[*1]

White v Fee
2012 NY Slip Op 51133(U)
Decided on June 7, 2012
Supreme Court, Westchester County
Scheinkman, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 7, 2012

Supreme Court, Westchester County

Marilyn White, CANDIDA FUNKE, on behalf of Themselves and as Co-Executrices on behalf of the ESTATE OF CANDIDA M. FEE, as Shareholders of THE RELIABLE AUTOMATIC SPRINKLER CO., INC., and All Other Shareholders of Said Corporation Similarly situated, Plaintiffs,

against

Frank J. Fee, III, personally and as an Officer and Director of the RELIABLE AUTOMATIC SPRINKLER CO., INC., KEVIN FEE, personally and as an Officer and Director of THE RELIABLE AUTOMATIC SPRINKLER CO., INC., and MICHAEL FEE, personally and as an Officer and Director of THE RELIABLE AUTOMATIC SPRINKLER CO., INC., and THE RELIABLE AUTOMATIC SPRINKLER CO., INC., and FRANK J. FEE, III as Trustee of the MARITAL DEDUCTION TRUST u/w/o FRANK J. FEE, JR., Article VII, and FRANK J. FEE, III, as Trustee of the RESIDUARY TRUST u/w/o FRANK J. FEE, JR. Article VII, , Defendants.

57828/11

APPEARANCES:

BASHIAN & FARBER, LLP

By: Gary E. Bashian, Esq.

Irving O. Farber, Esq. Michael B. Karlsson II, Esq.

Andrew Frisenda, Esq.

Outgoing Counsel for Plaintiffs

235 Main Street

White Plains, NY 10601

BOIES, SCHILLER & FLEXNER, LLP

By: Nicholas A. Gravante, Esq.

Andrew Z. Michaelson, Esq.

Incoming Counsel for Plaintiffs

575 Lexington Avenue

New York, NY 10022

TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP

By: Vincent J. Syracuse, Esq.

Yolanda Y. Kanes, Esq.

Matthew R. Maron, Esq.

Attorneys for the Fee Defendants

900 Third Avenue

New York, NY 10022

PAUL D. DEROUNIAN, P.C.

By: Paul D. Derounian, Esq.

Attorneys for Defendant The Reliable Automatic Sprinkler Co., Inc.

900 Third Avenue, Suite 1200

New York, NY 10022

Alan D. Scheinkman, J.

Defendants Frank J. Fee, III ("Frank"), Kevin Fee ("Kevin") and Michael Fee ("Michael") and Frank in his role as Trustee of the Marital Deduction Trust and Residuary Trust (the "Fee Defendants") move pursuant to CPLR 3211(a)(7) and CPLR 3016(b) to dismiss the Verified Complaint ("Complaint") or, alternatively, to dismiss based on a prior action pending pursuant to CPLR 3211(a)(4) (Motion Seq. No.2). Defendant The Reliable Automatic Sprinkler Co., Inc. ("Reliable") joins in the Fee Defendants' motion (Motion Seq. #1) and, based on the affirmation from its counsel, incorporates and adopts all of the arguments made by the Fee Defendants in their motion (Affirmation of Paul D. Derounian, Esq. dated January 11, 2012 at ¶ 2). Accordingly, the Court refers to Defendants collectively henceforth. Plaintiffs Marilyn White ("Marilyn") and Candida Funke ("Candy") on behalf of themselves and as Co-Executors of the Estate of Candida M. Fee ("Candida" or the "Estate") ("Plaintiffs") oppose the motion.

The motions have been consolidated for purposes of disposition. [*2]

RELEVANT BACKGROUND

This action for common law dissolution was initiated by Plaintiffs' filing of their Summons and Complaint in this Court's e-filing system (NYSCEF) on October 26, 2011. This Court's first glimpse of the case was upon the Defendants' filing of this motion to dismiss along with a motion to dismiss in a related shareholders' derivative action (*White v Fee*, Index # 57745/2011) (the "Derivative Action"). At the Preliminary Conference held on February 3, 2012, the Court was able to persuade Defendants' counsel to withdraw the motion to dismiss in the related Derivative Action, but was unable to persuade Reliable's counsel and Defendants' counsel to withdraw this motion. Despite the pendency of this motion, the Court

issued a Preliminary Conference calling for a discovery cut-off of May 3, 2012 and a Trial Readiness Conference of May 4, 2012. As a result of several discovery disputes and a change of Plaintiff's counsel, the discovery cut-off has been extended to July 25, 2012 and the trial readiness conference is now scheduled for July 26, 2012.

Based on the allegations of the Verified Complaint, which the Court must accept as true for purposes of this motion, Plaintiffs and the Fee Defendants are siblings. Their grandfather, Frank J. Fee was the founder and patriarch of Reliable.[FN1] Reliable is a New York corporation maintaining a place of business at 103 Fairview Drive, Elmsford, New York (Complaint at ¶ 22). Frank J. Fee, Jr. ("Frank Jr."), Plaintiffs' and Defendants' father took over the business of Reliable and under his watch "RELIABLE became a profitable company and it prospered and grew, consistently paying dividends to shareholders ...." (Complaint at ¶ 4). Plaintiffs allege that it was the intention of Frank Jr. and his wife, Candida, that they would transfer shares of Reliable's stock to their children "to enable each of their children to share in the profits from the family business" (*id.* at ¶ 8).

Frank Jr. died on November 17, 1976 and Candida died on December 3, 2009. Frank succeeded Frank Jr., as the President of Reliable and continues in that role to date.

Plaintiffs contend that Frank, Kevin and Michael collectively own 100% of the issued and outstanding voting shares of Reliable (*id.* at ¶ 31). It is alleged that Frank, Kevin and Michael each own 13 1/3 shares of voting Class A common stock and that they also own 90 shares of non-voting Class B Common Stock (*id.* at ¶¶ 52-54).

Plaintiffs allege that upon their mother's death, Frank, Kevin and Michael have been the only members of the board of directors of Reliable and "[b]y virtue of the [*3]provisions of the bylaws ...[they] constitute[d] a quorum of the Board of Directors of RELIABLE, and at all times alleged herein, control and controlled the determinations of the Board, their measures being incapable of defeat when supported by all three of them and no measure capable of passing without the support of at least two of the three of them" (*id.* at ¶ 32). It is alleged that Kevin, Michael and Frank as the directors have appointed themselves Reliable's officers in every year from 1985 to present (*id.* at ¶ 79).

Upon their graduations from college in 1967 and 1974, respectively, Candy and Marilyn received 50 shares of non-voting Class B Common Stock (*id.* at ¶¶ 57 -58). Plaintiffs allege that based on various provisions of Candida's will and the number of non-voting Class B

Common Stock shares held in both a Marital Trust and a Residuary Trust, Candy and Marilyn, each stand to hold a total of 163.5 shares of non-voting Class B Common Stock upon the distribution of the assets under Candida's will (*id.* at ¶¶ 47-49). The other holders of the Class B Common Stock are Majorie Madden and John Bennett, holding 25 shares each (*id.* at ¶ 50). According to Plaintiffs, neither Plaintiffs nor Majorie Madden and John Bennett were offered any of the perquisites provided to Kevin, Michael and Frank and their families (*id.* at ¶ 118).

Plaintiffs contend that Reliable had paid an annual dividend to shareholders from every year from 1967 to 1990, but in 1990, Frank, Kevin and Michael ceased paying dividends on Class B Common Stock and have not paid any dividends to date (*id.* at ¶¶ 80-81). According to Plaintiffs, as Reliable's directors, Frank, Kevin and Michael determine their compensation [FN2] and, in every year since 1990, Frank, Kevin and Michael have received greater compensation that they received the previous year. This compensation included, in addition to a fixed salary, a percentage of the company's gross sales, which Plaintiffs contend has resulted in Defendants' looting of Reliable's assets "to the extent of several million dollars each year ...." (*id.* at ¶ 87). This diversion of Reliable's funds has deprived Reliable of needed cash to fund operations, make capital improvements, and return a reasonable sum to shareholders in the form of dividends as Frank Jr. had intended (*id.*). The cessation of dividend payments further coincided with Defendants' decision to pay their mother a salary as a Reliable officer rather than pay her dividends. According to Plaintiffs, this change permitted them to deduct their mother's salary from the company's earnings whereas dividends could not be deducted (*id.* at ¶¶ 124-125). It is alleged that in every year since 1990, Marilyn and/or Candy attended the annual shareholders' meeting and at least one of them each year raised the issue of dividends, but Frank, Kevin and Michael "refused to discuss or consider the issue of dividends and offered vague and evasive excuses for failing to declare dividends" (*id.* at ¶ 131). [*4]

Although Kevin acted as the Secretary of Reliable at the meetings, Plaintiffs allege that Kevin breached his fiduciary duty, engaged in bad faith and perpetrated a fraud by "failing to record and reflect in the minutes the objection and questions by Plaintiffs and the other holders of Class B Common Stock regarding dividend policy and the excuses promulgated by the Defendants for failing to declare a dividend" (*id.* at ¶ 133).

Plaintiffs contend that Defendants have engaged in nepotism in their hiring practices and

have diverted company resources to selected family members by allowing them to receive compensation, benefits and other perquisites (such as an automobile owned, insured and maintained by Reliable, and a gas station credit card) of full time employees while allowing them to work less than full time and actually work outside of Reliable (*id.* at ¶ 91).

With regard to the perquisites provided to Frank, Kevin and Michael, Plaintiffs allege that each is provided at least one luxury car, at least one gas station credit card, and the non-employee wives are provided one gas station credit card. Further, at least one non-employee child of Frank, Kevin and Michael is provided at least one car that is owned, insured, maintained or reimbursed by Reliable (*id.* at ¶¶ 99-107).

Plaintiffs allege that Reliable pays for (1) Frank's membership at Winged Foot Golf Club and New York Athletic Club (*id.* at ¶¶ 109-110); (2) Kevin's membership in (i) an exclusive club in Bonita Springs, Fla., (ii) Westchester Country Club, (iii) Cherry Valley Country Club, (iv) Garden City Men's Club, and (v) Atlantic Beach Club; and (3) Michael's membership at the Atlantic Beach Club.

It is Plaintiffs' position that Frank, Michael and Kevin have engaged in such egregious breaches of fiduciary duties against the nonvoting shareholders that they should be disqualified from exercising the discretion they are afforded under the BCL over the dissolution of Reliable (*id.* at ¶ 120).

Plaintiffs contend that from 1990 to present, Defendants have perpetrated a fraud on the holders of Class B common stock

> by refusing to declare a dividend while substantially increasing their own compensation and perquisites, hiring and increasing the compensation and perquisites of their family members, whether they performed actual services for RELIABLE or not, and hiring and increasing the compensation of perquisites of friends and cronies of the Defendants, expending far in excess of what would otherwise be distributed to the holders of the Class B Common Stock in dividends ... Defendants have refused to entertain offers by holders of Class B Common Stock to sell [*5]their shares to RELIABLE at fair market value ... [These acts have caused] the books of the company ... [to] reflect an intentionally and artificially depressed profitability ... [and] the use of the company's financial statements in computing a fair market value per share is a fruitless effort, and any price per share derived from a multiple of the companies earnings is necessarily flawed (*id.* at ¶¶ 134-139).[FN3]

It is alleged that Defendants refused offers by Marilyn in 1979 and John Bennett sometime between 2000-2005 to have their shares purchased by Reliable (*id.* at ¶¶ 143-144). In December 2004, Defendants adopted a Stock Redemption Plan and offered to redeem the issued and outstanding shares of Class B Common Stock (the "Stock Redemption Offer" or "Plan", a copy of which is annexed as Ex. D to the Complaint). However, Plaintiffs contend the Plan valued the company at about ½ of its actual fair market value, which, according to Plaintiffs, occurred as a result of the Defendants' manipulation of the company's financial statements (*id.* at ¶¶ 146-147). Plaintiffs assert that when Defendants informed Plaintiffs of the Plan at the annual stockholders' meeting in October 2004, Marilyn voiced her objection to the redemption price offered and stated that it was 50% less than the price for which she would be willing to sell her stock. It is alleged that Kevin, as Secretary of Reliable,[FN4] failed to record her objection in the minutes of that meeting (*id.* at ¶ 149). Plaintiffs assert that Defendants have refused to increase their offer from the price offered in 2004, thereby preventing Plaintiffs from receiving fair value for their stock.

Plaintiffs allege that on or about November 15, 1999, in contravention of the requirements provided in the Certificate of Incorporation that no sale of stock be made without first offering the stock to Reliable in writing by registered mail and Reliable having 60 days to exercise its option to purchase the stock at book value (*id.* at ¶ 155), Defendant Frank, as trustee of the Frank J. Fee Jr. Residuary Trust, entered into a sale of 75 shares of Class B Common Stock held by the Residuary Trust and sold 25 shares to himself, 25 shares to Kevin and 25 shares to Michael (*id.* at ¶¶ 153-154). It is alleged that Defendants acted in bad faith, engaged in self dealing and perpetrated a fraud on Reliable and its shareholders by covertly purchasing the stock at a discount to book value rather than at fair market value with no notice to Reliable's other shareholders. As such, Plaintiffs contend that the stock sale should be rescinded and declared void *ab initio* based on the sales' failure to follow the requirements of the [*6]Certificate of Incorporation (*id.* at ¶ 160).

In support of their claim for common law dissolution, Plaintiffs assert that there is no market for Reliable's Class B Common Stock, that a redemption is unfeasible since the Company's book value does not reflect the true and fair value of Reliable's shares based on the Defendants' above-mentioned manipulations. Plaintiffs contend that at the times they acquired their shares in Reliable upon graduation from college, they had a reasonable expectation that Reliable would continue to pay dividends and that they would be considered for employment with and enjoy other perquisites of Reliable. Plaintiffs allege that Defendants

as officers and directors of Reliable owed Plaintiffs a fiduciary duty with regard to the Reliable's operations but they committed fraud and breach of fiduciary duties based on the above-referenced acts of mismanagement, looting, waste, spoliation and misuse of corporate assets for their own benefit and the benefit of their families and friends.

Plaintiffs allege that pursuant to their conspiracy, Defendants have caused Reliable to:

(1) carry excessive inventory by increasing it from $13,803430 in 1998 to $42,028,352 in 2008;

(2) accumulate excessive retained earnings from $14,668,528 in 1998 to $39,825,065 in 2008; and

(3) incur excessive general and administrative expenses which have increased from $17,280,924 in 1998 to $58,009,659 in 2008 based on the excessive salary, wages, loans and bonuses paid to Defendants Frank, Kevin and Michael (Complaint at ¶¶ 172-174).

Based on the foregoing, Plaintiffs demand that Reliable be dissolved and that Defendants be ordered to take all necessary and proper steps to dissolve it.

DEFENDANTS' CONTENTIONS IN SUPPORT OF MOTION

In support of their motion, Defendants submit a memorandum of law and an affirmation from counsel attaching the Complaints filed in this action and in the Derivative Action, Frank Jr.'s Last Will and Testament, Candida's Last Will and Testament, the Codicils to Candida's Last Will and Testament, the pleadings in the Probate Proceeding, the Subpoena ad Testificandum and Subpoena Duces Tecum, and a Chart comparing the similar allegations between the Complaint in this action and the Complaint in the Derivative Action.

In their memorandum of law, without providing an evidentiary foundation [*7]for many of the facts asserted, Defendants describe Reliable as "a major manufacturer and distributor of automatic fire sprinklers and sprinkler system component products that has grown from $5.9 million in annual sales in 1974 to $221 million in annual sales with approximately 700 employees" (Defs' Mem. of Law at 2).

By way of background, Defendants explain how Candida changed the terms of her will, and rather than leaving the Reliable shares in the Marital Deduction Trust to Plaintiffs and Defendants in equal shares as Candida's Will originally provided for, Candida executed a

series of Codicils and changed the disposition of the Reliable shares from the Marital Deduction Trust so that they would be transferred to Candy and Marilyn alone in equal shares. The change in the disposition of the Reliable stock held in the Marital Deduction Trust allegedly occurred in complete secrecy and Defendants did not learn of the change until after their mother's death. Candida had also changed the Executor of her Estate from Frank to her two daughters. Defendants originally filed objections to the Probate Proceeding, but ultimately withdrew those objections. During the Probate Proceeding, Defendants contend that under the guise of discovery, Plaintiffs sought information that was neither relevant to the administration of the Estate nor necessary for the defense of the action, and instead was "a full scale fishing expedition as to the inner workings of Reliable" (Defs' Mem. of Law at 6). Defendants assert that they ultimately produced multiple corporate tax returns and financial data and despite Plaintiffs being able to calculate the value of Reliable Stock for the Candida Estate Tax Return, Plaintiffs chose instead to fix their value based on the appraisal that had been done for the Stock Redemption Plan in 2004 (*id.* at 7).

In addition to the two actions pending here, Defendants contend that Marilyn and Candy initiated a special proceeding in Surrogates Court, Nassau County demanding an accounting of the Marital Deduction Trust and Residuary Trust (*id.*).

In their memorandum of law, without providing any predicate for the introduction of these facts, Defendants contend that as minority shareholders, Candy and Marilyn were provided on a yearly basis with financial information. Further, that they attended annual shareholders' meetings, received copies of the minutes circulated at the meetings and "[a]t no time did Candy or Marilyn ... object to the corporate actions taken, complain about the conduct of the officers and directors or express disagreement over the corporate direction of Reliable" (*id.* at 4). Indeed, they contend that up until their mother's death, Candy and Marilyn never questioned or objected to any of Reliable's dealings and they never raised any concerns of impropriety.

Defendants argue as minority shareholders with nonvoting stock, Plaintiffs have no right to a liquidation of their interest and it is evident that they are using this action and the Derivative Action "for the sole purpose of leveraging a favorable buyout of their shares by harassing their brothers and Reliable with unfounded allegations" (*id.* at 9).

Defendants acknowledge that a claim for common law dissolution can be [*8]made out

if the majority shareholders engage in egregious breaches of fiduciary duties — *i.e.*, " the directors and the majority shareholders "have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute"" (*id.* at 11, *quoting Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 69-70 [1984]), but argue that such breaches of fiduciary duty must meet the particularity requirements of CPLR 3016 and the proof required is more than what is required to establish a claim for corporate waste in a derivative action (*id.* at 12).

It is Defendants' position that a common law dissolution cannot " be compelled unless it [can] be found that the dominant stockholders or directors have been "looting" the corporation's assets and impairing the corporation's capital or *maintaining the corporation for their own special benefit"' (id. at 12, quoting Kruger v Gerth*, 22 AD2d 916, 917 [2d Dept 1976], *affd* 16 NY2d 802 [1965] [emphasis added]). And here, say Defendants, the Complaint fails to meet this standard since it merely alleges "a series of baseless allegations, none of which establish any acts of misconduct which would provide the foundation for the breach of fiduciary duty claim in support of their application to dissolve Reliable" (*id.* at 12). Defendants then reference the conclusory "inherently incredible" allegations found in the Complaint that suggest that Defendants used Reliable for selfish purposes but, say Defendants, these allegations do not support a palpable breach of fiduciary duty and completely neglect to address the fact that Reliable has grown to be one of the most successful automatic fire sprinkler and sprinkler system component products companies "with hundreds of employees and offices throughout the United States, Europe and Asia" (*id.* at 14).

Defendants also argue that Plaintiffs' claims for breach of fiduciary duty fail because they are not sufficiently particularized pursuant to CPLR 3016. This is so despite the fact that Plaintiffs received "thousands of pages of financial information and certain additional information obtained in the Accounting Proceeding ... including the company's tax returns" (*id.* at 17). Defendants point out that the Complaint alleges that Defendants looted the company without specifying any particular incident to support the looting claim and Plaintiffs also fail to identify any specific facts to show that the sale of stock constituted a breach of fiduciary duty.

In support of the branch of their motion to dismiss certain claims based on the statute of limitations, Defendants argue that the claims concerning the 1999 Stock Transaction and the

2004 Stock Redemption Plan are barred by the six year statute of limitations applicable pursuant to CPLR 213(1) and 213(8) since the Complaint was not filed until November 2011.

Alternatively, Defendants argue that this action should be dismissed pursuant to CPLR 3211(a)(4) since Plaintiffs have an adequate means of redress in the Derivative Action involving overlapping parties and claims. Defendants argue that if the claims arise out of the same actionable wrongs, they are deemed substantially similar. [*9]Because the Derivative Action was filed on the same day as this action (about one half of an hour earlier), the interests of Plaintiff are best protected through the mechanism of a Derivative Action.[FN5] According to Defendants, CPLR 3211(a)(4) mandates the dismissal of this action in favor of the prior pending Derivative Action because there is substantial identity of the parties and causes of action.

PLAINTIFFS' CONTENTIONS IN OPPOSITION

In opposition, Plaintiffs submit an attorney affirmation (with exhibits) and a memorandum of law.

In his affirmation, Plaintiffs' counsel goes after Defendants' counsel's suggestion that Plaintiffs are seeking a pay day by pointing out that instead, it is the Defendants who have had their pay day for some time now and that this action seeks to have them account for the excesses they've received by treating Reliable as their own personal piggy bank for the past 21 years. According to Plaintiff's counsel,[FN6] this occurred at the same time that Defendants denied their one sister from contributing to Reliable as a paid employee and denied their sisters' husbands requests to work at Reliable. Then, when the sisters were in need of income and Reliable was prospering, Plaintiffs' requests for dividends were denied (Affirmation of Gary Bashian, Esq. dated March 2, 2012 at ¶¶ 5-6) and Defendants proceeded to depress the value of Plaintiffs' stock in an effort to pressure them into selling at less than fair market value (*id.* at ¶ 6).

In response to Defendants' contentions concerning Plaintiffs' fishing expedition in the Surrogate's Court Proceeding, Plaintiff's counsel states that the documents were sought for estate tax valuation purposes and Defendants refused to voluntarily comply with the document demands, which is what necessitated the Subpoena. The Subpoena was thereafter so-ordered by Surrogate McCarthy in February 2011 (a copy of which is attached as Ex. A to

the Bashian Aff.). Further, counsel states that contrary to Defendants' characterization, Surrogate McCarthy did not modify or limit the documents requested, he merely held that the deposition would not be required at that time (*id.* at ¶¶ 9-10). Counsel asserts that Defendants' counsel failed to provide the information requested and only provided: (1) life insurance [*10]information for Candida; (2) a list of shareholders who redeemed shares; (3) W-2s for Candida; (4) Profit and Loss Statements without any supporting details; and (5) Reliable's income tax returns for 2006-2008.

Plaintiff's counsel argues that the documents requested but not produced were (1) documents reflecting the agreements for employment, compensation and benefits for Defendants and Candida; (2) corporate income tax returns with the supporting schedules; (3) documents relating to the 2004 Stock Redemption; (4) documents concerning any sale of stock by any other party or entity; (5) documents concerning loans to the Defendants or any other party; (6) any Stockholder Agreement or Buy-Sell Agreements; (7) any valuations or appraisals for Reliable or its assets; (8) financial statements; (9) more detailed Income and Expense Statements to the Profit and Loss Statements; (10) a list of Officers and Directors; and (11) copies of all meeting minutes (*id.* at ¶ 13). In support, counsel annexes correspondence between himself and Derounian outlining the deficiencies in Defendants' production of documents (Bashian Aff., Exs. B and C).

Plaintiffs' counsel counters Defendants' contentions that the pleading fails to meet the requirements of CPLR 3016 by asserting that it meets the requirements of CPLR 3013 and full and complete discovery in this action will provide the kind of specifics Defendants contend is lacking. Further, Plaintiffs had to use the last redemption price set by the Defendants based on Defendants' failure to produce the above-referenced documents, but counsel advises that "[a]ny amended Estate Tax Returns required to be filed at a later date will by filed by the Plaintiffs" (*id.* at ¶ 7,n.1).

Plaintiffs' counsel responds to Defendants' attempt to trivialize this action as some kind of family court proceeding by pointing out that Plaintiffs own at least 38% and as much as 41% of the non-voting Class B Common Stock and assuming Reliable is worth its gross sales or some multiple of its gross sales, it could be worth up to or above $400 million, making Plaintiffs' shares worth $160 million.

The remainder of the Bashian Affirmation is devoted to legal argument, which is also

set forth in Plaintiffs' memorandum of law.

In their memorandum of law, Plaintiffs argue that Frank as Trustee of the Residuary Trust and the Marital Deduction Trust, with both Trusts being shareholders of Reliable, and as President of Reliable, "improperly wore two hats in an absolute conflict of interest in breach of his fiduciary duty to Reliable and both Trusts" (Pltfs' Opp. Mem. at 2, 7-8). Thus, all of his decisions should be called into question.

Plaintiffs reiterate the facts set forth in their Complaint concerning Defendants' failure to pay dividends and the failure of the shareholders' meeting minutes to reflect the objections and questions raised by Plaintiffs at those meetings. Instead, in its place was "a stipulation, made up and approved by the Fee Defendants and Paul Derounian, that a non-binding pro forma vote of the non-voting shareholders [*11]had been taken to ratify the Fee Defendants' actions' since the previous Shareholder Meeting" (*id.* at 4).

Plaintiffs assert that the financial information provided to them did not reflect the excessive salary and perquisites paid to the Defendants and their friends and family members so that Plaintiffs had no way of knowing that the Defendants had depressed Reliable's profits and value (*id.* at 4).

With regard to Candida's decision to leave the Reliable shares found in the Marital Deduction Trust to her daughters, Plaintiffs contend that her reasons to do so are obvious — *i.e.*, having watched her sons reap the benefits of Reliable over the years and denying the benefits to any other shareholders, Candida wanted to have her daughters share in the rewards of the family business by forcing her sons to treat their sisters fairly (*id.* at 6).

Relying on Defendants' failure to provide all of the documents requested in the so-ordered Subpoena, Plaintiffs argue that despite the disadvantage of having received very few documents containing little useful information, the Complaint nonetheless contains sufficient allegations to support the claim for common law dissolution.

Relying on the Court of Appeals case *Leibert v Clapp* (13 NY2d 313, 316 [1963]), Plaintiffs argue that the fact that Reliable is a profitable going concern is no defense to a dissolution and it does not absolve Defendants' misconduct (*id.* at 9).

In support of the sufficiency of the Complaint, Plaintiffs point out that Defendants stand

in a fiduciary relationship to Reliable insofar as they must act in good faith and owe the corporation their undivided loyalty and are not permitted to derive personal profit at the expense of Reliable (*id.* at 11). Further, they owe a " fiduciary obligation to treat all shareholders fairly and equally, to preserve corporate assets, and to fulfill their responsibilities of corporate management with "scrupulous good faith"'" (*id.* at 12, *quoting Matter of Kemp & Beatley, Inc., supra,* 64 NY2d at 69).

With regard to Defendants' egregious conduct, Plaintiffs pose the rhetorical question — "How much more egregious does it get then manipulating a dividend policy by eliminating it under the guise of hiring' your mother, then eliminating dividends to her and entirely to all other non-voting shareholders?" (*id.* at 12). Plaintiffs elaborate by stating

> Where those in control of the corporation are looting corporate assets for their own enrichment at the expense of the minority shareholders, dissolution is warranted ... Plaintiffs' Complaint alleges specific acts of looting by the Fee Defendants in which they improperly direct company [*12]funds to be paid to themselves, their friends, and family members, constituting a palpable breach of fiduciary duty, including taking a percentage of gross revenue as compensation whether or not the company earns a profit, and employing friends and family members at inflated salaries who performed little or no work in exchange. (Complaint ¶ 86, 90). Reliable has not paid dividends since approximately 1990. Yet the Fee Defendants, in addition to increases in compensation, they then take a fixed percentage of Reliable's annual gross revenue (Complaint at ¶ 85, 86), without regard for deductions resulting in true net revenue. This, of course, is one technique to essentially capture all dividends for themselves (*id.* at 13).

In addition, Plaintiffs contend Defendants "depleted a corporate opportunity and breached their fiduciary duty by purchasing shares of stock from the Residuary Trust, which was a right belonging to the corporation as a right of first refusal under the Certificate of Incorporation, as amended (Complaint at ¶ 152-155)." (*id.* at 14).

Dissolution is further warranted, argue Plaintiffs, because " [w]hen the majority shareholders of a close corporation award *de facto* dividends to all shareholders except a class of minority shareholders, such a policy may constitute "oppressive actions" and serve as a basis for an order made pursuant to section 1104-a of the Business Corporation Law dissolving the corporation"' (*id.* at 15, *quoting Matter of Kemp & Beatley, Inc.*, 64 NY2d at 67).

Plaintiffs assert that Defendants' acts of carving up and appropriating for themselves a

percentage of Reliable's revenue is tantamount to conversion of Reliable's revenues since the revenues should be used to fund Reliable's operations and net profits accrue for the benefit of shareholders (*i.e.*, dividends). Further, these acts are evidence that Defendants have been exploiting Reliable for their own private benefit in breach of their fiduciary duty (*id.* at 16).

It is Plaintiffs' position that dissolution should also be granted because Defendants' actions are designed to coerce the minority shareholders to redeem their stock at less than fair market value (*id.* at 16). Further, Reliable's financials do not reflect fair market value because of the many years of excessive compensation taken by Defendants. According to Plaintiffs, the facts of this case are indistinguishable from the facts found in *Matter of Kemp & Beatley, Inc.*, in which the Court of Appeals held dissolution was properly granted given that the controlling faction of the company was attempting to squeeze out petitioners by offering them no return on their investment while at the same time increasing their own executive compensation (*id.* at 17). [*13]

With regard to the requirements of CPLR 3016(b), Plaintiffs argue that "Courts have consistently subordinated the threshold pleading requirement of CPLR 3016 (subd [b]) to the notice standard of CPLR 3013" so the Complaint need only satisfy CPLR 3013. Alternatively, Plaintiffs argue that even if CPLR 3016 controls, Plaintiffs have met that standard as well since the Complaint gives details about the circumstances constituting the breaches of fiduciary duty especially given that Plaintiffs have been precluded from participating in management such that the facts relating to the breaches of fiduciary duty are particularly within Defendants' knowledge (*id.* at 19-20).

In response to the branch of Defendants' motion seeking to dismiss the claims for breach of fiduciary duty that arose more than six years prior to the filing of the Complaint (*i.e.*, the 1999 Stock Purchase and the 2004 Stock Redemption Offer), Plaintiffs argue that Defendants "presume without support that Plaintiffs not only discovered those transactions when they occurred, but that they also discovered the Fee Defendants' impropriety in those transactions at that time" (*id.* at 21). According to Plaintiffs, " [D]efendants must show that the information available to plaintiffs suggest the *probability*, not just the possibility of fraud'" and here, when the Defendants fraud should have been inferred is a question of fact that is not subject to dismissal (*id.* at 21, *quoting Menke v Glass*, 898 F Supp 227, 233 [SD NY 1995]).

Alternatively, Plaintiffs argue that the statute of limitations period has not yet begun to run because Defendants continue to owe Plaintiffs a fiduciary duty and the statute of limitations begins to run when the fiduciary has repudiated his or her obligation or the relationship has terminated. And Plaintiffs argue that the cases cited by Defendants do not involve dissolution proceedings and, therefore, merely stand for the general rule concerning six year statute of limitations bars and are inapplicable to this dissolution proceeding.

Plaintiffs further contend that, even if the statute of limitations were a bar to these claims, because Plaintiffs are not seeking monetary damages nor specific relief as to these transactions, and because these transactions are merely two examples of Defendants' prior bad acts of looting and there are many other acts cited by Plaintiffs to support their claim, this branch of Defendants motion with regard to the statute of limitations bar has no effect on the viability of Plaintiffs' claim for dissolution.

Turning to the branch of Defendants' motion seeking to dismiss this action based on a prior pending action, Plaintiffs argue that the parties are not the same because:

> (1) in this action Reliable is named as a nominal defendant whereas in the Derivative Action, Reliable is a Plaintiff;
>
> (2) Defendant Frank J. Fee, III is named in this action as the Trustee of the Marital Deduction Trust and the Residuary Trust; and (3) the Plaintiffs are suing in different capacities; [*14]in this action they are suing directly whereas in the Derivative Action, they are seeking to recover on behalf of the corporation (*id.* at 23).

Moreover, "[t]he derivative stockholders' action covers past activities, but the demand for dissolution also contemplates the future and ought not to be stayed for the resolution of the other aspect" and " to restrict the minority shareholders to a derivative suite would be to commit them to a multiplicity of costly, time-consuming and difficult actions with the result, at most, of curing misconduct of the past while leaving the basic improprieties unremedied. It is the traditional office of equity to forestall the possibility of such harassment and injustice'" (*id.* at 24, *quoting Matter of Goldstone*, 40 AD2d 971, 971 [1st Dept 1972]).

Plaintiffs also assert that " CPLR 3211(d) provides a court with discretion to deny a motion to dismiss if it appears that "facts essential to justify the opposition may exist but cannot then be stated" and a motion to dismiss should be denied where "[t]here is a reasonable basis to believe that further discovery may reveal evidence of egregious conduct

necessary to sustain the claim" (*id.* at 25, citing Lemle v Lemle, 92 AD3d 494, 499-500 [1st Dept 2012]).

DEFENDANTS' REPLY

In further support of their motion, Defendants submit a reply memorandum of law and an affirmation from counsel, Yolanda Kanes, Esq., the purposes of which are (1) to provide the vehicle for the introduction of deposition testimony from Plaintiffs in the Surrogate's Court proceeding to show "Plaintiffs had knowledge of the activities they now complain of and failed to raise any timely objections" (Affirmation of Yolanda Kanes, Esq. dated March 9, 2012 ["Kanes Reply Aff."] at ¶ 4); and (2) to set the record straight as to the amount of information Plaintiff received in the Surrogate's Court proceeding.

With regard to the information produced in the Surrogate's Court Proceeding, Kanes affirms that contrary to Plaintiffs' contentions, Plaintiffs received:

> (1) Reliable's audited financial statements for the years 2007-2010 (which included 100 pages of detailed financial information including officer compensation); (2) corporate tax returns for 2007-2009; (3) K-1s; (4) valuations of Reliable Corporate Stock from 2004; (5) corporate minutes of meetings of both shareholders and certain board of directors from 2002-2010; and (6) hundreds of other documents in response to Plaintiffs' counsel's specific requests (Kanes Reply Aff. at ¶ 2).

[*15]

Given the vast amount of information Plaintiffs had prior to filing their Complaint, Kane states that it is insufficient for Plaintiffs' counsel to state in his affirmation that Plaintiffs may rely on the presumed truth of the allegations of the Complaint (*id.* at ¶ 3).

Defendants argue that the Bashian Affirmation should not be given any consideration at all because "the proper method for amplifying any deficiencies in a Complaint is through a client affidavit in opposition to the motion to dismiss, which they have failed to do" (Kanes Reply Aff. at ¶ 3). Defendants rely on the financial information provided prior to the shareholders' meetings (Kanes Aff., Ex. 1), the minutes of those shareholders' meetings, and the admissions made by Plaintiffs at their depositions taken during the Surrogate's Court Proceeding to the effect that they "could not point to one instance where, after having received the minutes, they asserted an objection to what the minutes reflected" (*id.* at ¶ 5,

Exs. 2, 3 and 4) in support of their argument that "at no time did Plaintiffs object to the corporate actions, complain about the conduct of the officers and directors or state their disapproval that dividends were not being paid" (*id.*).

Further, contend Defendants, Plaintiffs confirmed that as of about 2004, they were aware of their brothers' and mother's compensation (*id.* at ¶ 6) and Candy testified she was aware of the 1999 transaction as it was reflected in the stockholder minutes from at least 2002. Defendants argue that where there is evidence of actual knowledge, the statute of limitations will bar such claims (*id.* at ¶ 8).

With regard to the 2004 Redemption Offer, Defendants again cite to the deposition testimony provided by Marilyn in the Surrogate's Court Proceeding wherein Marilyn stated that while she and Candy knew about the Stock Redemption Offer and that she was disappointed with it, she failed to voice any objection when the 2004 minutes were circulated. Further, while she believed that the price offered was 50% lower than the stock's actual value, Marilyn testified that "she never undertook an analysis or engaged anyone to arrive at what she might believe to be a more appropriate valuation" (*id.* at ¶ 9). Defendants argue that based on her admissions, she cannot now be heard to complain that Defendants were exercising bad faith in issuing the valuation (*id.* at ¶ 10).

It is Defendants' position that Plaintiffs' reliance on this same valuation for purposes of the Estate's tax return means that Plaintiffs should be estopped from disputing the validity of that valuation or that the valuation constituted bad faith by Defendants — especially given that Plaintiffs had 15 months to file the 706 tax return and obtain a more accurate valuation if they truly believed the 2004 Redemption Offer was inaccurate. Further, "despite the known and obvious concerns, not a note or caveat was made with respect to the valuation on the return which would even suggest that they did not have sufficient information to make a valuation ... or that these very same fiduciaries had challenged this valuation at a stockholders meeting in 2004" and "Bashian affirmatively annexed as an exhibit the de Visscher & Co. Report that had [*16]calculated the 2004 valuation as proof' of the valuation of Reliable stock" (*id.* at ¶ 13). A copy of the 706 Tax Return is annexed as Ex. 7.

In their Reply Memorandum of Law, Defendants point out that an affirmation of counsel alone cannot remedy a deficient complaint (Defs' Reply Mem. at 4).

Furthermore, Defendants assert, while Plaintiff's counsel (Gary Bashian) may have

knowledge of the facts relating to the discovery disputes in the related Surrogate's Court Proceedings, his recitation of facts concerning Defendants' conduct should be stricken as he does not affirm that he has personal knowledge of these facts (*id.* at 4, *citing* Bashian Aff., at ¶¶ 3,4,5,6,7,16,17,18). It is Defendants' position that this Court need not accept as true allegations of bare legal conclusions, and factual assertions incredible or flatly contradicted by documentary evidence.

Defendants distinguish the cases upon which Plaintiffs rely. In particular, here, unlike *Matter of Kemp & Beatley, Inc., supra*, Reliable stopped paying dividends in 1990 — more than 20 years prior to the filing of this action — and Plaintiffs have not alleged that Reliable's decision to stop paying dividends was in any way related to a change in Plaintiffs' status or related to Plaintiffs at all (*id.* at 7). Defendants point out that Plaintiffs have not distinguished the cases upon which they rely (*i.e., Kruger v Gerth*, 22 AD2d 916 [2d Dept 1964], *affd* 16 NY2d 802 [1965] and *Shapiro v Rockville Country Club, Inc.*, 2004 NY Slip Op 50079[U], 2 Misc 3d 1002[A] [Sup Ct Nassau County 2004]).

Even if Plaintiffs' Complaint sufficiently alleged a claim for common law dissolution, "a court will not entertain such an application for dissolution when [the petitioning shareholders'] rights and interests could be adequately protected in a legal action, such as by a shareholder's derivative suit'" (*id.* at 9, *quoting Matter of Kemp & Beatley, Inc.*, 64 NY2d at 70).

Defendants contend that Plaintiffs have failed to address the branch of their motion seeking dismissal based on CPLR 3016 with regard to the claims for fraud, breach of trust and undue influence. It is Defendants' position that Plaintiffs have not distinguished the cases upon which Defendants rely where the complaints were dismissed for failure to plead fraud with requisite particularity since fraud claims cannot be pleaded in the conclusory fashion pleaded here. Thus, Plaintiffs' failure to allege any specific facts regarding Defendants' breach of fiduciary duty is fatal to their claim. Further, the conclusory allegations of looting, fraud and breach of fiduciary duty would not even satisfy the pleading requirements of CPLR 3013 (*id.* at 11).

According to Defendants, it is disingenuous for Plaintiffs' counsel to assert now that he did not receive the information requested because he had months in the Surrogate's Court Proceeding to compel Defendants' compliance, but never did. [*17]Defendants contend that

Plaintiffs are trying to use this to distance themselves from their 706 Tax Return, which used the price offered ($14,000/share) as a part of the Stock Redemption Plan. However, because the 706 Return was signed by both Plaintiffs and prepared by Plaintiffs' counsel, as this Court held in *Montefiore Med. Ctr. v Crest Plaza LLC* (2009 NY Slip Op 51215[U], 24 Misc 3d 1201[A] [Sup Ct Westchester County 2009], *affd* 83 AD3d 1016 [2d Dept 2011]), "Plaintiffs cannot at this point take a position contrary to sworn statements they made under oath regarding the value of Reliable's nonvoting shares as reflected in the 706 Tax Return ... [and] any attempt by Plaintiffs to allege that the nonvoting shares of Reliable should be valued at a higher amount should be given no consideration" (*id.* at 12).

In further support of the statute of limitations bar, Defendants assert that the cases cited by Plaintiffs stand for the proposition that the statute of limitations for breach of fiduciary duty begins to run " *when the fiduciary has repudiated his or her obligation* or the relationship has terminated'" (*id., quoting 770 Owners Corp. v Spitzer,* 2009 NY Slip Op 51968[U], 25 Misc 3d 1204[A]at *23-24 [Sup Ct Kings County 2009]). Here, the Complaint alleges that Plaintiffs were apprised of the 2004 Redemption Offer at the October 2004 shareholder meeting (and the minutes of that meeting reflect same). As such, the 2004 Redemption Offer cannot form the factual predicate for Plaintiffs' claim for common law dissolution since it is barred by the statute of limitations. Further, as to the 1999 Stock Transfer, Candy admitted at her deposition that she was aware of this transaction as early as 2002. Accordingly, the allegations concerning the 1999 Stock Transfer are barred by the statute of limitations.

Finally, in further support of the branch of their motion seeking to dismiss based on a prior pending action, Defendants distinguish the cases upon which Plaintiffs' rely for the proposition that a dissolution may proceed separately from a derivative action and argue that "in light of the overwhelming and uncontroverted authority cited in the Moving Memorandum, dismissal of the Complaint is warranted" (*id.* at 15).

THE LEGAL STANDARDS ON A MOTION TO DISMISS

The legal standards to be applied in evaluating a motion to dismiss are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.,* 242 AD2d 359 [2d Dept 1997], *citing Weiss v Cuddy & Feder*, 200 AD2d

665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra*, 242 AD2d at 360). The court's function is to " accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts'" (*id., quoting 219 Broadway [*18]Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra).*

A plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein*, 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern*, 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello, supra; Pace v Perk*, 81 AD2d 444, 449-450 [2d Dept 1981]; *see Kempf, supra*; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.*, 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

PLAINTIFFS HAVE STATED A CLAIM FOR COMMON LAW DISSOLUTION

As an initial matter, the Court agrees with Defendants that the applicable standard to

from which to judge the pleadings is that of CPLR 3016 — not merely CPLR 3013 — because when "the complaint alleges a breach of trust duty on the part of the officers and directors of a corporation, the circumstances constituting the wrong shall be stated in detail' (CPLR 3016(b))" (*Greenberg v Acme Folding Box Co., Inc.*, 84 Misc 2d 181, 184 [Sup Ct Kings County 1975]; *see also Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]; *Matter of Dissolution of Honecker & Luttati, P.C.*, 271 AD2d 362, 362 [1st Dept 2000], *lv dismissed in part, denied in part* 95 NY2d 861 [2000] [petitioner must set forth with particularity the essential facts constituting the purportedly oppressive conduct]).

A common law dissolution involves "the theory ... that despite the discretion ... vested in the directors and authority ... vested in the majority of the stockholders, a minority stockholder may enlist the judgment of the court to require a dissolution against the will of the directors and without the will of the majority of [*19]stockholders" (*Fontheim v Walker*, 282 AD 373, 374 [1st Dept 1953], *affd* 306 NY 926 [1954]). As noted by the Appellate Division, First Department, and as Defendants advise, "[m]ore is certainly required to sustain such an action than is required to sustain a derivative stockholders' action for waste"; to obtain a common law dissolution, the plaintiff must demonstrate "that the majority of the corporation seek to carry it on for the purpose of enriching themselves at the expense of the minority" (*Fontheim*, 282 AD at 375-376). It is well settled, however, that "the fact that the corporation is operating profitably or that the complaining stockholders may have a right to relief by way of derivative suits or otherwise is not in itself a bar to compelling dissolution" (*Matter of Kruger, supra*, 22 AD2d at 917).

The New York Court of Appeals has set forth the applicable standard for a claim of common law dissolution as follows:

> Minority shareholders were granted standing in the absence of statutory authority to seek dissolution of corporations when controlling shareholders engaged in certain egregious conduct ... Predicated on the majority shareholders' fiduciary obligation to treat all shareholders fairly and equally, to preserve corporate assets, and to fulfill their responsibilities of corporate management with "scrupulous good faith," the courts' equitable power can be invoked when "it appears that the directors and majority shareholders have so palpably breached the fiduciary duty they owe to minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute'" (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 69-70 [1984] [citations omitted]).

In *Leibert, supra*, the Court of Appeals found the Complaint sufficiently alleged a claim for common law dissolution and went "far beyond charges of waste, misappropriation and illegal accumulations of surplus, which might be cured by a derivative action" where the complaint alleged that the directors and those in control of the corporation were

> continuing the existence of the corporation solely for their own benefit at the expense of the minority shareholders, to force such shareholders to sell their holdings to them at a sacrifice and to freeze them out of the corporation .... (*Leibert,* 13 NY2d at 316).

[*20]

The Court also noted that "[i]n light of the serious charges of corporate abuses by the directors and majority shareholders, it would be inadequate and, therefore, inappropriate to remit the minority shareholders to the exclusive remedy of a derivative suit" since it would commit the minority shareholders to "a multiplicity of costly, time-consuming and difficult actions with the result, at most, of curing the misconduct of the past while leaving the basic improprieties unremedied" (*id.* at 106).

Thus, the *Leibert* Court held that there exists a common law right to dissolution when the management breaches its fiduciary duty to the shareholders (*Leibert*, 13 NY2d at 315-317). However, the *Kemp* Court made clear that such breaches must be "egregious" (*Matter of Kemp & Beatley, Inc.*, 64 NY2d at 69-70).

The factual predicates for common law dissolution have been described as follows:

> The court may direct the dissolution of a corporation on the petition of minority shareholders if the directors or those in control of the corporation are looting the corporate assets to enrich themselves at the expense of the minority shareholders; continuing the corporation solely to benefit those in control; or that the actions of the directors or those in control has been calculated to depress the capital of the corporation in order to coerce the minority shareholders to sell their stock at a depressed price (*Shapiro,* 2004 NY Slip Op 50079[U], 2 Misc 3d 1002[A] at *4).

In *Lewis v Jones* (107 AD2d 931 [3d Dept 1985]), the Appellate Division, Third Department, affirmed the trial court's holding that a minority shareholder with a 19% ownership interest was not limited to a shareholder's derivative action and had stated a viable claim for common law dissolution based on his allegations of fraud, misappropriation and use of corporate assets for personal gain. Relying on the Court of Appeals' holding in *Leibert* that a common law right to dissolution of a corporation by a minority shareholder exists where the officers and directors of the corporation are engaged in conduct which is violative of their

fiduciary duty, the Third Department held that assuming the allegations of plaintiff's complaint to be true, plaintiff was "in need of a remedy which will assure the recovery of his personal investment in defendant corporations and prevent further misuse by the individual defendants who now have exclusive control and management of the corporations" (*Lewis*, 107 AD2d at 932). The Third Department further rejected defendants' contention that the common law dissolution action should be dismissed pursuant to CPLR 3211(a)(4) based on the pendency of a derivative action also filed by plaintiff because in a derivative action, plaintiff is seeking a recovery on behalf of the corporation whereas in a dissolution, plaintiff is seeking an individual recovery based on the wrongs inflicted on plaintiff [*21]personally.

Similarly in *Lemle, supra*, the Appellate Division, First Department held that plaintiff had sufficiently alleged claims of breach of fiduciary duty and conversion [FN7] based on his allegations that his siblings who controlled the corporation in which he held a minority interest

> (1) falsified loan documents so as to eliminate millions of dollars in principal and interest they owed to the corporation; (2) used corporate funds to pay for personal vacation, shopping and other non-business related expenses; and (3) used corporate funds to pay excessive compensation and benefits to themselves and other individuals who did little or no work for the corporation (*Lemle*, 92 AD3d at 497).

The First Department also reversed the trial court's dismissal of the common law dissolution claim because "[t]here is a reasonable basis to believe that further discovery may reveal evidence of egregious conduct necessary to sustain the claim" (*Lemle*, 92 AD3d at 500).

While Defendants are correct that factual allegations that do not set forth a viable cause of action or consist of bare legal conclusions should not be deemed to be true and are not afforded every favorable inference in connection with a CPLR 3211(a)(7) motion (*Delran v Prada USA Corp.*, 23 AD3d 308, 308 [1st Dept 2005]), the allegations in the Complaint are sufficiently particularized and are supported with specific facts to make out Plaintiffs' claim for common law dissolution.

This action is akin to *Leibert, supra* and *Lemle, supra* in that Plaintiffs have alleged far more than corporate waste, they have alleged,[FN8] that Defendants as the only directors and the controlling voting shareholders of Reliable since their mother's death, have perpetuated

Reliable's existence for their sole benefit and at the expense of the minority shareholders in an effort to freeze them out and require that they sell [*22]their shares at less than a fair market value price. Whether Plaintiffs will be able to substantiate these allegations is not the issue to be addressed in the context of a motion to dismiss where this Court must deem these allegations to be true. Accordingly, the motions to dismiss of Reliable and the Fee Defendants shall be denied.

The Court finds the cases upon which Defendants rely factually distinguishable. For example, both *Kruger, supra* and *Shapiro, supra*, did not involve CPLR 3211 motions to dismiss. Rather, the *Kruge*r Court dismissed a dissolution after a nonjury trial and *Shapiro* involved a motion for summary judgment after discovery. Therefore, their holdings have little applicability in the context of a pre-discovery motion to dismiss. In *Shapiro,* the court found that no evidence had been presented that the persons in control had looted the corporation for their personal benefit or were continuing the corporation's existence solely for the benefit of those in control or that the directors' actions had been calculated to impair the value of the capital stock so to coerce the minority shareholders to sell their shares at depressed or deflated prices. Likewise, in *Kruger,* unlike here, the Court specifically found that there was no claim that there had "been a calculated deflation or impairment in the value of the capital stock in order to coerce the minority shareholders to sell their shares at depressed prices" (*Kruger,* 22 AD2d at 917).

In *Matter of Dubonnet Scarfs, Inc.*, 105 AD2d 339 [1st Dept 1985]), the Appellate Division, First Department held that the "mere fact that a closely held corporation may have substantial liquid assets, and a stockholder has personal financial problems totally unrelated to the corporation do not, in and of themselves, state grounds for judicial dissolution ... at Common Law" (*Matter of Dubonnet Scarfs, Inc.*, 105 AD2d at 343). Here, Plaintiffs allege much more than that.

Turning to the branches of Defendants' motion which seek dismissal of the claim for common law dissolution on the ground that the 1999 Stock Transfer and the 2004 Redemption Plan cannot form the predicate for Plaintiffs' claim as they occurred more than six years before the filing of this action, the Court agrees with Defendants.[FN9] It is uncontested that these acts occurred more than six years prior to the [*23]filing of this action. [FN10] Further, based on Plaintiffs' admissions, Plaintiffs were well aware of these acts having occurred more than six years prior to the filing of this action and, indeed, in their

pleadings Plaintiffs contend that they objected to the 2004 Redemption Offer at or about the time of its occurrence. Accordingly, these transactions may not provide the basis for Plaintiffs' common law dissolution claim (*see DiPace v Figueroa*, 223 AD2d 949 [3d Dept 1996]; *Blake v Blake*, 225 AD2d 337 [1st Dept 1996]; *Kermanshah v Kermanshah*, 580 F Supp 2d 247 [SD NY 2008]; *Pappas v Fotinos*, 2010 NY Slip Op 51300[U], 28 Misc 3d 1212[A] at *3 [Sup Ct Kings County 2010] [the six year limitations period for a claim for dissolution is "measured from the instances of alleged wrongdoing adverted to by the petitioner as grounds for dissolution'"]).

Plaintiffs argue that because the underlying claim for this dissolution is a breach of fiduciary duty, the statute of limitations should be tolled until the fiduciary repudiates the relationship or the relationship is terminated. Taken to its logical extreme, since the parties are still in a fiduciary relationship, Plaintiff suggests that none of these acts are barred, or could ever be, since there has been no termination or open repudiation of the relationship (*see* Bashian Opp. Aff. at ¶23). The fiduciary toll is usually found in actions seeking an accounting based on a breach of fiduciary duty and the rationale for the rule is that a person should be able to rely on the fiduciary's skill without the necessity of interrupting a continuous relationship of trust and confidence by instituting suit (*People ex rel. Spitzer ex rel. Ultimate Charitable Beneficiaries v Ben*, 55 AD3d 1306 [4th Dept 2008]; *Westchester Religious Institute v Kamerman*, 262 AD2d 131 [1st Dept 1999]). However, in a situation such as here, where it is undisputed that Defendants announced the Stock Redemption Plan in 2004 and Plaintiffs were aware of the 1999 Stock Transfer at least since 2002, there is no basis for an equitable tolling based on a breach of fiduciary duty (*see, e.g., Veritas Cap. Mgt., L.L.C. v Campbell*, 82 AD3d 529, *lv dismissed* 17 NY3d 778 [2011]). Indeed, it is evident that Defendants repudiated their fiduciary relationship at the time they performed these allegedly bad acts. It is also evident that Plaintiffs made known their objections at least as early as 2004. Plaintiffs have not shown they were "actively misled" by Defendants from filing suit or that Plaintiffs were "in some extraordinary way" prevented from complying with the limitations period. There is no evidence that Plaintiffs were prevented from timely filing an action due to reasonable reliance on their part upon deception, fraud or misrepresentation by Defendants (*Shared Communications Serv. of ESK, Inc. v Goldman, Sachs & Co., Inc.*, 38 AD3d 325 [1st Dept 2007]). Because Plaintiffs have made no allegations that Defendants concealed these transactions or otherwise prevented Plaintiffs from knowing that they had occurred, there is no basis for tolling the statute of limitations based on some continuous

fiduciary relationship between the parties. [*24]

While Plaintiffs do allege that critical information was not provided at the time of the 1999 transfer (see Complaint, ¶¶157-159), this different from alleging that Defendants did something to gull Plaintiffs into inaction, particularly given Plaintiffs' concessions that they have known about these two challenged transactions for more than six years prior to the commencement of this case and the absence of any explanation from any one with personal knowledge of the facts as to why a timely suit was not, or could not have been, brought.

Accordingly, the Court will dismiss the claims presented by Plaintiff regarding the 1999 Stock Transfer and the 2004 Stock Redemption Offer as time-barred. Nevertheless, because Plaintiffs have alleged other acts sufficient to support their claim for common law dissolution which occurred within six years of the filing of Plaintiffs' Complaint, Defendants' motion to dismiss the balance of the common law dissolution action shall be denied. Plaintiffs shall serve an amended pleading, which omits the claims found time-barred herein, by not later than June 27, 2012.

With regard to the branch of Defendants' motion seeking to dismiss this action in favor of the prior pending (which is prior pending by less than one hour) Derivative Action, the Court sees no basis to grant such relief. First, given that both actions are before this Court and are the subject of Preliminary Conference Orders having identical discovery schedules, and given that this action and the Derivative Action will likely be consolidated or at least jointly tried, the issues of judicial economy and inconsistent determinations have no bearing and do not weigh in favor of a dismissal or stay of this action in favor of the Derivative Action. Furthermore, because the Derivative Action and this dissolution proceeding seek completely different relief, and by dismissing this action in favor of the Derivative Action the Court would be committing Plaintiffs to "a multiplicity of costly, time-consuming and difficult actions with the result, at most, of curing the misconduct of the past while leaving the basic improprieties unremedied" (*Leibert*, 13 NY2d at 106), the Court shall deny this branch of Defendants' motion as well (*Lewis, supra*; *see also Matter of Goldstone*, 40 AD2d 971 [1st Dept 1972]).

CONCLUSION

The Court has considered the following papers in connection with these motions:

1)Notice of Motion dated January 13, 2012; Affirmation of Vincent J. Syracuse, Esq. dated January 13, 2012, together with the exhibits annexed thereto;

2)The Fee Defendants' Memorandum of Law in Support of their Motion to Dismiss the Verified Complaint dated January 13, 2012; [*25]

3)Notice of Motion dated January 11, 2012; Affirmation of Paul D. Derounian, Esq. dated January 11, 2012;

4)Affirmation of Gary E. Bashian, Esq. in Opposition to Defendants' Motion to Dismiss the Verified Complaint for Common Law Dissolution dated March 2, 2012, together with the exhibits annexed thereto;

5)Plaintiff's Memorandum of Law in Opposition to Fee Defendants' Motion to Dismiss the Verified Complaint dated March 2, 2012;

6)Reply Affirmation of Yolanda Kanes, Esq. in Further Support of the Fee Defendants' Motion to Dismiss the Verified Complaint dated March 9, 2012 together with the exhibits annexed thereto; and

7)The Fee Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss the Verified Complaint dated March 9, 2012.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendant The Reliable Automatic Sprinkler Co., Inc. to dismiss the Verified Complaint (Seq. #1) is consolidated with the motion by Defendants Frank J. Fee, Kevin Fee and Michael Fee, individually, as officers and directors of The Reliable Automatic Sprinkler Co., Inc. and Frank J. Fee, III as Trustee of the Marital Deduction Trust u/w/o Frank J. Fee, Jr., Article VII, and Frank J. Fee, III, as Trustee of the Residuary Trust u/w/o Frank J. Fee, Jr. Article VII to dismiss the Verified Complaint (Seq. #2); and it is further

ORDERED the consolidated motion is granted in part and denied in part as set forth

herein; and it is further

ORDERED that so much of the consolidated motion as seeks dismissal of certain allegations in the Complaint as present claims regarding the 999 Stock Transfer and the 2004 Stock Redemption Offer as barred by the statute of limitations is granted and such allegations are dismissed; and it is further

ORDERED that, except as set forth above, the consolidated motion to dismiss is denied; and it is further [*26]

ORDERED that Plaintiffs shall interpose an amended pleading, omitting the allegations hereinabove dismissed, by not later than June 27, 2012; and it is further

ORDERED that counsel are directed to attend the Trial Readiness Conference scheduled for July 26, 2012 at 9:30 a.m., which conference may not be adjourned without prior written order of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated:White Plains, New York

June, 2012

E N T E R :

____

Alan D. Scheinkman

Justice of the Supreme Court

Footnotes

Footnote 1: It is alleged that Reliable has at least three subsidiaries - Fee Sprink Corp., Reliable Fire Sprinkler Ltd., and Reliable Automatic Sprinkler of Canada, Inc., all New York corporations with the same place of business as Reliable's business address (Complaint at ¶ 24).

Footnote 2: Plaintiffs define compensation to include, but not to be limited to, annual W-2

compensation, bonuses, perquisites, properly reimbursed valid business expenses, properly reimbursed valid business expenses, improperly reimbursed or advanced expenses, payment of improperly reimbursed or advanced expenses (*id.* at ¶ 86).

Footnote 3:Under the Certificate of Incorporation, shareholders have the option of offering their shares to the company for purchase and Reliable has 60 days to exercise the option. The price to be paid is based on the book value as of the first day of the month following Reliable's exercise of its option (*id.* at ¶¶ 136-137).

Footnote 4:Although Kevin is the Secretary, it is alleged that the actual preparation of minutes was done by Reliable's counsel, Paul Derounian, Esq..

Footnote 5:At the time Defendants made this argument, they were also seeking to dismiss the Derivative Action, thus suggesting that Defendants were seeking to leave Plaintiffs without any mechanism to present their claims. That Defendants withdrew their motion as to the Derivative Action places their argument regarding the efficacious nature of that remedy in a somewhat more favorable light.

Footnote 6:Mr. Bashian's affirmation suffers from the same infirmities found in Defendants' moving papers in that he makes bald factual allegations without providing any evidentiary foundation (such as his personal knowledge) for the espousing of such "facts."

Footnote 7:The Appellate Division, First Department found that plaintiff's fraud claim was not sufficient on the element of justifiable reliance because there were no facts alleging the corporation acted or failed to act in reliance of the misrepresentations, nevertheless, dismissal at the pleading stage was unwarranted because plaintiff had set forth a grounds to believe with additional discovery (CPLR 3211[d]), he would be able to develop sufficient facts to justify the reliance element (*Lemle,* 92 AD3d at 499).

Footnote 8:Given their mother's final actions which appear to be an effort to counterbalance the unequal division of the family's major asset, Reliable, between those in control (Frank, Kevin and Michael) and those having to sit on the sidelines (Marilyn and Candy), these allegations appear to have some basis in fact.

Footnote 9:While the Fee Defendants' Notice of Motion specifically invoked only CPLR 3211(a)(7) (failure to state a cause of action), CPLR 3016(b) (particularity of pleadings), and CPLR 3211(a)(4) (prior action pending), and did not specifically invoke CPLR 3211(a) (5) or otherwise mention the statute of limitations as a basis for the motion, their moving memorandum of law (at 18-19) specifically argued that the claims regarding the 1999 Stock Transfer and 2004 Stock Redemption Plan were time-barred and Plaintiffs responded to the statute of limitations argument in their papers. Hence, Plaintiffs were not prejudiced by the failure of the Notice of Motion to include the statute of limitations issue and the Court will deem the Notice of Motion to be amended so as to assert such a basis.

Footnote 10:It is undisputed that a six year statute of limitations applies to this action whether it is based on the six year period applicable to fraud and breach of fiduciary duty

claims seeking equitable relief or based on the six year period applicable to dissolution claims.

Return to Decision List