion.

²⁴ Contrary to Harvard's suggestion, Harvard Mem. at 13, the court expressed no "concern" in ruling on this issue in connection with the motion to dismiss that could be addressed with further discovery. The court's interpretation of the language of the release and the claims made by the plaintiff, none of which has changed, was not in the least tentative. Dismissal Decision at 49-50.

(Docket No. 96) at 3-4, not only is not “fatal to [the plaintiffs’] claims,” *id.* at 4, it is also completely consistent with tort claims that are distinct from claims raised in connection with the July 25 contract. In addition, some of the asserted facts are properly disputed by the plaintiffs.

There is no need to revisit further the assertion that the plaintiffs’ claims are barred by the release.

C. False Statements

The defendants next contend that all of the plaintiffs’ claims are based on assertions that Hay made false statements in 1996 upon which they relied, that the evidence establishes that none of Hay’s statements was false and that any reliance by the plaintiffs on those statements was unreasonable as a matter of law. Harvard Mem. at 14-20. The plaintiffs respond that the evidence is sufficient to allow their claims to proceed and that the defendants misstate the applicable law. Plaintiffs’ Opposition at 28-38.

The defendants assert that “[t]he short, but sufficient, answer to plaintiffs’ claims is that Forum had both ownership and control of FRSD until it voluntarily relinquished them (for \$408,000), and thus Hay’s alleged representations were absolutely fulfilled.” Harvard Mem. at 15. As this court previously noted when the defendants raised this issue in their motions to dismiss, Dismissal Decision at 37-38, this “answer” is anything but sufficient under the circumstances of this case. Contrary to the defendants’ contention, the evidence concerning the voluntary nature of the plaintiffs’ sale of the FRSD is very much in dispute. The fact that “no one ever told Forum they had to give up ownership or management control of the FRSD,” Harvard Mem. at 15 n.3, is an over-simplified view of the necessary factual support for the plaintiffs’ position on this question. It is the plaintiffs’ position that they would have been unable to continue to hold management control of the FRSD, contrary to Hay’s representations, and there is disputed evidence in the summary judgment record to support that claim.

There is also disputed evidence that would allow a reasonable factfinder to conclude that Hay knew at the time he made the representations that Forum would not be allowed to maintain management control once the FRSD became fully operational. As the court noted previously, Dismissal Decision at 37-38, the evidence that the defendants were simultaneously seeking other United States investors in the FRSD while Hay was promising the plaintiffs that they would own and control the entire portion not required by Russian law to be held by Russian investors or owners would allow a factfinder to conclude that Hay's representations to Forum were false when made. This evidence is present in the summary judgment record. Plaintiffs' SMF ¶¶ 51-56.

The defendants next contend, Harvard Mem. at 16-20, that there is no evidence in the summary judgment record that would allow a reasonable factfinder to conclude that the plaintiffs' reliance on Hay's alleged misrepresentations was reasonable, a necessary element of the claims of fraudulent misrepresentation, negligent misrepresentation and tortious interference, *see, e.g., Reed Paper Co. v. Procter & Gamble Distrib. Co.*, 807 F. Supp. 840, 844 (D. Me. 1992) (elements of claim of fraudulent misrepresentation under Maine law); *McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 53 (Me. 1996) (elements of claim of negligent misrepresentation); *Green v. Maine Sch. Admin. Dist. # 77*, 52 F.Supp.2d 98, 111 (D. Me. 1999) (elements of claim of tortious interference with economically advantageous relationship under Maine law).

The defendants first argue that Hay's allegedly false representations are not actionable under Maine law because Hay did not have exclusive control to make decisions with regard to the subject matter of the representations, citing *Kearney v. J.P. Auction Co.*, 265 F.3d 27 (1st Cir. 2201), *Veilleux v. National Broad. Co.*, 206 F.3d 92 (1st Cir. 2000), and *Chedd-Angier Prod. Co. v. Omni Publ'ns Int'l, Ltd.*, 756 F.2d 930 (1st Cir. 1985). Harvard Mem. at 16-17. The latter case deals with Massachusetts law, 756 F.2d at 939, and is not applicable here. The defendants contend that the

plaintiffs knew that “decisions concerning ownership and management control of the FRSD were within the control of the Russian SEC,” Harvard Mem. at 17, making any reliance on Hay’s representations on this subject unreasonable. The existence of exclusive control is discussed in *Kearney* and *Veilleux*, both of which deal with Maine law and accordingly may have value in the resolution of the issues raised by the parties in this case, in the context of whether the alleged misrepresentation could reasonably be construed as an averment of present fact rather than a statement of opinion or a promise of future performance, neither of which provides a basis for recovery in most circumstances under Maine law. *Kearney*, 265 F.3d at 34-38; *Veilleux*, 206 F.3d at 119-21. Here, the defendants apparently contend that the misrepresentations at issue were promises of future performance. Harvard Mem. at 17. However, the speaker’s exclusive control is not the sole means under Maine law by which a statement concerning future performance may be actionable as a negligent or fraudulent misrepresentation.

Under Maine law,

[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.

Boivin v. Jones & Vining, Inc., 578 A.2d 187, 188-89 (Me. 1990) (quoting *Shine v. Dodge*, 130 Me. 440, 444 (1931)). There is sufficient disputed evidence in the summary judgment record to prevent this court from concluding that no reasonable factfinder could decide that the plaintiffs were at the mercy of Hay insofar as any representations made regarding ownership and control of the FRSD. *Wildes v. Pens Unlimited Co.*, 389 A.2d 837, 840 (Me. 1978). Indeed, the plaintiffs contend that the defendants had sufficient control over the issue of ownership and management control of the FRSD to plan to obtain it for themselves at the plaintiffs’ expense. The defendants may not avoid liability on

the basis of the defendants' asserted lack of exclusive control over the plaintiffs' ability to own and manage the FRSD.²⁵

The defendants next argue that an integration clause in the July 25 contract extinguished any promises made by Hay or any other defendant or agent of any defendant made before that date and thus made any reliance on such promises after that date unreasonable. Harvard Mem. at 18-19. The plaintiffs respond that their claims sound in tort, not in contract, that the misrepresentations at issue do not concern any services to be performed under the contract, that not all of the misrepresentations occurred before July 25, and that none of the defendants is a party to the contract, so they may not invoke the protection of any of its provisions. Plaintiffs' Opposition at 34-37. The parties to the July 25 contract are Forum and the Russian SEC. Defendants' SMF ¶ 143; Plaintiffs' Responsive SMF ¶ 143. The integration clause of the July 25 contract on which the defendants rely provides:

This Contract contains all covenants, stipulations and provisions agreed by the Parties. No agent or representative of either Party has authority to make, and the Parties shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein.

Id. ¶ 177. Even if Hay is considered an agent or representative of the Russian SEC, a position vigorously contested by the plaintiffs, this clause does not make the plaintiffs' alleged reliance on his representations unreasonable *per se*. Under this integration clause the parties have no liability for any promises or representations not set forth in the document; the plaintiffs do not seek to establish any liability on the part of the Russian SEC. The plaintiffs have submitted evidence that the FRSD was created before the contract was executed, Plaintiffs' SMF ¶ 62, and that the July 25 contract concerned consulting services and was independent of the FRSD, *id.* ¶¶ 38, 40, 42, 44, 48-50; Plaintiffs'

²⁵ In connection with their "exclusive control" argument, the defendants assert that the plaintiffs ask this court to inquire into the legality or validity of the actions of the Russian state, in violation of the act-of-state doctrine. Harvard Mem. at 17 n.7. This court has already found the act-of-state doctrine to be inapplicable in this case, after a much more extensive argument presented in connection with the motions to dismiss. Dismissal Decision at 48-49. The defendants offer no reason why the court should revisit that determination, and I (*continued on next page*)

Responsive SMF ¶ 28. On the current state of the summary judgment record, the existence of the integration clause in the July 25 contract cannot be deemed to render the plaintiffs' alleged reliance on any of the defendants' representations unreasonable.

Finally, the defendants contend that any reliance by the plaintiffs was unreasonable because "they acknowledge distrusting Hay as early as March 1996." Harvard Mem. at 19. One of the three paragraphs of the defendants' statement of material facts cited by them in support of this assertion deals with an alleged distrust arising in early June, not March, and in their qualified response to that paragraph the plaintiffs state that only one representative of Forum (its in-house counsel and principal negotiator Dana Lukens), and not plaintiff Keffer or another representative of Forum (David Goldstein), entertained such distrust at that time. Defendants' SMF ¶ 169; Plaintiffs' Responsive SMF ¶ 169. The other paragraphs on which the defendants rely establish only that the plaintiffs investigated the "legitimacy" of HIID and Hay. Defendants' SMF ¶¶ 167-68. The fact that the plaintiffs took steps to assure themselves that Hay was who he represented himself to be and that HIID was in fact an existing entity engaged in the activities in which it represented itself to be engaged does not mean that the plaintiffs had reason to doubt the veracity of Hay's representations. The defendants also contend that Zagachin's statement to Forum on May 10, 1996 that she "wanted to have management control" of the proposed specialized depository, *id.* ¶ 150, makes any subsequent reliance on Hay's representations that the plaintiffs would have management control unreasonable, Harvard Mem. at 19. However, in the absence of evidence that the plaintiffs knew or should have known that Zagachin's stated desire would inevitably be implemented by the Russian SEC, that fact alone does not make the plaintiffs' reliance so unreasonable that a factfinder may not be permitted to determine the question. No such evidence is provided in the summary judgment record.

decline to do so.

The defendants are not entitled to summary judgment on the basis of their arguments concerning the nature of the alleged misrepresentations and the plaintiffs' reliance on them.

D. Absence of Provable Damages

The defendants seek summary judgment on Counts HIX on the ground that the evidence demonstrates that the “plaintiffs cannot prove any of their alleged damages.” Harvard Mem. at 20. They contend that the plaintiffs received full value for the FRSD when it was sold, that any claim for other damages is wholly speculative and that Keffer has shown no harm to himself independent of damage allegedly caused to Forum. *Id.* at 20-24. The plaintiffs respond that the defendants invoke an inapplicable theory of damages, that they have submitted sufficient evidence of damages and that Keffer's financial interest in the FRSD allows him to claim personal damages. Plaintiffs' Opposition at 39-41.

The defendants rely on *Rosenthal v. Rosenthal*, 543 A.2d 348 (Me. 1988), to support their argument that the plaintiffs received full value for the FRSD when it was sold to Zagachin through Oasis and accordingly have suffered no damage as a result of this “forced sale.” Harvard Mem. at 21. They contend that the plaintiffs may only seek nullification of the sale or the difference between the fair market value on the date of sale and the amount actually received and that no other remedy is available. *Id.* In *Rosenthal*, the Maine Law Court discussed the appropriate measure of damages on a claim of violation of fiduciary duty, for which the plaintiff is entitled to recover the benefits unjustly acquired by the wrongdoer. 534 A.2d at 348. Restitution is the only remedy discussed in that opinion. *Id.* Here, the plaintiffs have alleged several tort claims, none of which involves breach of fiduciary duty. It is the nature of the claim, not the similarity of the factual circumstances that may underlie two claims based on very different legal theories, that governs the availability of damages. The damages

available for interference with an expected economic advantage, for example, are not limited to restitution. *See, e.g., James v. MacDonald*, 712 A.2d 1054, 1058 (Me. 1998) (discussing damages including lost profits on claim of tortious interference). Accordingly, it is not necessary to discuss the question whether the summary judgment record contains any evidence from which a reasonable factfinder could conclude that the amount paid for the FRSD was less than its fair market value at the time.

The defendants next contend that the plaintiffs' evidence concerning lost business as an element of damages is "wholly speculative" and thus inadmissible, entitling them to summary judgment on all claims. Harvard Mem. at 22-23. While it is true that Maine law requires that, in order to be recoverable, damages must not be uncertain or speculative, *Tang of the Sea, Inc. v. Bayley's Quality Seafoods, Inc.*, 721 A.2d 648, 650 (Me. 1998), lost profits or future income are not too speculative *per se*. "Damages for loss of prospective profits are allowable only if they can be estimated with reasonable certainty." *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 650 (Me. 1993) (citation and internal punctuation omitted). The defendants' argument on this point, Harvard Mem. at 23, goes to the weight of such evidence in the summary judgment record, not its admissibility. The defendants are not entitled to summary judgment on this basis.

Finally, the defendants assert that there is no evidence that Keffer suffered any injury distinct from that suffered by Forum as a result of their alleged actions and that his claims must therefore be dismissed. Harvard Mem. at 24. The plaintiffs respond that "Keffer's financial interest in the FRSD is the economic interest at stake in this action, and he is a proper party Plaintiff." Plaintiffs' Opposition at 40-41. The premise of that sentence may well be true, but the conclusion does not necessarily follow from it. The fact that "[a]t all times, Keffer was 100 percent owner of Forum Financial Group," *id.* at 41, the other named plaintiff, does not give Keffer standing to seek relief as an

individual. A stockholder does not acquire, by virtue of that status, a personal cause of action for injuries to the corporation. *Pharmaceutical Research & Mfrs. of Am. v. Commissioner, Maine Dep't of Human Servs.*, 201 F.R.D. 12, 15 (D. Me. 2001). “Even a *sole* shareholder acquires no personal cause of action because of an injury . . . to the corporation.” *In re Dein Host, Inc.*, 835 F.2d 402, 406 (1st Cir. 1987) (emphasis in original). In the absence of any evidence of injury to Keffer distinct from the injuries alleged to have been suffered by the corporate plaintiff or its assignor, the defendants are entitled to summary judgment on Keffer’s individual claims. *See generally Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991) (RICO claims); *Alford v. Frontier Enters., Inc.*, 599 F.2d 483, 484 (1st Cir. 1979).

E. Arguments Made by Harvard Only

The remaining arguments in support of summary judgment are made only by Harvard, which contends that it cannot be held vicariously liable for the torts of Hay and Shleifer, that Maine law does not recognize a claim for negligent supervision like that set forth in Count IX of the complaint, that the plaintiffs’ claim for punitive damages fails as a matter of law and that it is immune from liability, or that its liability is limited to the extent of its applicable insurance coverage, under the doctrine of charitable immunity. Harvard Mem. at 24-36. All but the second of these arguments were addressed by the court in connection with Harvard’s motion to dismiss. I will address the new issue first.

1. Negligent Supervision. Count IX of the complaint alleges that Harvard “owed a duty to the Plaintiffs to supervise, oversee and manage Shleifer’s and Hay’s operation of its Russia Program .. including the duty to retain and supervise its agents and employees in a reasonable manner,” Complaint (Docket No. 1) ¶ 145, and that its breach of this duty caused them damages, *id.* ¶¶ 146-48. Harvard asserts that Maine does not recognize the independent tort of negligent supervision. Harvard Mem. at 30-31. In their response, the plaintiffs conflate their negligent supervision claim with their

claims based on *respondeat superior* liability, asserting that this court in its order on the motions to dismiss somehow addressed Maine law regarding negligent supervision claims. Plaintiffs' Opposition at 44. The legal theory of negligent supervision is not addressed in the court's order, which discusses the separate legal theory of *respondeat superior* liability that is set forth in Counts VII and VIII of the complaint. The Maine Law Court in fact has not adopted the theory of negligent supervision as an independent basis for recovery. When asked to do so "for the first time" in *Napieralski v. Unity Church of Greater Portland*, 802 A.2d 391, 392 (Me. 2002), it declined to reach the issue, *id.* The theory was discussed in *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 444 & n.5 (Me. 1997), but again was not adopted. Count IX cannot reasonably be interpreted to allege any claim other than one resting on a theory of negligent supervision. This court has rejected claims based on common law torts not adopted by the Law Court, *e.g. Town & Country Motors, Inc. v. Bill Dodge Auto. Group, Inc.*, 115 F.Supp.2d 31, 33 (D. Me. 2000), and it should continue to do so. *See generally Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 744 (1st Cir. 1990) ("litigants who reject a state forum in order to bring suit in federal court under diversity jurisdiction cannot expect that new trails will be blazed"). The defendants are entitled to summary judgment on Count IX.

2. *Vicarious Liability.* In its order on the defendants' motions to dismiss, the court held that the plaintiffs had credibly alleged that Harvard held out Hay and Shleifer, its employees, as cloaked with apparent authority to act on its behalf, pointing out that Hay and Shleifer used Harvard and HIID letterhead, business cards and credentials and "were otherwise conducting various activities under the apparent aegis of Harvard." Dismissal Decision at 42-43. It also held that Harvard had failed to establish that Hay and Shleifer were acting outside the scope of their employment without apparent authority or without assistance in accomplishing their alleged torts by the existence of the agency

relationship. *Id.* at 44. Harvard now contends that Hay and Shleifer did not have apparent authority to act as alleged²⁶ and that there is no evidence that the alleged actions were intended to benefit Harvard or that Harvard had knowledge of any improper intent on the part of Hay or Shleifer. Harvard Mem. at 25-29. The plaintiffs respond, with remarkable brevity, that Harvard has provided no new evidence or legal argument to justify a change in the court's earlier ruling. Plaintiffs' Opposition at 42-43.

Under Maine law, apparent authority

is that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing. Apparent authority exists only when the *conduct of the principal* leads a third person to believe that a given party is his agent.

Libby v. Concord Gen. Mut. Ins. Co., 452 A.2d 979, 982 (Me. 1982) (citations and internal punctuation omitted; emphasis in original). Apparent authority may also arise when the principal negligently holds someone out as possessing authority to act for him. *Williams v. Inverness Corp.*, 664 A.2d 1244, 1246 (Me. 1995).

Harvard first argues that it may not be held liable under the doctrine of apparent authority for any conspiracy in which Hay and Shleifer may have been involved, because a conspiracy is by nature secretive and apparent authority is "open and notorious." Harvard Mem. at 25-26. The complaint does allege that Hay and Shleifer engaged in a conspiracy to misappropriate the FRSD, *e.g.*, Complaint ¶¶ 38, 41, 51, 56, 60, 75, 81-82, but that is not the only basis for the claims asserted, *see id.* ¶¶ 133-42. To the extent that claims based solely on a conspiracy theory may reasonably be identified in the complaint and therefore may be subject to summary judgment on this basis, none of the case law cited by Harvard supports its position. In fact, the concepts of conspiracy and apparent authority are not mutually exclusive. *See, e.g., Hydrolevel Corp. v. American Soc. of Mech. Eng'rs, Inc.*, 635 F.2d

²⁶ To the extent that Harvard's argument in this regard is based on its assertion that "the overwhelming evidence of record is that Hay never made a false promise to plaintiffs," Harvard Mem. at 26, I have already rejected that conclusion and will not discuss the matter (*continued on next page*)

118, 127 (2d Cir. 1980) (sufficient for plaintiff to demonstrate that defendant’s agents acted with apparent authority when participating in alleged conspiracy); *Worley v. Columbia Gas of Kentucky, Inc.*, 491 F.2d 256, 260 (6th Cir. 1973) (plaintiff failed to prove that agent had apparent authority so that defendant could be tied to conspiracy); *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 848 F. Supp. 797, 812 (N.D. Ill. 1994) (genuine issue of material fact as to whether agent acted with apparent authority when allegedly conspiring with third party). Harvard’s argument on this point is without merit.

Harvard next contends that there is no evidence in the summary judgment record that the alleged conduct of Hay and Shleifer occurred with its apparent authority. The evidence that this court found sufficient on this point in the context of the motions to dismiss is also present in the summary judgment record, *e.g.*, Plaintiffs’ SMF ¶¶ 35, 48, 50; Defendants’ SMF ¶¶ 11, 15, 18, 25; Plaintiffs’ Statement of Additional Facts ¶¶ 6, 34, 59, 63, and Harvard offers no reason why it should be disregarded at this point. The material evidence on this issue can only be described as disputed, and summary judgment is accordingly not available.

Harvard’s next argument is that the alleged actions of Hay and Shleifer may not be imputed to their employer because “the attempted misappropriation could not, as a matter of law, have been done for the benefit of Harvard.” Harvard Mem. at 28. This argument rests on an unduly restrictive view of the doctrine of scope of employment. The First Circuit has held, in the context of a criminal proceeding, that an agent is acting within the scope of his employment only when he is “performing acts of the kind which he is authorized to perform, and those acts must be motivated — at least in part — by an intent to benefit” the principal. *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982). Assuming *arguendo* that this statement, clearly limited by the context in which it appears to

further.

consideration of intent as an element of a criminal charge, *id.* at 242, may be applied in the context of a tort claim, *cf. Nichols v. Land Transp. Corp.*, 223 F.3d 21, 24 (1st Cir. 2000) (under Maine law, servant's tort is committed in scope of employment only if actuated at least in part by purpose to *serve* the master; emphasis added), the evidence in the summary judgment record does not preclude a reasonable factfinder from reaching the conclusion that Hay and Shleifer intended to benefit Harvard as well as themselves by their alleged activities. In any event, Maine law on the scope of employment, as distinct from the federal criminal law at issue in *Cincotta*, allows for a more expansive consideration of the scope of employment and is applicable here. As this court noted in its ruling on the motion to dismiss, Dismissal Decision at 44, under Maine law an employer may be liable for conduct of an employee that was outside the scope of his employment if the employee "was aided in accomplishing what he did because of the fact that he bore the employee relationship to the employer," *McLain v. Training & Dev. Corp.*, 572 A.2d 494, 497-98 (Me. 1990). *See also Grover v. Minette-Mills, Inc.*, 638 A.2d 712, 717 (Me. 1994) (employer vicariously liable for tortious interference of employee that was aided by employment relationship). The evidence in the summary judgment record would certainly allow a reasonable factfinder to conclude that Harvard's employment of Hay and Shleifer aided them in accomplishing the alleged torts at issue. Hay and Shleifer would not have been involved in the development of the mutual funds industry in Russia were it not for their employment by Harvard. Absent that involvement, Hay and Shleifer could not have caused the harm they are alleged to have caused to the plaintiffs.

Harvard further argues that it cannot be held vicariously liable on the aiding and abetting claims against Shleifer because there is no evidence that Shleifer had knowledge of Hay's tortious purpose, so any such claims must be dismissed. Harvard Mem. at 28-29. The court rejected this argument in connection with the motions to dismiss, Dismissal Decision at 40-42, and Harvard offers

no reason to justify a different result at this time. The disputed evidence in the summary judgment record, e.g., Plaintiffs' SMF ¶¶ 51-52, 54, 56, 58, 74-75, 89-91; Plaintiffs' Statement of Additional Facts ¶¶ 9-10, 13-19, 31-32, 36, 38-40, would allow a reasonable factfinder to infer that Shleifer did know that Hay was making false representations to Forum. Therefore, summary judgment is not available on this basis.

Finally, Harvard contends in a footnote that it cannot be liable for any torts of Hay because he was acting as the borrowed servant of the Russian SEC when the alleged torts were committed. Harvard Mem. at 27 n.15.

It is a universally recognized rule that a master may loan or let his servant to another in such a way that he becomes the servant of the other for the time being. Although the employee in such a case remains the general servant of his regular master, for anything he does in the transaction for which he is loaned or let, his special employer has all the usual liabilities of a master. On the other hand, the master may agree with another that he will perform the work of the other through his own servant, who is retained in his service and under his direction and control. If so, the original master remains solely liable for the acts of the servant. In determining where the liability rests in this class of cases, the test which has long and repeatedly been applied is whether, in the particular service which the servant is performing at the time of his tort, he was liable to the general direction and control of his original employer or had become subject to that of the person for whom the work was being done.

* * *

...The original master remains liable and the employee remains his agent, unless the authority to direct and control the servant in all the details of the transaction is surrendered to some other person, so that the business in which the servant is engaged is no longer the business of his general employer, but is in all respects the business of the person to whom he is sent.

Frenyea v. Maine Steel Prods. Co., 170 A. 515, 516-17 (Me. 1934) (citations omitted). The circumstances surrounding the particular employment are determinative. *Boyce's Case*, 81 A.2d 670, 673 (Me. 1951). Harvard's citations in this footnote to paragraph 27 of its statement of material facts does not support the assertion that Hay was acting at all relevant times as the servant only of the Russian SEC; its citations to the complaint in support of that assertion are inappropriate where, as

here, the summary judgment record makes clear that such a factual assertion is very much in dispute. *See, e.g.*, Defendants' SMF ¶ 83, Plaintiffs' Responsive SMF ¶ 83. It is not possible to conclude from the summary judgment record that Hay acted at all relevant times only as the agent of the Russian SEC and not as the agent of Harvard. Because either conclusion may reasonably be drawn from the evidence in the summary judgment record, Harvard is not entitled to summary judgment on this basis.

3. *Punitive Damages.* Harvard asserts that punitive damages are not available on a claim of vicarious liability. Harvard Mem. at 31. That assertion misstates both Maine and federal law. *See Larose v. Berman*, 122 A. 433, 434 (Me. 1923); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 542-43 (1999). As this court pointed out when this issue was raised in Harvard's motion to dismiss, Dismissal Decision at 45-46, punitive damages are available against a principal because of an act by an agent if the principal authorized the act, the agent was unfit and the principal was reckless in employing him, the agent was employed in a managerial capacity and was acting within the scope of his employment or a managerial agent of the employer ratified or approved the act, *Kolstad*, 527 U.S. at 542-43. The plaintiffs invoke the third and fourth alternatives. Plaintiffs' Opposition at 41. Harvard contends that "there is no evidence that Shleifer or Hay ever had managerial positions at Harvard," suggesting, without citation to authority, that managerial positions "only on HIID's project in Russia" cannot constitute managerial positions at Harvard. Harvard Mem. at 32. A principal may not insulate itself from liability for punitive damages arising from an agent's tort merely by designating that employee as a manager "only" of a division or project within the principal's business. Harvard and HIID are not separate entities; managers of HIID are managerial employees of Harvard. *See Mancuso v. City of Atlantic City*, 193 F.Supp.2d 789, 807-09 (D. N.J. 2002) (assistant chief of city beach patrol could be managerial employee of city for purposes of assessment of punitive damages).

Harvard next argues that, as a matter of law, Hay and Shleifer could not have been acting within the scope of their employment at the time of the alleged tortious activity. Harvard Mem. at 32. I have already noted that the evidence on this point remains very much in dispute.

Finally, Harvard contends, *id.* at 33-34, that there is no evidence of malice against the plaintiffs on the part of any of the defendants or of conduct so outrageous that malice may be implied, the applicable standard under Maine law, *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). The plaintiffs indicate that they rely only on the second alternative. Plaintiffs' Opposition at 41-42. I have already rejected many of the assertions upon which Harvard relies to support its argument, Harvard Mem. at 33-34; the facts involved remain in dispute. The plaintiffs assert that the alleged actions of Hay and Shleifer were "egregious," "outrageous," "surreptitious" and "fraudulent," Plaintiffs' Opposition at 42, all conclusory terms which are of little help in the necessary analysis of the record evidence. The paragraph of the plaintiffs' statement of material facts cited by them in support of their argument on this point, Plaintiffs' SMF ¶ 47, does not support the characterization made in their memorandum of law, Plaintiffs' Opposition at 42. I conclude that insufficient evidence exists to allow the claim for punitive damages to proceed on a theory of conduct so outrageous that malice may be implied. While the alleged conduct of the defendants is less than admirable, the facts presented in the summary judgment record cannot reasonably be construed to allow the implication of malice. Under Maine law, something more than self-interest by a defendant is required to allow a finding of conduct so outrageous that malice may be implied. *See, e.g., Newbury v. Virgin*, 802 A.2d 413, 418 (Me. 2002) (implied malice may be found where evidence showed defendant planned to drive plaintiff out of business, did not like plaintiff, and knew that his actions would cause plaintiff's business to fail); *Pettee v. Young*, 783 A.2d 637, 639, 643 (Me. 2001) (no implied malice where defendant refused to allow plaintiff to use existing easement and used family connection to bring local police to

visit plaintiff to urge him not to use easement); *Palleschi v. Palleschi*, 704 A.2d 383, 385 (Me. 1998) (punitive damages award upheld where ex-husband defendant subjected ex-wife plaintiff to severe physical, sexual and emotional abuse). The plaintiffs have presented evidence in this case of nothing beyond service of the interests of Hay and Shleifer to the exclusion of the interests of the plaintiffs inherent in the actions of the defendants and evidence that would allow a factfinder to conclude that the defendants committed the alleged torts. This evidence would not allow a reasonable factfinder to conclude that malice could be implied from the defendants' alleged actions. Accordingly, Harvard, the only defendant moving for summary judgment on this claim, is entitled to summary judgment on Count X, which seeks punitive damages against all of the defendants.

4. *Charitable Immunity*. Harvard seeks summary judgment on the basis of the doctrine of charitable immunity, claiming both that it is immune from all liability and that it is not immune only to the extent that its potential liability is covered by insurance, which Harvard "may have." Harvard Mem. at 34 & n.22. Harvard presented this issue in its motion to dismiss, and this court ruled that it has "failed to carry its burden of establishing, on this record, that it derives its funds mainly from charity and, therefore, the affirmative defense of charitable immunity is inapplicable to it in this case." Dismissal Decision at 50. The plaintiffs take the position that this ruling is law of the case and may not be revisited at this time. Plaintiffs' Opposition at 46.

Under Maine law,

[a]n organization is entitled to charitable immunity if it has no capital stock and no provision for making dividends or profits and derives its funds mainly from public and private charity, holding them in trust for the object of the institution.

Coulombe v. Salvation Army, 790 A.2d 593, 595 (Me. 2002) (citation and internal punctuation omitted). This is an affirmative defense. *Id.* at 594.

A charitable organization shall be considered to have waived its immunity from liability for negligence or any other tort during the period a policy of insurance is effective covering the liability of the charitable organization for negligence or any other tort. Each policy issued to a charitable organization shall contain a provision to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such organization is immune from liability on the ground that it is a charitable organization. The amount of damages in any such case shall not exceed the limits of coverage specified in the policy, and the courts shall abate any verdict in any such action to the extent that it exceeds such policy limit.

14 M.R.S.A. § 158. The party asserting the defense bears the burden of establishing that it did not waive its charitable immunity. *Coulombe*, 790 A.2d at 596.

Here, Harvard states that “it appears as if Harvard may have insurance coverage in this case.” Harvard Mem. at 34 n.22. Nothing further concerning such insurance appears in any party’s statement of material facts. If Harvard has such insurance, it has waived any possible charitable immunity defense to the extent of the limits of available coverage. Unless and until a damages award has been made against Harvard after trial, it is not possible to know whether the limits of that coverage will be exceeded. Not until that time could it be necessary for the court to determine whether Harvard has established its entitlement to a charitable immunity defense. Under these circumstances, Harvard is certainly not entitled to summary judgment on the ground of charitable immunity, because it has admitted that it may have some insurance coverage. Nor is Harvard entitled to know whether it will be entitled to charitable immunity for the amount of an award that exceeds the unknown limit of the coverage that may be available, since it is impossible to determine at this time either what the coverage limit is or what amount of damages might be awarded. This court will not engage in a legal analysis that may well be unnecessary. Harvard may raise the defense at the appropriate time, when and if it becomes applicable.

IV. Conclusion

For the foregoing reasons, I recommend that the motions of defendants Hay and Shleifer for summary judgment be **GRANTED** as to any claims asserted by plaintiff Keffer and otherwise **DENIED** and that the motions of defendant Harvard for summary judgment be **GRANTED** as to any claims asserted by plaintiff Keffer and as to Counts IX and X (punitive damages) and otherwise **DENIED**.

NOTICE

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

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

Dated this ___th day of September, 2002.

David M. Cohen
United States Magistrate Judge

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